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# Through the Looking Glass: What Abortion Teaches Us About American Politics

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## BOOK REVIEW ESSAY

### THROUGH THE LOOKING GLASS: WHAT ABORTION TEACHES US ABOUT AMERICAN POLITICS

ABORTION AND AMERICAN POLITICS. By Barbara Hinkson Craig and David M. O'Brien. Chatham, New Jersey: Chatham House Publishers, Inc., 1993. Pp. xvi, 382. \$30.00.

*Reviewed by Neal Devins\**

*Roe v. Wade*<sup>1</sup> was designed to help put an end to the abortion dispute. Justice Harry Blackmun put forth a trimester test governing state authority over the abortion decision both to make clear what the Court intended and to foreclose future governmental efforts to sidestep the Court's decision.<sup>2</sup> Over objections by Justice Potter Stewart that the draft opinion was "inflexibly 'legislative,'"<sup>3</sup> Blackmun nonetheless persisted in his efforts to clarify the reaches and limits of governmental authority in this area.

Twenty-one years later, the abortion wars rage on, and Blackmun's belief that *Roe* might settle the issue seems to have been—to put it mildly—hopelessly naive. What Blackmun did not take into account was the inevitable backlash from elected government at both the state and federal levels. "[J]udges," as Blackmun's newest colleague Ruth Bader Ginsburg has written, "play an *interdependent* part in our democracy. They do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well."<sup>4</sup> Indeed, Ginsburg went so far as to suggest in December 1992 that *Roe* "prolonged divisiveness and deferred stable settlement of the [abortion] issue" by short-circuiting early, 1970s legislative reform efforts.<sup>5</sup> Although Justice Ginsburg overstates her claim,<sup>6</sup> there is no doubt that *Roe* is a point of

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1. 410 U.S. 113 (1973).

2. The trimester test rejected state regulation of abortion during the first trimester of a pregnancy, approved reasonable state regulation during the second trimester, and authorized the prohibition of third trimester abortions. See *Roe v. Wade*, 410 U.S. at 163–65.

3. See Bob Woodward, *The Abortion Papers*, *Wash. Post*, Jan. 22, 1989, at D1, D2.

4. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *N.Y.U. L. Rev.* 1185, 1198 (1992) (emphasis added).

5. *Id.* at 1208.

6. See David Garrow, *History Lesson for the Judge: What Clinton's Supreme Court Nominee Doesn't Know About *Roe**, *Wash. Post*, June 20, 1993, at C3 (arguing that although liberalization forces had scored a series of dramatic breakthroughs between 1967

departure, not a point of termination, in studying the constitutionality of abortion.<sup>7</sup>

A simple comparison of elected branch interest in abortion before and after *Roe* makes clear that the abortion dispute is not controlled by nine individuals working in isolation. Prior to *Roe*, abortion was a matter of some state and limited national attention. In the decade preceding *Roe*, after nearly a century of political dormancy, four states repealed and nineteen states—while still limiting abortion rights—liberalized their abortion laws.<sup>8</sup> Congress and the White House, for the most part, were content to leave the abortion issue in the hands of state government: congressional action was limited and designed to preserve the anti-abortion status quo ante,<sup>9</sup> while executive branch action was equally limited and typically reaffirmed state authority.<sup>10</sup>

Elected government action since *Roe* makes clear that the Supreme Court's nationalization of abortion rights was anything but the last word on the subject. Over the past twenty years, the abortion dispute has spread throughout the American political system. *Roe v. Wade* and *Planned Parenthood v. Casey*<sup>11</sup> notwithstanding, abortion is hardly the sole province of the judiciary. While abortion politics and court decision-making are closely linked—especially through the nomination and confirmation of federal judges—the sweep of abortion-related policy is far too broad for any one branch of government to dominate.

The abortion drama demonstrates that the elected branches can influence the shaping of constitutional values in many ways. The executive branch has been extremely active in its attempts to regulate abortion. Presidential appointments to courts and government agencies, the use of constitutionally specified powers to recommend as well as veto legislation,

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and 1970, the emergence of powerful right-to-life forces in 1970 and 1971 resulted in an all-but-complete deadlock on abortion liberalization in state legislatures).

7. For commentary depicting *Roe* as the beginning of a dialogue, see Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 153 (1988); Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577, 658–68 (1993); see also Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. Chi. L. Rev. 819, 821–24 (1986) (using *Roe* to support the argument that *Katzenbach v. Morgan*, 384 U.S. 641 (1966), permits Congress to engage the Supreme Court in a dialogue).

8. See Eva R. Rubin, *Abortion, Politics, and the Courts: Roe v. Wade and Its Aftermath* 20–24 (rev. ed. 1987); Austin Sarat, *Abortion and the Courts: Uncertain Boundaries of Law and Politics in American Politics and Public Policy* 113, 125–27 (Allan P. Sindler ed., 1982).

9. By including abortion restrictions in a handful of family planning and health-related bills, Congress simply honored 46 states' abortion legislation.

10. In 1971, for example, the Nixon administration restricted the performance of abortion in military hospitals to bases located in states with legalized abortion. This episode is discussed in Lee Epstein & Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* 154 (1992).

11. 112 S. Ct. 2791 (1992) (affirming right to abortion but replacing trimester standard with undue burden test).

and the exercise of symbolic leadership through bully pulpit speeches all figure prominently in the abortion dispute. Furthermore, federal departments and agencies involved in health and family planning, civil rights, foreign policy, and the budget have all found themselves in the midst of the abortion controversy.<sup>12</sup> Congress and its committees have also been vigorous players in the abortion dispute. Through its roles both as lawmaker and overseer of government agencies and departments, Congress is continuously involved in shaping and limiting abortion rights.

Abortion, finally, is not simply about federal decision-making. A vigorous dialogue has emerged between state legislatures and the federal courts. State legislatures regularly enact, review, and modify laws governing such areas as pre-abortion counseling, waiting periods, and juvenile and spousal rights. In conjunction with Congress, the White House, and the states, interest groups are also actively involved in this political dynamic. Pro-life forces, for example, played a prominent role in the election of Ronald Reagan and have been active participants in the crafting of anti-abortion legislation and regulation.<sup>13</sup> Pro-choice forces have also come to understand the pivotal role played by political action, with the American Civil Liberties Union and National Abortion Rights Action League both calling Congress the "court of last resort."<sup>14</sup>

The volume of post-*Roe* elected branch initiatives is truly remarkable.<sup>15</sup> Irrespective of one's views of elected government's efforts, the abortion dispute clearly provides a revealing glimpse into the workings of American political institutions. Although elected branch interpretation figures prominently in all areas of constitutional decision-making,<sup>16</sup> abor-

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12. These departments and agencies include the Department of Justice, Surgeon General, National Institutes for Health, Food and Drug Administration, Equal Employment Opportunity Commission, Civil Rights Commission, Department of State, U.S. Agency for International Development, Department of Defense, Civil Service Commission, and Office of Management and Budget. The United States' delegation to the United Nations is also involved in the abortion controversy. See generally *infra* notes 45-79.

13. See Michele McKeegan, *Abortion Politics: Mutiny in the Ranks of the Right* 1-46 (1992).

14. Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* 7 (1992) (quoting from a statement entitled "Supreme Court Alert" which was distributed by the National Abortion Rights Action League on June 27, 1991); W. John Moore, *In Whose Court?* 23 *Nat'l J.* 2396, 2400 (1991) (quoting Leslie A. Harris, chief legislative counsel in Washington for the American Civil Liberties Union).

15. Admittedly, since much of abortion politics centers on legislative proposals that are never enacted and regulatory initiatives that are repealed whenever there is a change of administration, it is possible to describe abortion politics as a controversy where "[r]arely have so many public officials worked so hard to say so little about an issue on the minds of so many citizens." Amy Gutmann, *No Common Ground*, *New Republic*, Oct. 22, 1990, at 43, 43 (book review). Nonetheless, although the volume of legislation and regulation seems disproportionately low in relation to the amount of effort invested, many laws have been enacted and regulations put into effect.

16. Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* 231-74 (1988); See Fisher & Devins, *supra* note 14, at 1-26; Symposium, *Elected Branch*

tion is indisputably the perfect candidate for a comprehensive examination of the role played by nonjudicial forces in the shaping of constitutional values.

Political scientists Barbara Hinkson Craig and David M. O'Brien have recently undertaken this task.<sup>17</sup> Their *Abortion and American Politics* is easily the most comprehensive accounting of federal and state abortion politics to date. Remarkable as it may sound, Craig and O'Brien's study is the first book-length survey of elected branch participation in the abortion dispute.<sup>18</sup> Other works on this subject have sought either to juggle abortion politics with other concerns or have limited their sights to a select number of abortion politics topics.<sup>19</sup> *Abortion and American Politics* therefore addresses a surprisingly large gap in this literature. Craig and O'Brien's study is also well timed. With Congress, the courts, the Clinton administration, and the states currently embroiled in a broad range of abortion disputes, a comprehensive account of this subject is especially valuable. Furthermore, since the abortion wars have raged for more than twenty years, conclusions can be drawn about the style and impact of elected branch participation.

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Constitutional Interpretation, 56 Law & Contemp. Probs. (Neal Devins ed., forthcoming 1993).

17. Craig and O'Brien are both well known for studies on the political nature of constitutional decision-making. Craig's *Chadha: The Story of an Epic Constitutional Struggle* (1988) details how political and judicial actors both contributed to the Supreme Court's legislative veto decision. O'Brien's *Storm Center: The Supreme Court in American Politics* (1990) highlights the political nature and inner workings of Supreme Court decision-making.

18. Eva Rubin's 1987 *Abortion, Politics, and the Courts*, which examines federal and state abortion politics both before and after *Roe*, is principally concerned with court decision-making. Rubin's discussion of the state legislative response to *Roe*, for example, focuses on post-*Roe* adjudication and not the politics surrounding post-*Roe* legislative repeal efforts. See Rubin, *supra* note 8, at 117-49.

19. Abortion politics is typically featured as one of several examples of elected branch constitutional interpretation. See Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (1991); Epstein & Kobylka, *supra* note 10; Fisher & Devins, *supra* note 14; Edward Keynes & Randall K. Miller, *The Court vs. Congress: Prayer, Busing, and Abortion* (1989); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (1991). Books focusing on the abortion dispute, moreover, have limited their examination of abortion politics to a period of time or subtopic or have incorporated their discussion of abortion politics into a broader consideration of the propriety of *Roe*. See, e.g., *The Abortion Dispute and the American System* (Gilbert Y. Steiner ed., 1983) (highly selective compilation which does not systematically consider Congress, White House, or state role); Marian Faux, *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal* (1988) (focus on *Roe* case); Frederick S. Jaffee et al., *Abortion Politics: Private Morality and Public Policy* (1981) (focus on abortion as social policy issue); Kristin Luker, *Abortion and the Politics of Motherhood* (1984) (focus on interest groups, not elected government action); McKeegan, *supra* note 13 (focus on "New Right" attacks on *Roe*); James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) (focus on nineteenth-century policy development); Laurence H. Tribe, *Abortion: The Clash of Absolutes* (1990) (abortion politics balanced with normative concerns).



*Abortion and American Politics* aims high. Recognizing that "the politics of the abortion controversy has affected every branch and every level of American government" (p. xiii), Craig and O'Brien set out to "use the abortion controversy as an illustrative portrait, even if in some ways a disappointing reflection, of the American governmental and political process" (p. xv). In unveiling this portrait, Craig and O'Brien steadfastly refuse to present an argument in support of either side of the abortion debate. Other than demonstrating that "decisions on highly controversial matters are rarely final" but instead "are subject to challenge, evasion, and overturning" (pp. xiv–xv), *Abortion and American Politics* is intended to be a purely descriptive presentation. Craig and O'Brien opt for this value-neutral approach so that their conclusions on the American political system will not be tainted by their personal beliefs (p. xv).

In many ways, *Abortion and American Politics* is highly successful in accomplishing its self-described task. The book is a thorough, accessible, and even-handed introduction to the multifarious modes through which elected government at both the state and federal levels has tackled the abortion issue. The book chronicles, in varying degrees of detail, the principal initiatives of pro-choice and pro-life forces, including legislative debates and hearings, court filings and arguments, and regulatory action.<sup>20</sup>

*Abortion and American Politics* is best viewed as an introduction to political institutions through the abortion dispute. Chapters are sometimes built around critical players (Congress, the White House, states, and interest groups) and sometimes around pivotal events (Supreme Court decisions in *Roe*, *Webster v. Reproductive Health Services*,<sup>21</sup> and *Casey*). Craig and O'Brien make good use of this hybrid format. Their recounting offers the benefits of an institutional focus with compelling narrative force. *Abortion and American Politics* is unquestionably an important and valuable addition to the burgeoning literature on the propriety and sweep of elected branch constitutional interpretation.<sup>22</sup>

Despite its many virtues, however, *Abortion and American Politics* is a work of limited value. Craig and O'Brien draw no conclusions about what abortion politics reveals about American political institutions (or,

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20. During the period beginning with the *Roe* decision and ending with the election of Bill Clinton, the bulk of these initiatives were pro-life efforts designed to curtail abortion rights. Consequently, *Abortion and American Politics*—which is current up to the first month or two of the Clinton administration—is principally a book about the reaches and limits of pro-life attempts to curtail *Roe v. Wade* and its progeny. Pro-choice efforts, for the most part, are described—as they should be—as attempts to defend *Roe* from pro-life attacks.

21. 492 U.S. 490 (1989) (approving second trimester viability testing and, with it, calling into question the *Roe* trimester standard).

22. See sources cited *supra* notes 7, 16 and 19. See also Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1 (1993) (analyzing issues raised by statutes that "utilize the language of the Constitution itself, or . . . the language of judicial gloss on the Constitution").

conversely, what American political institutions tell us about abortion politics). The authors' sole objective, instead, is to demonstrate that political actors, as well as courts, shape abortion rights. This proposition is sufficiently obvious that its proof is hardly groundbreaking. Craig and O'Brien do not discuss issues such as the quality of elected branch constitutional interpretation, the choice of elected branch responses, the predominance of White House or congressional influences, and elected branch attitudes toward the judiciary. Consequently, instead of meeting head on their stated objective of using the abortion controversy to "[understand] the American governmental and political process" (p. xv), the authors' unwillingness to communicate some lesson beyond a simple recounting of events makes *Abortion and American Politics* less provocative and less durable than it might be.

The book, for example, provides no analytical framework with which to assess the dramatic change in federal abortion politics spurred on by the advent of the Clinton administration. Prior to Bill Clinton's election, no administration supported *Roe*, and most administrations actively opposed it. Today, pro-choice initiatives have moved into the political forefront. Aside from historical background, *Abortion and American Politics* is uninformative in explaining why efforts to enact the Freedom of Choice Act<sup>23</sup> stalled and abortion funding restrictions persist.

The failure of *Abortion and American Politics* to offer any guidance on how to assess the factors that affect elected government action, or on the quality and impact of elected branch constitutional interpretations, is truly unfortunate. Craig and O'Brien have skillfully amassed an extraordinary amount of information only to place the burden on the reader to figure out the significance of their facts. This review will attempt to help fill the gap by offering a more cohesive and far-ranging analysis of the power that governmental institutions wield in shaping abortion and other constitutional controversies. Part I will follow Craig and O'Brien's lead and demonstrate how abortion politics illuminates the numerous ways in which elected government can shape constitutional values. The examples used, for the most part, will be taken from *Abortion and American Politics*. Craig and O'Brien, however, do not seek to bring together these examples to offer a summary statement on elected branch influences. Part I serves as such a statement. Part II will extend the lessons of *Abortion and American Politics*. Issues considered include the reasons why elected government regularly makes use of some but not all of its powers to shape constitutional disputes; the seriousness with which the elected branches engage in constitutional interpretation; the impact of abortion politics on political institutions; and elected government attitudes toward the judiciary. The Conclusion, finally, will offer some thoughts on the future of abortion politics.

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23. H.R. 25, 102d Cong., 1st Sess. (1991).

I. THE ROLE OF ELECTED GOVERNMENT IN SHAPING  
CONSTITUTIONAL VALUES

Each and every feature of the abortion dispute is dominated by elected government action. Before a case comes to court, Congress or the states must enact a law or the executive branch must promulgate a regulation. Once a case is in court, the states, the Justice Department, and Congressional coalitions—sometimes as parties and sometimes as *amici curiae*—inform the judiciary of their views. After a case is adjudicated, elected government may seek to expand or limit the holding through a number of techniques ranging from the interpretation of the judicial ruling to the nullification of the ruling through constitutional amendment. Through the appointments-confirmation process, moreover, the President and Senate control the composition of the federal bench.

Nothing about the above inventory of elected branch influences is unique to the abortion debate. Issues such as school desegregation, women in the military, flag burning, war powers, search and seizure, and the legislative veto follow a similar pattern.<sup>24</sup> What makes governmental conduct in the abortion dispute unique is the intensity of elected branch interest and the resulting evolution of an extraordinary portfolio of legislative-executive-judicial dialogues. Through this portfolio of constitutional dialogues, the abortion dispute serves as a lens through which to view the political dynamics of constitutional law.

A. *Elected Government Participation in the Abortion Dispute*

1. *Congress*. — Abortion opponents, according to Craig and O'Brien, pursued "[v]irtually every possible legislative response" (p. 103) and, although "able to make significant progress" in stopping federal funding, were unable to "destroy[ ]" *Roe v. Wade* through congressional action (p. 150). *Abortion and American Politics* offers persuasive evidence to support this contention.

Congress has repeatedly shied away from taking an absolutist position on abortion. It has rejected a proposed constitutional amendment overturning *Roe* as well as human life legislation defining the beginning of life as conception and specifying that fetuses are persons for Fourteenth Amendment purposes (pp. 137–45).<sup>25</sup> These proposals would have done more than overturn *Roe* and return the abortion issue to the states. The specification of fetuses as legal persons was designed to prevent states from permitting abortions unless the mother's life was in jeopardy. Congress also rejected a more modest "federalism amendment" in 1982 and again in 1983 that would have allowed states to regulate abor-

24. See sources cited *supra* notes 7, 16, 19 and 22.

25. See *infra* notes 117–128 and accompanying text.



tion as they saw fit (pp. 146-47).<sup>26</sup> Another example of this unwillingness to endorse extremist positions, although not mentioned in *Abortion and American Politics*, is Congress' repudiation of proposals to strip federal courts, including the U.S. Supreme Court, of jurisdiction in abortion cases.<sup>27</sup> These proposals would leave state courts free to follow, limit, or abandon *Roe*. Of all these measures, only the federalism amendment made it out of committee, but it was soundly defeated on the Senate floor (pp. 146-47).

Congress has also rejected pro-choice absolutism. For example, in the wake of an endorsement in *Planned Parenthood v. Casey* of a qualified right to seek an abortion, legislators began backing away from efforts to codify abortion rights.<sup>28</sup> In addition to pro-life legislators, pro-choice legislators who endorse parental consent and waiting period restrictions appear unwilling to support the codification of *Roe* through the Freedom of Choice Act.<sup>29</sup> Notwithstanding the Clinton administration's ostensible support for these codification efforts,<sup>30</sup> the Freedom of Choice Act has stalled and is unlikely to reemerge in the near future.

Congress, as Craig and O'Brien suggest, is far more inclined to pass legislation limiting abortion funding than to restrict access to abortion by more direct means. Starting in 1976 with the Hyde Amendment, Congress has barred the use of Medicaid funds for most abortions (pp. 110-37).<sup>31</sup> Congress has also used its appropriations powers to set abortion-related restrictions on programs involving family planning, foreign aid, legal services, military hospitals, the Bureau of Prisons,<sup>32</sup> and the Peace Corps (pp. 112-13, 131). The use of federal and local funds for abortions in the District of Columbia has also been limited by Congress (p. 113).

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26. S.J. Res. 110, 97th Cong., 2d Sess. (1982) (a proposed amendment declaring no constitutional right to abortion and providing that more restrictive state abortion laws preempt less restrictive federal laws); S.J. Res. 3, 98th Cong., 1st Sess. (1983) (proposed amendment declaring no constitutional right to abortion). See *infra* notes 117-118, 123-126 and accompanying text.

27. See *infra* notes 117-119, 123-126, 128. For a thorough description of Congress' authority to restrict court jurisdiction, see Erwin Chemerinsky, *Federal Jurisdiction* 164-77 (1989).

28. See Julie Rovner, *Abortion Ruling Slows Momentum of Freedom of Choice Act*, 50 Cong. Q. Wkly. Rep. 1951 (1992).

29. H.R. 25, 102d Cong., 1st Sess. (1991); see *Id.*

30. See *Promises Kept on Abortion Policy*, *Chi. Trib.*, Jan. 26, 1993, at 14; Brian Reilly, 75,000 Protest Clinton's 'Vision': Pro-Lifers Renew Efforts After Pro-Choicer's Election, *Wash. Times*, Jan. 23, 1993, at A1.

31. Pub. L. No. 94-439, 90 Stat. 1418 (1976) (applicable for fiscal year 1977). The precise terms of the Hyde Amendment change from year to year—sometimes allowing for abortions where the mother's life is in jeopardy, other times providing funds for the victims of rape and incest, and one year authorizing the funding of abortions when there is a risk of severe and long-lasting physical health damage to the pregnant woman (p. 124). Despite its apparent receptiveness to funding prohibitions, Congress has flatly and repeatedly declined to enact a permanent Hyde Amendment.

32. 132 Cong. Rec. H4583 (daily ed. July 17, 1986).

Congressional action extends beyond the adoption of funding restrictions and rejection of efforts to overrule *Roe*. Congress has approved a handful of measures that affect abortion rights outside the context of federal funding prohibitions. The Pregnancy Discrimination Act,<sup>33</sup> both by defining discrimination on the basis of pregnancy as sex discrimination and providing that employers may exempt abortions from health insurance benefits, lowers the relative cost for a woman to carry her pregnancy to term. Congress also undertook to encourage alternatives to abortion in its Adolescent Family Life Demonstration Projects.<sup>34</sup> This legislation, better known as the "chastity act," enabled religious organizations to seek federal funds to promote sexual abstinence as a method of birth control among teenagers. Organizations, religious and otherwise, could not participate in the program if they engaged in abortion counseling.

Congressional action, however, is not always hostile to abortion rights. Following the Supreme Court's 1991 approval in *Rust v. Sullivan*<sup>35</sup> of regulations prohibiting federally funded family planning programs from mentioning abortion, Congress sought to nullify the regulations<sup>36</sup> (only to be thwarted by a presidential veto). Craig and O'Brien, while making note of this episode (pp. 311-15), barely touch on Congress' power to expand abortion rights. Furthermore, Congress' willingness to protect abortion rights with legislation appears on the rise. Five months after Clinton took over the White House, Congress enacted the National Institutes of Health Revitalization Act of 1993,<sup>37</sup> reversing a Reagan and Bush era moratorium on federally funded research that uses aborted fetal tissue. Congress also appears set to enact the Freedom of Access to Clinic Entrances Act of 1993,<sup>38</sup> nullifying the Supreme Court's 1993 decision in *Bray v. Alexandria Women's Health Clinic*,<sup>39</sup> that existing federal civil rights legislation is not applicable to blockades of abortion clinics by Operation Rescue and other pro-life groups. Specifically, Freedom of Access legislation would prohibit the use or threat of force against a woman seeking an abortion or any individual assisting that woman.

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33. Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1980) (amending § 701 of the Civil Rights Act of 1964). Craig and O'Brien refer to this measure in a table of abortion-related legislation (p. 112), but do not discuss it further.

34. 42 U.S.C. §§ 300z-10 (1988). Again, Craig and O'Brien refer to this measure in a table of abortion-related legislation, but do no more (p. 113). For further discussion, see *infra* text accompanying notes 107, 110-114.

35. 111 S. Ct. 1759, 1771-78 (1991).

36. Characterizing the regulations' denial of "quality health care" to "low income pregnant women" as "bizarre and cruel," Congress approved a rider prohibiting federal funding of the regulations. John H. Chafee, Congress Should Remedy the Court's Decision, *Wash. Post*, June 7, 1991, at A23.

37. Pub. L. No. 103-43, § 113, 107 Stat. 122, 132 (1993); 42 U.S.C.A. § 289(g) (West Supp. 1993) (banning the use of fetal tissue in research); see *infra* notes 54-55 and accompanying text.

38. H.R. 796, 103d Cong., 1st Sess. § 2 (1993).

39. 113 S. Ct. 753, 758-62 (1993).

Congress also participates in the abortion dispute through the use of its powers outside of lawmaking. Craig and O'Brien make brief mention of some of these legislative influences, although they treat these matters as ancillary to the powers of other branches. Their chapters on presidential politics and post-*Webster* national politics, for example, refer to the Senate's role in confirming judicial nominees as part of a presidentially dominated appointments process (pp. 173-85, 316-21). A larger discussion of interest group participation in Supreme Court litigation (pp. 207, 225) also makes note of congressional participation in litigation.<sup>40</sup>

These congressional powers deserve more focused attention. Since the 1981 nomination of Sandra Day O'Connor, the Senate Judiciary Committee has made a nominee's views on abortion the sine qua non of the confirmation process. This singlemindedness figured largely in the defeat of Robert Bork. More significantly, the fixation of both the Judiciary Committee and interest groups on the abortion dispute may have contributed to Justices O'Connor, Kennedy, and Souter's affirming the "central holding of *Roe*" in *Casey*.<sup>41</sup>

Another phenomenon deserving more focused attention is how Congress seeks to shape constitutional doctrine through its participation in litigation. When the Supreme Court upheld the constitutionality of the Hyde Amendment in *Harris v. McRae*,<sup>42</sup> for example, a bipartisan coalition of over 200 congressional amici argued that "[t]o tamper with [the inviolable and exclusive power of the purse] is to tamper with the very essence of constitutional, representative government."<sup>43</sup> In recent years, pro-choice and pro-life legislators have lined up on opposite sides of state regulation cases. These filings, although principally symbolic, are nonetheless instructive in measuring legislative attitudes. In *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>44</sup> eighty-one pro-choice legislators publicly scolded Solicitor General Charles Fried for having "taken an extraordinary and unprecedented step" in calling for *Roe*'s reversal.<sup>45</sup>

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40. Through two tables comparing Senators signing "pro-choice" and "anti-abortion" briefs in 1985 and 1989, Craig and O'Brien adeptly demonstrate how pro-choice legislators proved much more willing to defend abortion rights when *Roe* appeared vulnerable (10 in 1985; 25 in 1989), while pro-life legislators' willingness to advocate *Roe*'s reversal remained stable (12 in 1985; 15 in 1989) (pp. 207, 225).

41. See Stephen S. Wermeil, *Confirming the Constitution*, 56 *Law & Contemp. Probs.* 142 (1993).

42. 448 U.S. 297, 312-20, 321-26 (1980).

43. Brief of Rep. Jim Wright et al. at 14, *Harris*, 448 U.S. 297 (1980) (No. 79-1268) [hereinafter Brief of Jim Wright].

44. 476 U.S. 747 (1986) (striking down informed consent and reporting requirements as well as demand that two physicians be present during abortion procedure), overruled in part by *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

45. Brief of Sen. Bob Packwood et al. at 3, *Thornburgh*, 476 U.S. 747 (1986) (No. 84-495).

A few aspects of Congress' involvement in the abortion dispute are not considered in *Abortion and American Politics*. The confirmation process, of course, extends to executive branch officials as well as Article III judges. Starting with the Carter administration, presidential appointees for such positions as Secretary of Health and Human Services, Surgeon General, Attorney General, Solicitor General, and Director of the Office of Personnel Management have come to the Senate with a track record on the abortion issue. The Senate grants the President great leeway in executive branch appointments. Although the Senate will explore the nominee's personal views on abortion and how those views will affect her management of government resources, abortion is not a litmus test issue. Charles Fried, who had filed a brief calling for *Roe's* reversal prior to Reagan's nominating him as Solicitor General, spoke of being "surprised by how pleasant and interesting the [courtesy call] meetings with the most liberal Democratic Senators—Kennedy, Metzenbaum, Simon—turned out to be."<sup>46</sup> Nonetheless, the Senate uses these hearings to make nominees well aware of the high-stakes nature of abortion politics. Joseph Califano, Secretary of Health, Education, and Welfare under Carter, put it this way: "[Following a round of questioning about abortion,] [t]he tension in the room eased a little as other senators asked questions on Social Security, balancing the budget, eliminating paperwork, busing, race discrimination, [etc.]."<sup>47</sup>

Another topic not addressed by Craig and O'Brien is how Congress participates in the abortion dispute through its oversight of governmental programs. When the U.S. Commission on Civil Rights published a report advocating abortion rights in 1975, Congress expressed its displeasure with the agency by forbidding future studies on this issue.<sup>48</sup> Congress likewise used its oversight powers to express its dissatisfaction with the Office of Personnel Management's (OPM) treatment of Combined Federal Campaign contributions to Planned Parenthood. OPM, then headed by pro-life activist Donald Devine, excluded Planned Parenthood from the list of approved charities that federal employees could donate to through a payroll deduction. Following a series of court decisions, including a Supreme Court decision<sup>49</sup> suggesting that the Planned Parenthood exclusion might well be an impermissible attempt to snuff out a particular point of view, Congress enacted legislation in 1985 block-

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46. Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* 36 (1991).

47. Joseph A. Califano, Jr., *Governing America* 59 (1981).

48. See Jaffee et al., *supra* note 19, at 57. Rather than criticize the substance of the Commission's arguments, Congress thought the Commission strayed too far from its statutory mandate in studying abortion rights.

49. See *Planned Parenthood Fed'n of America, Inc. v. Devine*, No. 83-2118 (D.D.C. Sept. 14, 1983) (holding that Planned Parenthood could not arbitrarily be excluded from the Combined Federal Campaign).



ing the exclusion of advocacy groups from the Combined Federal Campaign.<sup>50</sup>

In addition to the enactment of punitive legislation, congressional oversight also, and more typically, takes the form of legislative jawboning. When the Reagan administration suspended fetal tissue research, for example, House Committee on Human Resources chair Ted Weiss requested that the administration turn over all "research evidence" and "all documents, including letters, memoranda, minutes of meetings, and internal or draft documents."<sup>51</sup> Another example of congressional cajoling occurred when the Reagan administration announced its proposed regulations on family planning programs. Congressional supporters, including 106 co-signers of a letter of support to Health and Human Services Secretary Otis Bowen, encouraged the administration to stick to its guns and promulgate the regulations in final form.<sup>52</sup> Opponents, in contrast, pleaded with the administration to suspend the regulations, accusing the administration of "succumb[ing] to political pressure" and describing the proposal as "not in the best interest of the 5,000,000 low income people that depend upon the program each year for family planning services."<sup>53</sup>

2. *The President.* — The preeminence of the abortion issue in presidential politics is tellingly revealed by the remarkable speed and vigor with which the Clinton administration put its pro-choice policies into effect. Having made campaign pledges to work for the enactment of the Freedom of Choice Act<sup>54</sup> and to appoint federal judges "who believe . . . [in] the constitutional right to privacy and the right to choose,"<sup>55</sup> Clinton wasted little time in waving the pro-choice banner. On January 22, 1993, two days after his inauguration, Clinton dismantled the pro-life regulatory initiatives of the Reagan and Bush administrations. Speaking of our national "[goal] to protect individual freedom" and his vision "of an America where abortion is safe and legal, but rare," Clinton directed his Secretaries of Health and Human Services and Defense as well as the Administrators of the Food and Drug Administration and U.S. Agency for International Development (AID) to rescind existing anti-abortion regulations.<sup>56</sup> As a result, the ban on fetal tissue research was lifted, limits on

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50. See 132 Cong. Rec. H2054 (daily ed. Apr. 22, 1986) (debate on supplemental appropriations of fiscal year 1986); McKeegan, *supra* note 13, at 48-52.

51. Letter from Ted Weiss, Chairman, Human Resources and Intergovernmental Relations Subcommittee of the United States House of Representatives, to Louis Sullivan, M.D., Secretary, Department of Health and Human Resources (Nov. 13, 1989) (on file with the Columbia Law Review).

52. See Fisher & Devins, *supra* note 14, at 223.

53. Letter from Sen. Edward Kennedy to Otis Bowen, Secretary, of Health and Human Services (Oct. 30, 1987) (on file with the author).

54. H.R. 25, 102d Cong., 1st Sess (1991).

55. Prime Time Live (ABC television broadcast, Oct. 29, 1992) (transcript on file with the Columbia Law Review).

56. Remarks on Signing Memorandums on Medical Research and Reproductive Health and an Exchange with Reporters, 29 Weekly Comp. Pres. Doc. 85 (Jan. 25, 1993).



the ability of family planning programs to mention abortion were suspended, privately funded abortions at military hospitals were permitted, the moratorium on the importation of the abortifacient RU-486 was suspended, and limitations on the use of private funds by pro-choice organizations that also receive AID funds were suspended.<sup>57</sup> In the first six months of his administration, moreover, Clinton advanced his pro-choice agenda through legislative initiatives, court filings, and judicial appointments. During this time, Clinton supported abortion coverage in his national health care package and proposed a budget that did not include the Hyde Amendment and other abortion funding prohibitions.<sup>58</sup> In addition to supporting the Freedom of Choice Act, Clinton also stood behind legislative efforts to guarantee access to abortion clinics and to fetal tissue for research. On the judicial front, Clinton told reporters that he had settled on Ruth Bader Ginsburg as his Supreme Court nominee "after he became convinced that she was 'clearly prochoice.'"<sup>59</sup> Finally, before the Supreme Court, Clinton's Solicitor General argued that federal racketeering laws apply to the activities of Operation Rescue.<sup>60</sup>

The range and ferocity of Clinton administration action makes clear that the White House can be an active and somewhat one-sided participant in all phases of the abortion dispute. Focusing on Reagan administration initiatives, *Abortion and American Politics* reaches the same conclusion. Pointing to Reagan's efforts to advance his pro-life agenda through spiritual leadership, regulatory reform, judicial appointments and arguments, and legislative and constitutional amendment proposals, Craig and O'Brien argue that "the Reagan administration not only fundamentally changed the national debate over abortion but set the stage for how the controversy will play out in the 1990s" (p. 157).

Before the election of Ronald Reagan, abortion was an important but not front burner issue for the executive. Prior to *Roe*, the White House saw abortion as a states' rights issue and left it alone. In the 1972 election, for example, Richard Nixon spoke of "abortion [as] an unacceptable form of population control" (p. 158), but proposed no federal action, while George McGovern made clear that he had "never advocated federal action to repeal [abortion] laws" and that, if elected, he "would take no such action" (p. 159). After *Roe*, abortion was too much on the national political agenda to be dismissed by the White House. The Ford administration, for example, could not help but confront questions regarding the eligibility of abortion under federal health care programs. In

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57. See *id.* at 85-86.

58. See Stephen Barr, *Abortion Coverage Proposed*, *Wash. Post*, Apr. 6, 1993, at A-1. Clinton also proposed to allow federal employee health insurance plans to cover abortions. See *id.*

59. Michael Kranish & Joel P. Engardio, *Clinton Defends Methods*, *Boston Globe*, June 16, 1993, § 3, at 1.

60. See Brief for the United States as Amicus Curiae, *Nat'l Org. of Women v. Scheidler*, (No. 92-780) (cert. granted June 14, 1993) (case pending) (interfering with abortion clinics does not violate RICO).

the 1976 election, moreover, Ford and Carter both sought out the Catholic electorate by opposing public funding of abortion.<sup>61</sup> When Carter was elected, he justified the disproportionate burden that poor women suffer under the Hyde Amendment by observing that "there are many things in life that are not fair, that wealthy people can afford and poor people can't."<sup>62</sup> Neither Carter nor Ford played an activist role in the abortion dispute, however. Abortion did not figure prominently in their judicial appointments; neither asked the courts to either affirm or disavow *Roe*; legislation and constitutional amendments were not proposed; and regulatory initiatives were modest in scope and sweep.

The 1980 election of Ronald Reagan changed all that. Indeed, to understand the range of options available to the executive one cannot help but focus—as Craig and O'Brien do—on the Reagan administration. Reagan campaigned on a platform that "support[ed] a constitutional amendment to restore protection of the right to life for unborn children" and "support[ed] . . . the Congressional efforts to restrict the use of taxpayers' dollars for abortion."<sup>63</sup> Once in office, as Reagan Solicitor General Charles Fried put it, "[t]he Reagan administration made *Roe v. Wade* the symbol of everything that had gone wrong in law, particularly in constitutional law."<sup>64</sup> In Reagan's view, *Roe v. Wade* was as divisive and as wrong as *Dred Scott*.<sup>65</sup>

Reagan, as Craig and O'Brien note, was generally ineffective in his efforts to push through a pro-life legislative agenda (p. 172). With or without White House cheerleading, Congress was unwilling to approve a constitutional amendment restricting abortion rights, to enact a permanent Hyde amendment, to prohibit federally funded family planning centers from referring pregnant women for abortions, or to statutorily define a fetus as a legal person. While the President was not able to push his legislative agenda through a reluctant Congress, Reagan effectively advanced his pro-life agenda on matters squarely within the executive's domain—judicial and administrative appointments, court filings, regulation, and the power to veto or to approve legislation enacted by the Congress.

Court filings and judicial appointments are the most direct ways by which the executive seeks to shape constitutional law and, not surprisingly, Craig and O'Brien focus their efforts here. Reagan and his appointees spoke of judicial restraint and vigorously opposed "court create[d]"

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61. See Tribe, *supra* note 19, at 147–50.

62. President's News Conference of July 12, 1977, Pub. Papers, 1977 (II), at 1237.

63. 1980 Republican Party Platform, reprinted in 36 Cong. Q. Almanac 58-B, 62-B (1980).

64. Fried, *supra* note 45, at 72.

65. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding that a Black American is not a citizen of a state as "citizen" is used in the federal constitution). On this point, see Reagan's remarkable Human Life Review article reprinted in Ronald Reagan, *Abortion and the Conscience of the Nation* 15 (1984).

privacy rights.<sup>66</sup> In advancing this judicial philosophy, the administration clearly heeded pro-life Senators and interest group concerns and, arguably, gave these groups a veto over prospective nominees (p. 175). This strategy, more importantly, worked: "Reagan appointees were much more resistant to abortion rights than were the appointees of his predecessors."<sup>67</sup> The Reagan administration also advanced its judicial philosophy through briefs and oral arguments before the lower federal courts and the Supreme Court (pp. 185-87). In many instances, the administration defended its regulatory agenda in court. In some instances (typically before the Supreme Court), the administration appeared as an amicus to inform the Court of its views on state authority to regulate abortion. Reagan's first term Solicitor General Rex Lee, although falling short of asking the Court to overturn *Roe*, suggested that the Justices replace the trimester test with a more lenient undue burden standard.<sup>68</sup> Reagan's second term Solicitor General Charles Fried took the plunge and argued that *Roe* was "so far flawed and . . . a source of such instability" that it should be overturned (p. 186).<sup>69</sup>

The Reagan administration also reshaped abortion rights through its management of the administrative state. *Abortion and American Politics* discusses the most controversial of these regulatory initiatives, namely, the so-called "gag rule" ultimately upheld in *Rust v. Sullivan*.<sup>70</sup> The story begins in 1970 when Congress added to Title X a comprehensive family planning statute, an explicit prohibition against appropriating funds "where abortion is a method of family planning."<sup>71</sup> The Carter administration interpreted the funding ban narrowly, mandating that Title X recipients provide "non-directive counseling" on "pregnancy termination."<sup>72</sup> The Reagan administration vehemently opposed these

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66. According to his Assistant Attorney General in charge of judicial selections, Stephen Markman, "Reagan would have been derelict of his constitutional duty if he were to have appointed judges who were willing to create new constitutional 'rights' out of thin air." Stephen J. Markman, *Judicial Selection: The Reagan Years*, in *Judicial Selection: Merit, Ideology, and Politics* 33 (Henry Julian Abraham ed., 1990).

67. Steve Alumbaugh & C. K. Rowland, *The Links Between Platform-Based Appointment Criteria and Trial Judges' Abortion Judgments*, 74 *Judicature* 153, 162 (1990).

68. On the trimester test, see *supra* note 2. The undue burden standard would approve state regulation of abortion that does not place an "undue burden" on a woman's decision to terminate her pregnancy. See Brief for the United States as Amicus Curiae, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (No. 81-746). For further discussion, see *infra* note 153.

69. Fried advanced this argument in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). (pp. 186-87).

70. 111 S. Ct. 1759 (1991).

71. Family Planning Services and Population Research Act of 1970, Title X, § 1008, 84 Stat. 1504, 1508 (1970).

72. Program Guidelines for Project Grants for Family Planning Services, U.S. Dep't of Health & Human Services, Part II, 8.6 at 13 (1981).

regulations and ultimately elected to override the Carter scheme through its own regulatory initiatives.<sup>73</sup>

The Supreme Court approved the Reagan scheme because "substantial deference is accorded" to the executive in its interpretation of statutes.<sup>74</sup> Craig and O'Brien discuss *Rust* but do not consider its implications (pp. 311-12, 331-32). As the varying approaches of the Carter and Reagan administrations reveal, the executive has broad latitude in filling the gaps of statutory language. Moreover, as Congress' failed attempt to statutorily overrule the gag order suggests, it may well take a two-thirds supermajority for Congress to trump the regulatory initiatives of the executive. The Reagan—and later the Bush—administration made good use of this regulatory authority to advance its pro-life agenda. Policies on fetal tissue research, U.S. AID grant recipients, the importation of RU-486, and the permissibility of abortions in military hospitals were all promulgated pursuant to the executive's authority to implement the laws.

The effective exercise of rule-making authority requires the President to appoint like-minded individuals to administer abortion-related programs. *Abortion and American Politics*, however, does not take into account how the Reagan White House made use of its appointments authority. To start, Reagan's regulatory appointees, according to political scientists George Eads and Mike Fix, were "selected for their symbolic value rather than their administrative skills" and "there was no appreciable fear of the damage controversial appointees could generate."<sup>75</sup> On abortion-related issues, not surprisingly, a number of Reagan appointees came from the Right-to-Life movement: OPM head Donald Devine had run the Life Amendment Political Action Committee; Centers for Disease Control director James Mason had opposed abortion rights as head of Utah's state health department; Health and Human Services secretary Richard Schweiker had, as a U.S. Senator, sponsored a constitutional amendment to overturn *Roe*; Title X family planning program head Marjory Mecklenburg was a founder of the National Right to Life Committee and her eventual successor Jo Ann Gasper had been editor of the *Right Woman*; and Surgeon General C. Everett Koop had written and lectured against abortion.<sup>76</sup> The Reagan administration also made opposi-

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73. The Reagan administration had earlier (and unsuccessfully) proposed legislation to prohibit Title X recipients from discussing abortion as a family planning alternative (p. 188).

74. *Rust*, 111 S. Ct. at 1767.

75. George C. Eads & Michael Fix, *Relief or Reform: Reagan's Regulatory Dilemma* 143 (1984).

76. See McKeegan, *supra* note 13, at 48 (Donald Devine, Director of Office of Personnel Management), 53 (Dr. James Mason, Director of Centers for Disease Control), 66 (Richard Schweiker, Secretary of the Department of Health and Human Services), 67 (Marjory Mecklenburg, Deputy Assistant Secretary for Population Affairs), 114 (Jo Ann Gasper, succeeded Mecklenburg), 121 (C. Everett Koop, Surgeon General). Although her biographical background on these Reagan appointees is accurate, it should be noted that



tion to abortion a litmus test for key government posts. Charles Fried's nomination for Solicitor General, for example, hinged on his willingness, as Acting Solicitor General, to ask the Supreme Court to overturn *Roe*.<sup>77</sup> This policy cohesiveness stands in sharp contrast to the Carter administration where top Health, Education, and Welfare (HEW) appointees participated in a meeting organized by White House advisor Midge Costanza to protest against Carter and his HEW Secretary Joseph Califano's opposition to federal funding of abortion.<sup>78</sup> Reagan administration policy cohesiveness also helps explain the effectiveness of Reagan's regulatory campaign against abortion.

Another significant presidential weapon not seriously considered by Craig and O'Brien is the veto power. The veto power, as the experiences of the Bush administration demonstrate, can be used in two ways. First, the President can block congressionally supported programs that he disfavors. Bush's veto of legislative efforts to reinstate fetal tissue research and suspend the gag rule fits this category.<sup>79</sup> Second, the veto power can sometimes be used to force Congress to adopt a presidentially supported program. This is precisely what occurred when Congress refused to reenact a 1989 provision of the D.C. spending bill prohibiting the expenditure of both federal and city funds to pay for abortions.<sup>80</sup> Bush vetoed the bill and demanded that Congress reinsert the city funding prohibition. Recognizing the necessity of passing a spending bill and failing to override the Bush veto, Congress ultimately capitulated and reinserted the prohibition of both federal and city abortion expenditures.

3. *The States*. — The states are as prominent as the federal government in shaping the abortion dispute. Prior to *Roe v. Wade*, abortion battles were the near exclusive province of the states. Since *Roe*, as Craig and O'Brien argue, the states have been afforded and have taken advantage of "multiple opportunities for thwarting compliance with, or implementation of [*Roe*]" (p. 77). With recent decisions like *Webster v. Reproductive Health Services*<sup>81</sup> and *Planned Parenthood v. Casey*<sup>82</sup> acknowledging broad state authority to regulate (although not prohibit) abortion, the scope of abortion rights seems to hinge on state politics.

*Abortion and American Politics* explains the pivotal role played by state actors in this constitutional dynamic. State responses to *Roe* (pp. 78–100) as well as state politics after *Webster* (pp. 279–303) are considered sepa-

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McKeegan's book is the work of an advocate hostile to Reagan's "New Right" anti-abortion agenda.

77. See Stephen Wermeil, Reagan Names Fried to Become Solicitor General, *Wall St. J.*, Sept. 26, 1985, at 64.

78. See Califano, *supra* note 46, at 65.

79. On the gag rule, see 137 Cong. Rec. H10,491, Nov. 19, 1991 (daily ed.). On fetal tissue, see Pub. Papers 1992–93 (I), at 1005.

80. See Fisher & Devins, *supra* note 14, at 235–37.

81. 492 U.S. 490 (1989).

82. 112 S. Ct. 2791 (1992).



ately and at length. State politics before *Roe* is also examined, but not in any detail (pp. 73-78).

*Roe v. Wade*, although setting in motion the contemporary abortion dispute, did not appear in a political vacuum. Actions in the 1960s by the American Law Institute, American Medical Association, and various religious organizations spurred nineteen states to liberalize their criminal statutes governing abortion (p. 74). Of equal significance, only three states (Louisiana, New Hampshire, Pennsylvania) prohibited all abortions (p. 74). In the early 1970s, although thirty-four states had rejected reform initiatives,<sup>83</sup> more dramatic change seemed possible. The National Conference of Commissioners on Uniform State Laws drafted a Uniform Abortion Act, which would have placed no limitations on abortion during the first twenty weeks of pregnancy.<sup>84</sup>

The Court in *Roe* sought to ride the crest of these reform efforts. State responses to *Roe*, however, reveal that the nation was not prepared to accept the Court's decision. Indeed, in the year following *Roe*, 260 bills aimed at restricting abortion rights were introduced and thirty-nine were enacted (p. 77). Moreover, by turning abortion rights advocates' principal objective into a constitutional mandate, reform efforts became the province of groups seeking to chip away at, if not destroy, *Roe*.

Anti-abortion interest groups had huge success. From 1973 to 1989, 306 abortion measures were passed by forty-eight states. The principal weapons of *Roe*'s opponents were attempts to make abortion less attractive through so-called "burden creation" strategies. These strategies included increasing the risks of undergoing an abortion (statutes forbidding a safe abortion method—saline amniocentesis—while permitting more dangerous abortion techniques); reducing accessibility to medical facilities that perform abortions (statutes demanding that all abortions be performed in a hospital and zoning laws restricting the number of abortion clinics); increasing the cost of abortions (statutes requiring pathologist or other physician involvement in abortion procedures); and establishing detailed pre-abortion procedures (statutes requiring women to be informed of the "medical risks" of abortion and to wait at least twenty-four hours after consenting to the abortion procedure).<sup>85</sup>

*Abortion and American Politics* expertly details this first wave of state resistance to *Roe*. Through sections on health regulations, public funding, advertising, fetal protection, and parental consent and notification, Craig and O'Brien nicely summarize the various categories of post-*Roe*

83. See Lynn D. Wardle & Mary Anne Q. Wood, *A Lawyer Looks at Abortion* 43 (1982).

84. See Fisher & Devins, *supra* note 14, at 234.

85. See Albert M. Pearson & Paul M. Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 Harv. J.L. & Pub. Pol'y 427, 433-34 (1985). For an alternative typology, see Rubin, *supra* note 8, at 127-30 (describing seven types of abortion-related legislation enacted immediately after *Roe*).

regulation and the states that supported those regulations (pp. 78–94). This accounting reveals the obvious, namely, that “[t]he price of preserving diversity in the states . . . comes at the cost of nationally uniform laws” (p. 94).<sup>86</sup>

Just as *Roe* transformed state abortion politics in 1973, the Court’s 1989 *Webster* decision signaled a new era in abortion politics. On the brink of overturning *Roe*, the Court declared “the rigid *Roe* framework” unworkable and opened the door to anti-abortion legislation by approving, among other things, second trimester fetal viability tests.<sup>87</sup> In the days following *Webster*, pro-choice and pro-life interest groups predicted an avalanche of anti-abortion legislation.<sup>88</sup>

*Webster* did not live up to its interest group billing. From 1989 to 1992, only fourteen statutes were enacted; nine pro-choice and five pro-life (p. 282). This paucity of enacted bills prompted the Alan Guttmacher Institute to conclude that “[t]he wholesale changes in abortion law that had been widely predicted by activists, political pundits and the media [are yet to occur. Instead,] . . . law makers [have] stayed in the ‘safe,’ familiar, middle ground.”<sup>89</sup> Craig and O’Brien reach a similar conclusion and glean from the mixed results and modest volume of legislative output that there are now “two powerful, determined, and politically active forces—one on each side of the abortion issue—and caught in the middle [are] the state politicians” (p. 299).

This conclusion is hardly groundbreaking, but it goes a long way toward explaining the events of the past few years. It explains, for example, that legislative inertia can be a measure of a decision’s impact. It also suggests that pro-choice interests are politically dominant in states that protect abortion rights and, correspondingly, that pro-life interests are dominant in states that enact anti-abortion measures. Otherwise, pro-choice interests would have enough clout to kill off pro-life initiatives and vice versa. Craig and O’Brien recognize the role of interest group pressure but also point to other factors that explain legislative decision-making such as the nature of competing issues, the demographics of the population, and the perspectives of key legislators as well as the governor (p. 283).

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86. Craig and O’Brien never discuss whether uniformity in abortion legislation is a value worth pursuing and consequently provide no guidance on whether the “cost” of sacrificing uniformity is a matter of consequence.

87. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 518–19 (1989).

88. Representative Chris Smith, Chair of the Congressional Pro-Life Caucus, beamed that *Webster* would “lead to the enactment of state laws” and the “saving of many children.” Planned Parenthood Press Conference, Fed. News Serv., July 3, 1989, available in LEXIS, Nexis Library, Omni File. Kate Michelman, Executive Director of National Abortion Rights Action League, warned that “[w]omen’s lives hang by a thread, and the Justices this morning handed the state politicians a pair of scissors.” *Id.*

89. The Alan Guttmacher Inst., State Reproductive Health Monitor: Legislative Proposals and Actions, December 1990 at i.

A factor not considered by Craig and O'Brien in their assessment of state abortion politics is the often pivotal role played by state court judges. Before *Roe*, several state courts struck down anti-abortion laws.<sup>90</sup> After the Supreme Court concluded in *Harris v. McRae*<sup>91</sup> that a congressional prohibition on the use of Medicaid funds for abortions did not violate the Equal Protection Clause, courts in California, Connecticut, Massachusetts, Michigan, New Jersey, and Oregon interpreted their own constitutions to protect the right of indigent women to a state-funded abortion. The New Jersey Supreme Court pointed out that "state Constitutions are separate sources of individual freedoms and restrictions on the exercise of power by the Legislature. . . . Although the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete."<sup>92</sup>

Ten states' constitutions contain explicit privacy provisions and several others contain clauses that have been interpreted to protect the right to privacy. Some state courts have applied these provisions to protect abortion rights. For example, the California Supreme Court ruled that "the federal right of privacy . . . is more limited than the corresponding right in the California Constitution" and that restrictions on abortion funding for indigent women therefore violated California's explicit privacy right.<sup>93</sup>

Victories in state court, moreover, do not end the political struggle. Instead, the state legislature and voters engage state courts in a dialogue over the meaning of the state constitution. Take the case of California. In 1981, the California Supreme Court declared that the legislature could not restrict state funding for abortions for indigent women, but in each of the last ten years the legislature passed laws restricting the funding. Each year the courts struck down the laws and reinstated the funding.<sup>94</sup> Conservatives attempted to make use of the ballot box to remove liberal judges. California Chief Justice Rose Elizabeth Bird and two other justices were ousted in 1986 when conservatives targeted them for electoral defeat. A five-two conservative majority now dominates the court, but it

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90. See Survey of Abortion Law, 1980 *Ariz. St. L.J.* 67, 106-11. See also Rubin, *supra* note 8, at 31-57 (chronicling Court opinions leading up to *Roe*).

91. 448 U.S. 297, 299 (1980).

92. *Right to Choose v. Byrne*, 450 A.2d 925, 931 (N.J. 1982) (citations omitted).

93. *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 796 (Cal. 1981). Following *Webster*, pro-choice groups scored impressive court victories in California and Florida. See *American Academy of Pediatrics v. Van de Kamp*, 263 Cal. Rptr. 46, 55 (Cal. Ct. App. 1989) (Affirming grant of an injunction preventing implementation of a bill that would prevent unemancipated minors from having abortions without parental consent); *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989) (holding that a statute that requires parental consent of judicial bypass for minors seeking an abortion unconstitutionally intrudes on the privacy rights of pregnant minors).

94. See, e.g., Philip Hager, *Court Again Rejects Curbs on Abortions*, *L.A. Times*, Nov. 17, 1989, at A3.

continues to issue an expansive interpretation of California's privacy right.<sup>95</sup>

*Webster* and *Casey*, by substituting an "undue burden" test for *Roe*'s trimester standard, have made state politics the fulcrum of the abortion dispute. Prior to *Webster*, *Roe* and its progeny left little room for significant state regulation. That state legislators were activists during this *Roe* to *Webster* period yet are extraordinarily cautious today says a good deal about state attitudes both toward abortions and toward the Supreme Court. *Abortion and American Politics* does not address this issue; instead, it simply concludes that "[h]ow the battles in the states shape up, and whether and what kinds of new restrictions on abortion emerge depend on the politics of each state" (p. 349).

#### B. *On Constitutional Dialogues and the Abortion Dispute*

The abortion dispute reveals that the shaping of constitutional values is a dynamic process in which the courts, the executive, and the legislature engage in a dialogue with each other at both the federal and state level. The Supreme Court has moderated *Roe*'s stringent trimester standard thanks to presidentially nominated and Senate confirmed judicial appointments, amicus filings by the Solicitor General and congressional groups, and state legislators whose willingness to legislatively challenge *Roe* created repeated opportunities for the Court to fine-tune its abortion doctrine. With *Webster* and *Casey*, the Court recognized that state legislatures and courts will likely play the pivotal role in defining the reaches and limits of abortion rights.

Congress and the White House have also shaped abortion rights and participated in a dialogue with the courts and each other through legislative enactments and administrative rule-making. Congress puts into law a vision of constitutional meaning whenever it enacts abortion-related legislation; the executive likewise participates in these matters through the President's signing of this legislation and the Justice Department's defense of these measures; the courts, finally, adjudicate constitutional challenges to these enactments. Administrative rule-making follows a similar interactive course—agency heads engage in constitutional interpretation when promulgating regulations. The executive, moreover, defends these regulations in court and fends off congressional attacks through testimony, and if need be, the veto power. Congress also participates in rule-making through its confirmation of agency heads, oversight of government programs, amicus filings in court, and occasionally through legislation to moderate disfavored initiatives. Finally, the courts have entered the fray through decisions concerning the scope of executive power to interpret vague statutory language.

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95. See *Van de Kamp*, 263 Cal. Rptr. at 46.



This dynamic is pervasive.<sup>96</sup> It clearly shows the judiciary to be one part of a constitutional dialogue that involves all of government. *Abortion and American Politics*, despite hinging its argument on constitutional decision-making being much more than pronouncements of the Supreme Court, does not speak of this dialogue. Craig and O'Brien certainly describe the numerous initiatives of Congress, the President, and the states. What they do not do is explain how the actions of one branch interface with the actions of another. *Abortion and American Politics* sees each event as a snapshot; that these interacting events form a mosaic is not revealed by Craig and O'Brien. Consequently, the story they tell is interesting but less interesting than it could be, and their depiction of constitutional decision-making is accurate but less accurate than it could be.

*Abortion and American Politics* would also benefit if it approached non-judicial influences in a more systematic fashion. Congress, the executive, and the states all make use of different types of powers at different moments (before judicial action, during adjudication, and after judicial action). In understanding elected branch influences, it is important to know what these powers are and when they are used. Craig and O'Brien, although describing the most significant episodes of elected branch involvement, never connect these critical episodes to a fuller description of what techniques are used by elected government and when they will be used. In addition, by focusing their efforts on critical episodes, there are some gaps in their coverage of the techniques of elected branch influences. Congressional oversight of agency enforcement, the veto power, and the appointment and confirmation of agency officials are important topics that go virtually unnoticed in *Abortion and American Politics*.

Craig and O'Brien understate how nuanced and how complex elected branch action is by failing to delineate systematically nonjudicial influences. Take the case of the Reagan-Bush federal family planning rules. By discussing the promulgation (pp. 188-90), judicial approval (pp. 331-32), and repeal of these rules (p. 358) as three discrete events, Craig and O'Brien provide few insights into the ways in which all three branches may play off one another. For example, Congress' 1991 efforts to statutorily override family planning regulations were intended to express dissatisfaction with the executive for promulgating the order and the courts for upholding it.

These criticisms of *Abortion and American Politics* should not be overstated. Craig and O'Brien's account is cogent and detailed. Indeed, with a little diligence, the reader can piece together what powers the various branches possess and when they are likely to exercise those powers. Nonetheless, by placing the onus of interpretive responsibility squarely with the reader, Craig and O'Brien dilute their central claim about the pervasiveness of elected government action.

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96. See sources cited *supra* notes 8, 16, 19 and 22.



II. ABORTION AND ELECTED BRANCH INTERPRETATION CONSIDERED:  
EXTENDING *ABORTION AND AMERICAN POLITICS*

The abortion dispute reveals a great deal about the American governmental and political processes. "[T]hat [Supreme Court] decisions on highly controversial matters are rarely final" (pp. xiv-xv) is the lesson that Craig and O'Brien glean from their examination of state and federal abortion politics. A modest extension of Craig and O'Brien's assessment, as Part I demonstrates, reveals that constitutional values are shaped by a highly interactive dynamic that involves repeated volleys between the executive, legislative, and judicial branches of both state and federal government. Craig and O'Brien, however, leave unexamined numerous issues critical to an understanding of elected branch constitutional interpretation as well as abortion's impact on the governmental process. This section will extend *Abortion and American Politics* by examining four of these issues: the reasons why elected government regularly makes use of some but not all of its powers to shape constitutional disputes; the seriousness with which elected government approaches constitutional issues; the impact of single issue politics on political institutions; and elected government attitudes towards the judiciary. Although these issues never surface in *Abortion and American Politics*, they all lurk in the background of the events recounted by Craig and O'Brien. Consequently, while this section will extend *Abortion and American Politics*, it will principally rely on episodes discussed in the book.

A. *Elected Government's Choice of Response*

Patterns of congressional and White House responses to *Roe* have emerged over the past twenty years. Congressional opposition to *Roe* has been principally expressed in funding prohibitions, many of which must be reenacted every year. Constitutional amendments, court-stripping, and statutory repeal have been rejected. When Congress acts to support abortion rights, moreover, it typically acts to rein in either the executive for a regulation which it disapproves or the courts for a statutory interpretation it disfavors. Constitutional amendments or statutory language asserting the correctness of *Roe* have been eschewed. Since Ronald Reagan's 1980 election, the presidency has made use of all the weapons available to it to advance its pro-choice or pro-life positions. Judicial and administrative appointments, legislative initiatives, the veto power, rule-making, and the bully pulpit head the list of these presidential tools.

Congress' mixed approach and its heavy reliance on appropriations-based policymaking are quite understandable. Appropriations measures are preferred over constitutional amendment and direct statutory repeals because they are easier to enact.<sup>97</sup> Take the case of the Hyde Amendment. Anti-abortion forces, unable to get statutory and constitutional

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97. See Neal E. Devins, Regulation of Government Agencies Through Limitation Riders, 1987 Duke L.J. 456, 456-59.

amendment proposals out of committee, turned their attention to the subterranean world of appropriations-based policymaking. Appropriations measures must be enacted every year, and anti-abortion forces, through a simple floor amendment, were able to compel a majority up or down vote on Medicaid funding. That Congress would approve such a funding ban is hardly surprising. A funding ban leaves the right intact and hence appears to be a moderate response. Congress' decision not to finance an activity which many find morally reprehensible does not necessarily call into question the correctness of *Roe*; instead, the decision not to appropriate is part and parcel of Congress' power of the purse. It is also a decision—because of the single year nature of appropriations—with a limited shelf life and great opportunity for fine tuning. Direct legislative repeals, in contrast, are uncompromising and consequently, the political costs of supporting such measures are great.

Congress' pro-abortion decision-making follows a similar pattern. Direct affirmations of *Roe*, such as the proposed Freedom of Choice Act of 1989,<sup>98</sup> have been rejected. Congress instead limits its pro-choice activity to decision-making that does not explicitly reaffirm *Roe*. Legislation to restore fetal tissue research and to allow family planning centers to discuss abortion were designed to check an overly aggressive executive. This is a classic exercise of Congress' oversight authority. Along the same lines, were Congress to enact abortion clinic access legislation in response to the Supreme Court's *Bray* decision,<sup>99</sup> Congress would simply be checking what it perceived as the Court's misinterpretation of statutory language.<sup>100</sup> In both instances, Congress would be playing a reactive role where decisional costs were kept to a minimum.

On issues as divisive as abortion, Congress has strong incentives not to prompt the ire of losers by making decisions that are too final. In addition to the desire of many members of Congress to avoid decisional costs, the failure of absolutist approaches is also attributable to Congress' structure. Because Congress only acts collectively, pro-choice and pro-life members of Congress who adopt extreme views and want to exercise Congress' power in a forceful manner often cancel each other out.

Congress' reluctance to embrace a substantive theory of abortion rights is also evidenced in legislative filings before the courts. In cases calling into question the correctness and scope of abortion rights, coali-

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98. S. 1912, 101st Cong., 2d Sess. (1990) (prohibiting states from restricting the right of a woman to choose abortion prior to fetal viability except when necessary to protect the woman's life).

99. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (holding that Ku Klux Klan Act does not apply to Operation Rescue Protestors blockading abortion clinics).

100. Congress likewise responded to the Court's perceived misinterpretation of employment discrimination statutes when it enacted the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1980) (amending § 701 of the Civil Rights Act of 1964). Specifically, Congress disapproved of Supreme Court decisions upholding state and private exclusion of pregnancy-related costs from health care coverage. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

tions of pro-choice and pro-life congressional amici file competing briefs before the Court.<sup>101</sup> Bipartisan congressional support is more likely—although far from a sure thing—in cases that implicate legislative powers. For example, when the Supreme Court adjudicated the constitutionality of the Hyde Amendment,<sup>102</sup> a bipartisan coalition of pro-choice and pro-life legislators advanced a broad interpretation of Congress' appropriations power.<sup>103</sup>

White House decision-making, on the other hand, has been calibrated differently from that of Congress. Rather than only playing a reactive role, Reagan, Bush, and Clinton have been activists. Reagan's anti-abortion speeches and regulatory agenda, Bush's defense of that agenda in court and through the veto, and Clinton's immediate dismantling of Reagan-Bush programs exemplify the White House's commitment to vigorous and strident leadership on the abortion question.<sup>104</sup> This activism—like Congress' decision to minimize decisional costs—is pragmatic. Unwilling to alienate both pro-choice and pro-life interests with a Carteresque middle ground strategy, the White House aligns itself with one or the other set of interest groups in the abortion dispute.

Starting with the 1980 election of Ronald Reagan, for example, every President has subscribed to a substantive theory of abortion rights and has been willing to back up that theory with Supreme Court filings and arguments. While the theories of pro-choice and pro-life administrations are incompatible with each other, the singular nature of the presidency apparently demands that the executive embrace one or the other theory. On questions of presidential authority, moreover, pro-choice and pro-life administrations have advanced similar arguments. The Reagan, Bush, and Clinton administrations, among other things, have endorsed broad executive branch authority to interpret vague legislative mandates.<sup>105</sup>

Congress' tendency to be reactive and diffuse as well as the competing executive tendency to endorse one or the other side are critically important factors in understanding the abortion dispute. By the same token, an examination of the abortion dispute helps explain other factors

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101. See *supra* notes 41–44 and accompanying text.

102. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

103. See Brief of Jim Wright, *supra* note 42.

104. The President has broad authority to advance his policy initiatives as part of his constitutional responsibility to execute the law. See Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 *Stan. L. Rev.* 203, 219–28 (1987). For example, it is inappropriate for any administration to make use of judicially approved consent decrees to bind its successors to its policy preferences. See *id.* at 227–28. With respect to abortion-related regulations, the Clinton administration was in no way legally or morally bound by Reagan-Bush initiatives just as the Reagan administration was not bound by Carter-era interpretations.

105. See *supra* notes 54–59, 69–73, 78 and accompanying text (discussing how Reagan promulgated, Bush defended, and Clinton repealed regulations governing the mentioning of abortion by federally funded family planning centers).

that motivate both the White House and Congress. Specifically, by utilizing all of his powers, the President has maximized his influence in shaping the tone of the abortion debate vis-à-vis Congress. On regulatory matters, for example, the executive has hardly been confined by the broader boundaries of the legislation which Congress enacted. Initiatives on fetal tissue research, family planning counseling, and the like suggest that executive branch authority is catapulted by broadly stated legislative mandates. Craig and O'Brien, who use the abortion dispute to "vividly illustrate how our political institutions actually operate" (p. xiii) would have been well served by considering the institutional tugs and pulls that help explain elected government decision-making.

*B. The Seriousness With Which Elected Branches Undertake Interpretation*

Does elected government take seriously its responsibility as constitutional interpreter?<sup>106</sup> After all, lawmakers and regulators might simply pursue whatever policies serve their interests and leave questions of constitutionality to the courts. Alternatively, lawmakers and regulators could invest great time and energy in determining what is and is not constitutional. The abortion dispute suggests, not surprisingly, that the truth lies somewhere in between. Sorting out why some but not all matters are given serious attention is useful in understanding both the abortion dispute and the American system of government. This inquiry applies with equal force to Congress, the executive, and the states. For the purposes of illustration, only Congress will be considered.

Congressional decision-making is highly visible, greatly observed, and much criticized. Committee hearings and reports, floor debates, and amici curiae filings call attention to the seriousness with which Congress approaches the task of constitutional interpretation.<sup>107</sup> Congress has made varied use of these tools in its consideration of abortion-related issues. Little to no attention was paid to constitutional concerns in the Hyde Amendment debates or the enactment of the Adolescent Family

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106. On the issue of whether elected government *should* interpret the Constitution, see sources cited supra notes 7, 16. See also Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 1-33 (2d ed. 1986) (addressing the history of and justifications for judicial review); Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (1971); Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 *Tul. L. Rev.* 977-1095 (1987); Herbert Wechsler, *The Courts and the Constitution*, 65 *Colum. L. Rev.* 1001 (1965) (analyzing the political and moral limits of judicial review).

107. See, e.g., Paul Brest, *Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 *Ga. L. Rev.* 57 (1986) (Congress has neither the institutional nor political capacity to engage in effective constitutional deliberation); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 *N.C. L. Rev.* 587 (1983) (same); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 *N.C. L. Rev.* 707 (1985) (Congress always has resources and sometimes has the inclination to interpret the Constitution effectively).



Life Act (AFLA).<sup>108</sup> In contrast, constitutional concerns seemed to play a role in Congress' consideration and ultimate rejection of constitutional amendment proposals, court-stripping proposals, the Human Life Act,<sup>109</sup> and the Freedom of Choice Act.<sup>110</sup>

The AFLA and Hyde Amendment support Owen Fiss's observation that legislators are disinterested in the "search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people."<sup>111</sup> The AFLA and the Hyde Amendment each raised serious constitutional concerns—the AFLA because it prohibits religious organizations that engage in abortion counseling from participating in the AFLA program and the Hyde Amendment because its restrictions on Medicaid funding limit the availability of abortions. In each instance, constitutional challenges were sustained by lower federal courts only to be overturned by bare five member majorities in the Supreme Court.<sup>112</sup> Congress, however, appeared indifferent to constitutional concerns when enacting these measures.

The AFLA originated in the Senate Labor and Human Resources Committee. Hearings held in March 1981 featured the testimony of economists, doctors, child psychologists, and sociologists—not constitutional scholars.<sup>113</sup> Likewise, the Committee Report makes no mention of constitutional issues.<sup>114</sup> Indeed, when the AFLA was reauthorized in 1984, Congress seemed relatively unconcerned that a constitutional challenge had been launched against the measure. Subcommittee Chair Jeremiah Denton simply noted that "[t]he courts will have to decide whether the law as passed by Congress is constitutional. The task before the subcommittee and the Congress is to oversee the activities of the current act."<sup>115</sup>

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108. 42 U.S.C. § 300z-5 (1982).

109. See The "Human Life Bill": Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 1-7, 64-66, 155-64 (1981) (statements by Senators) [hereinafter *Hearings on The Human Life Bill*].

110. See Freedom of Choice Act of 1989: Hearings on S.1912 Before the Senate Comm. on Labor & Human Resources, 101st Cong., 2d Sess 1-4 (1990) (statements by Senators regarding impact of proposed Act on *Roe*).

111. Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 10 (1979).

112. See *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y.), rev'd sub nom. *Harris v. McRae*, 448 U.S. 297 (1980) (upholding Hyde Amendment); *Kendrick v. Bowen*, 657 F. Supp. 1547 (D.D.C. 1987), rev'd, 487 U.S. 589 (1988) (upholding AFLA).

113. See Oversight of Family Planning Programs, 1981: Hearings on Examination of the Role of the Federal Gov't in Birth Control, Abortion Referral, and Sex Education Programs Before the Senate Comm. on Labor & Human Resources, 97th Cong., 1st Sess., (1981).

114. See Senate Comm. on Labor & Human Resources, Adolescent Family Life, S. Rep. No. 161, 97th Cong., 1st Sess. (1981).

115. Reauthorization of the Adolescent Family Life Demonstration Projects Act of 1981: Hearings on an Overview of the Adolescent Pregnancy Problem and Reauthorization of Title XX of the Public Health Services Act Before the Subcomm. on



Congress did not hold hearings or prepare a report when it enacted the Hyde Amendment. Introduced on the House floor, the Amendment was subject to prolonged, fierce, and emotional debate. While amendment supporters occasionally criticized *Roe* as "mistaken and immoral" and Hyde opponents suggested that Congress' refusal "to pay for something guaranteed by the Constitution" is itself unconstitutional, these references were rare and never rose above the level of conclusory rhetoric.<sup>116</sup> Congress gave more careful attention to constitutional concerns when the Hyde Amendment went before the Supreme Court. A bipartisan coalition of over 200 members of Congress, including members who voted against Hyde, filed an amicus brief defending Congress' right not to spend money under the appropriations power.<sup>117</sup>

Constitutional concerns did, however, pervade the attacks on *Roe* that occurred in the early 1980s. Pro-life forces were empowered through Republican control of both the White House and the Senate after the 1980 election. In 1981, the Senate Judiciary Committee actively considered human life legislation, court-stripping proposals, and constitutional amendment proposals. In each case, extensive hearings were dominated by constitutional law experts. Committee and Subcommittee reports too were replete with citations to this expert testimony, as well as to Supreme Court decisions and law review articles.<sup>118</sup> Unlike the Labor and Human Resources Committee's handling of the AFLA, the Senate Judiciary Committee seemed keenly interested in separation of powers and constitutional interpretation concerns.

Differences between the Judiciary Committee and the Labor and Human Resources Committee are to be expected. Unlike the AFLA, where Congress used funding as a mechanism for abortion regulation, the early 1980s proposals directly challenged both the correctness of *Roe* and the propriety of judicial involvement in the abortion dispute. Constitutional concerns could not be easily brushed aside in this context.

Moreover, the Judiciary Committee's variable treatment of court-stripping, human life, and constitutional amendment proposals supports its reputation as a "'Committee of Lawyers' [which] reacts to constitutional questions in a very judicial, courtlike fashion."<sup>119</sup> Court-stripping proposals, which were savaged as an inappropriate and unconstitutional interference with a co-equal branch by most constitutional experts as well

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Family and Human Services of the Senate Comm. on Labor & Human Resources, 98th Cong., 2d Sess. 4 (1984).

116. See 122 Cong. Rec. 20,410-12; 30,898; 27,672-75 (1976).

117. See Brief of Rep. Jim Wright, *supra* note 42.

118. Hearings on the Human Life Bill, *supra* note 108; Report of the Comm. on the Judiciary on S.J. Res. 110, Human Life Federalism Amendment, S. Rep. 465, 97th Cong., 2d Sess., (1982) (with minority views) [hereinafter Report on Human Life Federalism Amendment].

119. Mark C. Miller, Congress and the Constitution: A Tale of Two Committees 39 (1992) (unpublished manuscript on file with the Columbia Law Review).

as Attorney General William French Smith,<sup>120</sup> never emerged from committee. Proposed human life legislation also raised questions about Congress' constitutional authority to respond to court decisions. Subcommittee Chair John East (Republican, North Carolina) described the proposal as an "exercise [of] the authority of Congress . . . based on an investigation of facts and on a decision concerning values that the Supreme Court has declined to address."<sup>121</sup> Subcommittee hearings, however, revealed that most, but not all, legal academics opposed the bill on constitutional grounds.<sup>122</sup> East persisted and a sharply divided subcommittee reported the bill out, but issued a report presenting three dramatically different assessments of Congress' § 5 authority to enforce the Fourteenth Amendment.<sup>123</sup> East thought Congress was constitutionally empowered to find that life begins at conception and to enforce that finding through legislation. Orrin Hatch (Republican, Utah), although strongly opposed to *Roe*, concluded that Congress' § 5 authority does not include the establishment of substantive rights whether they be voting rights or a fetus's right to life. Max Baucus (Democrat, Montana) argued that Congress can establish rights but cannot statutorily overturn Supreme Court decisions. East, Hatch, and Baucus all made the assessment of Congress' authority the centerpiece of their remarks, with ample references to case law and the testimony of constitutional experts.

The Human Life Bill never made it to the floor of Congress. Instead, the full Judiciary Committee focused its efforts on a proposed constitutional amendment to return the abortion issue to the states. This alternative was favored for three reasons. First, it is beyond dispute that Congress may initiate a constitutional amendment to overturn a Supreme Court decision. Second, unlike statutory court-stripping and human life proposals which would nullify Court holdings without following constitutionally specified procedures, constitutional amendment proposals express disapproval of *Roe* without challenging judicial authority. Third, "[w]ithout actually moving to outlaw abortion," the Federalism Amendment enabled Congress to "demonstrate [its] concern about [*Roe*], while at the same time disposing of this troublesome issue by throwing it back to the states."<sup>124</sup>

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120. See Keynes with Miller, *supra* note 19, at 292-98.

121. See Burgess, *supra* note 19, at 36-48.

122. See Hearings on the Human Life Bill, *supra* note 108 (including, e.g., testimony of Robert Bork, 308-17; testimony and prepared statement of Laurence H. Tribe, 242-55).

123. See Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, *The Human Life Bill S.158: Report Together with Additional and Minority Views to the Committee on the Judiciary*, S. Rep. No. 1, 97th Cong., 1st Sess. 20-29, 33-38, 39-43 (1981).

124. Jaffee, et al., *supra* note 19, at 115. Congress' desire to pass the *Roe* buck back to the states also explains why the Senate Judiciary Committee did not act on a constitutional amendment to define a fetus as a person (pp. 137-46); see also Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud. Am. Pol. Dev.* 35,

Constitutional concerns were given serious treatment at both the subcommittee and committee level. Subcommittee hearings included several constitutional experts who discussed both the soundness of *Roe* and the appropriateness of checking the court through a constitutional amendment.<sup>125</sup> The Judiciary Committee, which voted 10-7 to report the amendment out, likewise addressed these constitutional interpretation and structure of government concerns in its report.<sup>126</sup> Floor debates on the amendment, although varied, also considered the correctness of *Roe* as a matter of constitutional interpretation.<sup>127</sup>

Early 1980s anti-abortion initiatives demonstrate Congress' recognition that constitutional interpretation plays a critical role in the abortion dispute. Critics of Congress are unimpressed by this constitutional exegesis. Paul Brest, for example, argues that the legislative history of the Human Life Bill reveals that constitutional complications are typically raised by bill opponents as "rhetorical stratagems" and that proponents sought to stack the hearing with pro-life witnesses and eventually drafted a "Subcommittee report [which] reads more like an advocate's brief than a judicial opinion."<sup>128</sup> The fact remains, however, that many abortion opponents disapproved of human life and court-stripping legislation as a constitutionally inappropriate substitution of legislative for judicial authority.<sup>129</sup> Along the same lines, abortion rights supporters defended the Hyde Amendment as a constitutionally permissible exercise of the appropriations power.

Whatever one's views of the skillfulness and seriousness with which Congress approaches constitutional interpretation, abortion politics is certainly affected by the ways in which Congress balances constitutional and other concerns. *Abortion and American Politics* does not consider this subject, however. Craig and O'Brien offer no guidance on different committees' approaches to constitutional analysis, the relevance of staff-dominated hearings and committee reports to Congress' workproduct, the role of Supreme Court precedents in Congress' deliberations, and other such matters. These questions, however, are quite relevant to understanding both the abortion dispute and the political institutions involved in the dispute. The same can be said of the seriousness with which the executive branch and the states approach constitutional interpretation—another topic unexplored by Craig and O'Brien.

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53-61 (1993) (Congress typically seeks to avoid speaking to the correctness or incorrectness of *Roe*).

125. See Hearings on S. 158, *supra* note 121, at 242, 275, 328 (testimony of Laurence H. Tribe, William Van Alstyne, and Archibald Cox).

126. See Report on Human Life Federalism Amendment, *supra* note 117 at 1, 7, 53-54.

127. See 129 Cong. Rec. 17,570-78 (1983).

128. Brest, *supra* note 106, at 93, 97; see also Burgess, *supra* note 19, at 48 (Congress' performance as constitutional interpreter during Human Life hearings "suggest a mixed result").

129. See *supra* note 123 and accompanying text.

*C. Institutional Concerns*

The abortion dispute has exacted a heavy price on all three branches of the federal government. Specifically, abortion's dominance as a single issue concern has subordinated competing and otherwise relevant concerns in congressional and executive decision-making. Abortion's dominance has also altered public perceptions of the Supreme Court, if not the Court's perception of itself.

The nomination and confirmation of federal court judges, especially Supreme Court Justices, is the most obvious example of how the abortion issue displaces other concerns. Beginning with Ronald Reagan, presidents have been under great pressure to use support or opposition to abortion as a "litmus test" in the judicial selection process. Reagan made "judicial restraint" and opposition to the "creat[ion] [of] new constitutional 'rights' out of thin air" the trademark of his judicial appointments.<sup>130</sup> A desire to please pro-life interests figures prominently in this calculation. Some judicial nominees "'were asked directly about their views on abortion'" (p. 175, quoting Nina Totenberg); one appeals court nomination was withdrawn after it became known that the nominee contributed to Planned Parenthood (pp. 174-75); and pro-life interests scuttled the planned nomination of federal appeals court Judge Patrick Higginbotham to the Supreme Court because he recognized—albeit reluctantly—*Roe* to be the law of the land in one of his opinions.<sup>131</sup> The Clinton administration appears no different. Candidate Bill Clinton stated "that a judge ought to be able to answer a question in a Senate hearing, 'Do you or do you not support the right to privacy, including the right to choose?'"<sup>132</sup> With respect to his Supreme Court nominee Ruth Bader Ginsburg, Clinton commented that her writings suggest she is pro-choice "and that was to me the important thing."<sup>133</sup>

The abortion issue has, on occasion, dominated other areas of executive-judicial relations. Abortion, for example, figured largely in the staffing of the Justice Department's Office for Legal Policy (charged with judicial selection) and the Solicitor General's Office. Rex Lee resigned as Solicitor General after Reagan's first term, in part because of his unwillingness to respond to administration-condoned interest group pressure and to ask the Supreme Court to overturn *Roe* and other disfavored rulings. Speaking of the importance of *stare decisis*, Lee spoke of resenting "this notion that my job is to press the Administration's policies at every turn and announce true conservative principles through the pages of my briefs. It is not."<sup>134</sup> Open opposition to abortion, however, had become

130. Markman, *supra* note 65 at 33.

131. See *Margaret S. v. Edwards*, 794 F.2d 994, 995-96 (5th Cir. 1986).

132. *Inside Politics* (CNN television broadcast, June 30, 1992) (on file with the Columbia Law Review).

133. Stephen Labaton, *Senators See Easy Approval for Nominee*, N.Y. Times, June 16, 1993, at A22.

134. Lincoln Caplan, *The Tenth Justice* 107 (1987) (quoting Rex Lee).



a prerequisite of a Reagan administration Solicitor General—Charles Fried's nomination may well have been contingent on his seeking *Roe*'s reversal as Acting Solicitor General.<sup>135</sup>

Abortion has likewise affected legislative-judicial relations, becoming the pivotal issue in Senate Judiciary Committee confirmation hearings. Starting with the 1981 nomination of Sandra Day O'Connor, Committee questioning and Committee reports, while paying some attention to other issues, bespeak a near obsession with right-to-privacy concerns. David Souter, for example, spoke at his confirmation hearings of *Roe v. Wade* as "the one case which has been on everyone's mind and on everyone's lips since the moment of my nomination."<sup>136</sup> Clarence Thomas, in contrast, caused an uproar by claiming never to have discussed or even thought about the correctness of *Roe v. Wade*. Since the Bork nomination, moreover, the Judiciary Committee has made clear to nominees that a willingness to profess belief in the right to privacy and a respect for stare decisis is a prerequisite for the job.<sup>137</sup> Indeed, in explaining why Bork was unacceptable, the Senate Judiciary Committee Report emphasized his "narrow definition of liberty" being at odds with the "image of human dignity [which] has been associated throughout our history with the idea that the Constitution recognizes 'unenumerated rights.'"<sup>138</sup>

Abortion has also proven surprisingly critical to Congress' annual enactment of the federal budget. Technically, House and Senate rules preclude substantive policymaking through appropriations.<sup>139</sup> This distinction between authorizations and appropriations is designed to ensure both that fiscal policy concerns dominate debates over the budget and that committees with subject matter expertise screen authorizing legislation. The Hyde Amendment reveals the limits of the appropriations-authorizations distinction and, with it, the impossibility of confining appropriations to fiscal policy matters. First enacted in 1976, the Hyde Amendment has proven a permanent and destabilizing force in appropriations policymaking. Debate over abortion provisions in the fiscal year 1977 rider lasted eleven weeks, with dozens of compromise proposals on the floor. The fiscal year 1978 stalemate was worse, lasting more than five

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135. See Wermeil, *supra* note 40.

136. Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, United States Senate, 101st Cong., 2d Sess. 54 (1990).

137. See Wermeil, *supra* note 40, at 124. Pro-choice interests' focus on privacy—rather than abortion *per se*—is understandable. The Block Bork Coalition emphasized Bork's attack against privacy in order to "pluck the heartstrings of [the] middle class" and thereby avoid White House charges that the Bork opposition was merely a thinly veiled pro-choice special interest group. See Fisher & Devins, *supra* note 14, at 200 (quoting abortion rights activist Ann Lewis) (alteration in original).

138. S. Exec. Rep. No. 7, 100th Cong., 1st Sess. 8, 8 (1987).

139. See Devins, *supra* note 96, at 458 & n.12; Louis Fisher, The Authorization Appropriation Process in Congress: Formal Rules and Informal Practices, 29 Catholic Univ. L. Rev. 51 (1979).

months (pp. 119–27). Before deciding the matter, twenty-eight roll call votes were taken (seventeen in the Senate and eleven in the House), two continuing resolutions expired, and thousands of federal employees were threatened with delays in their paychecks. Debates over Hyde and other abortion-related riders remain contentious. In 1989, the appropriations process was delayed by skirmishes between the White House and Congress over the sweep of abortion funding prohibitions. Abortion funding also proved contentious in 1993. On September 28, 1993, the Senate followed the House's lead by maintaining restrictions on Medicaid funding of abortions. The 1993 funding restrictions allow for funding in cases of rape and incest, but otherwise retain the hard line adopted during the Bush administration. Pro-choice congressmen, however, remain undaunted, predicting ultimate victory when the issue is met in the national health care arena.<sup>140</sup> The disruption caused by these battles demonstrates the potentially debilitating impact of appropriations-based policy initiatives on Congress' ability to perform essential legislative functions.

Abortion, finally, has transformed interest group advocacy before the Supreme Court. When *Roe* was argued, ten amicus briefs were filed; when *Webster* was argued, that number had risen to seventy-eight (pp. 212–27).<sup>141</sup> Beyond interest group filings, the Justices today—as Justice Scalia bemoaned in *Webster*—are subject to “carts full of mail from the public, and streets full of demonstrations, urging us—their unelected and life-tenured judges . . .—to follow the popular will.”<sup>142</sup> This avalanche of partisanship, whether healthy or unhealthy, cannot be discounted. It may well explain why Justice O'Connor began her *Casey* opinion with the admonition that “[l]iberty finds no refuge in a jurisprudence of doubt.”<sup>143</sup>

Without question, inter-branch relations as well as the capacity of each branch to function effectively figure prominently in understanding abortion's impact on the American political system. The abortion dispute also calls attention to the impact of single issue politics on the American governmental and political process. The appointment and confirmation of judicial nominees, the Hyde Amendment debates, and Supreme Court advocacy reveal the profound impact that the abortion dispute has had on the affected governmental actors. *Abortion and American Politics* makes clear that abortion figures prominently in appropriations policy (pp. 108–37) as well as judicial selection (pp. 173–85), but does not comment on these institutional concerns. Furthermore, Craig and O'Brien, while doing a fine job of explaining the origins and

140. See Eric Pianin, Senate Keeps Medicaid Abortion Limits, *Wash. Post*, Sept. 29, 1993 at A-11.

141. See generally, Susan Behuniak-Long, Friendly Fire: Amici Curiae and *Webster v. Reproductive Health Services*, 74 *Judicature* 261 (1991).

142. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring).

143. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803 (1992).

mobilizations of pro-choice and pro-life interest groups (pp. 35-71), do not comment on the relationship of single issue politics to governance issues.

*D. Elected Government Attitudes Toward the Judiciary*

The Supreme Court, while it does not have the "last word" on the abortion dispute, is a critical part of the dynamic that defines the reaches and limits of abortion rights. What role the Court plays in shaping abortion rights is quite another matter. Common sense suggests a positive correlation between the respect accorded *Roe* and the judiciary's influence in defining the abortion issue. Along the same lines, common sense suggests a positive correlation between changes in abortion rates following *Roe* and the decision's impact on people's lives. What then if abortion rates have not changed after *Roe* or elected government has sought to undermine the decision through massive legislative and administrative resistance? Does this mean that *Roe* is inconsequential or that elected government does not take Court edicts seriously? These questions figure largely in the abortion dispute and the relevance of this dispute to an understanding of American political institutions.

*Roe* clearly is consequential.<sup>144</sup> By overturning forty-six state abortion laws, *Roe* triggered unprecedented legislative and administrative activism at both the federal and state level. *Abortion and American Politics* spends close to four hundred pages describing that activism; this review spends most of its pages calling attention to gaps that still remain in that descriptive summary. *Roe* also helps explain the rise in the number of legal abortions from 586,800 in 1972 to 1,553,900 in 1980.<sup>145</sup> *Roe*'s checking of state power enabled market mechanisms to make relatively affordable abortions more readily available. For example, the number of women who could not obtain an abortion shrunk from over 1,000,000 in 1973 to less than 600,000 in 1977.<sup>146</sup> In freeing the market (especially in authorizing nonhospital abortions), *Roe* has spurred changes in access to abortion in the most restrictive states (due to increased availability) and among poor women (due to increased affordability).<sup>147</sup> By affecting both

144. For an argument that *Roe* was inconsequential, see Rosenberg, *supra* note 19, at 229-46. For critiques of Rosenberg, see Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 *Yale L.J.* 1763, 1777-80 (1993); Neal Devins, *Judicial Matters*, 80 *Calif. L. Rev.* 1027, 1054-65 (1992) (book review).

145. See Rosenberg, *supra* note 19, at 180.

146. See Jacqueline D. Forrest et al., *Abortion in the United States, 1976-1977*, 10 *Fam. Plan. Persp.* 271, 272 (1978).

147. See Susan B. Hansen, *State Implementation of Supreme Court Decisions: Abortion Rates since Roe v. Wade*, 42 *J. Politics* 372, 379 (1980). In addition, the abortion procedure has become safer as a consequence of *Roe*. From 1963 to 1973, the death rate for women as a result of abortion was roughly 5.7 per one million persons, with criminal procedures accounting for 75% of abortion deaths from 1940 to 1972. See *id.* at 378. After *Roe*, the number of women's deaths fell from pre-*Roe* figures of 57 per year to six in 1974, three in 1976, and none in 1979. See Jesse H. Choper, *Consequences of Supreme*

abortion rates and the delivery of abortion services, the decision's practical impact helped catalyze pro-life efforts to politically nullify *Roe*.

Supreme Court abortion decisions also offer telling evidence of elected government attitudes toward the Court. Rather than suggest cavalier disrespect for judicial authority by elected government, the vast majority of post-*Roe* action reveals that elected government generally respects Court decision-making, but is not afraid to test the boundaries of those decisions. To be sure, most elected government action has sought to limit abortion rights. At the same time, no federal and virtually no state action has directly challenged Supreme Court edicts. The Hyde Amendment, the AFLA, and family planning and fetal tissue regulations do not contradict *Roe* and its progeny. In contrast, proposals that sought to nullify *Roe*—human life legislation, court-stripping, and constitutional amendment—were rejected by Congress. At the state level, only a handful of states have played a leadership role in enacting stringent abortion laws. Most states wait to see if the courts will approve these “challenger” state initiatives.<sup>148</sup> Furthermore, most “challenger state action” is not clearly at odds with Court decisions, but tests the limits of these decisions. For example, *Roe* did not explicitly address parental or spousal consent, public funding, hospital-only abortions, or waiting periods. State action on those subjects engages the judiciary in a dialogue on the sweep of abortion rights; it does not necessarily challenge Court authority.

The possibility that elected government output may not measure elected government preferences also suggests that too much should not be read into elected government resistance to *Roe*. Many elected officials were quietly pleased by *Roe*. John Hart Ely, for example, speaks of “[t]he sighs of relief as this particular albatross was cut from the legislative and executive necks.”<sup>149</sup> That an avalanche of abortion restrictions were enacted may only mean that legislators saw no downside in responding to pro-life interest groups because pro-choice concerns were content to leave it to the courts to protect their interests. In a sense, federal and state efforts to limit abortion rights paid homage to a judiciary who would toe the line and provide whatever constitutional protections were appropriate.

Federal and state responses to *Webster* support this hypothesis. Rather than prompting a new wave of abortion regulation, legislative inertia followed in *Webster*'s wake. Many legislators would have preferred that the Court retain control over abortion and not return the issue to elected government. This reaction is not surprising. Knowing that pro-

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Court Decisions Upholding Individual Constitutional Rights, 83 Mich. L. Rev. 1, 185–86 (1984).

148. See generally Glen Halva-Neubauer, Abortion Policy in the Post-*Webster* Age, 20 Publius 27, (1990) (assessing nexus between pre- and post-*Webster* state anti-abortion legislation).

149. John H. Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 947 (1973).



choice forces were "going to take names and kick ankles,"<sup>150</sup> Webster made right-to-life initiatives less likely to succeed. Instead, the *Roe*-created "status quo" became the governing norm—despite the fact that *Roe* had earlier invalidated forty-six state laws.

Elected government perceptions about the judicial role and the respect owed Supreme Court decisions figure prominently in the story of abortion politics. The dialogue that takes place between the courts and federal and state government is highly nuanced. For example, rather than legislatively responding to family planning regulations before the *Rust v. Sullivan* decision, Congress deferred to the Supreme Court in the hopes that it could avoid the issue altogether. When the Court upheld the regulations, legislative repeal efforts targeted both the Court for its decision and the White House for its support of that decision.<sup>151</sup> One cannot simply conclude, as Craig and O'Brien do, that Supreme Court decisions are not final. Elected government has chosen certain types of limited responses and rejected more confrontational approaches. That is telling. It is also telling that federal and state officials, while supporting measures at odds with abortion rights, may well have preferred that the Court maintain a stranglehold on this issue. *Abortion and American Politics*, while very much concerned with Supreme Court decisions, does not fully explore the judiciary's role in the abortion dispute. *Roe's* impact on abortion rights and elected government attitudes toward the Court are not given serious treatment. These issues, however, are critically important to the abortion dispute and the relevance of that dispute to American political institutions.

Craig and O'Brien are correct in choosing the abortion dispute as a lens through which to view American political institutions. Abortion, among other things, highlights the institutional tugs and pulls which help explain elected government decision-making, the seriousness with which elected government approaches constitutional interpretation, the impact of single issue politics on the political process, and elected government attitudes toward the judiciary. *Abortion and American Politics*, however, does not address these questions. It presents "an illustrative portrait . . . of the American governmental and political process" (p. xv) without providing guidance to understanding the ramifications of that portrait. Perhaps fearful that any commentary will shatter their efforts to provide a neutral account, Craig and O'Brien leave it to the reader to sort out the lessons of the abortion dispute. This Part, by utilizing examples found in the book, has suggested what some of those lessons might be.

#### CONCLUSION

*Abortion and American Politics* concludes with the observation that "[t]he abortion controversy will remain a driving force in and a reflection

150. 135 Cong. Rec. H4928 (daily ed. Aug. 2, 1989) (statement of Rep. AuCoin).

151. See 137 Cong. Rec. H10491-508 (daily ed. Nov. 19, 1991).

of American politics" (p. 359). After two decades of elected branch responses to *Roe* and its progeny, Craig and O'Brien's prediction seems a near certainty. Indeed, it is hard to imagine abortion not playing a prominent role in a Supreme Court appointment, a Medicaid appropriation, a presidential or gubernatorial campaign, or a host of other policy issues.

That the abortion dispute will persist is beyond cavil. All the same, the prospects of executive-legislative-judicial equilibrium on the abortion issue seem better today than at any time since the modern abortion controversy emerged in the 1960s. At the federal level, no branch of government is at war with another, and public policy generally matches public opinion. Unpopular Reagan-Bush initiatives on fetal tissue research and family planning counseling (p. 274) have been rejected and seem unlikely to return. In contrast, abortion funding restrictions, which are acceptable to the courts and remain popular with Congress and much of the nation, persist. While the Clinton administration may disfavor these measures, that disapproval (at least for the time being) does not merit a fight over the funding ban. Likewise, with public opinion strongly supportive of parental notification and consent laws (pp. 274-75), there is little mystery in Congress' failure to enact a Freedom of Choice Act that either curtails parental rights or guarantees federal funding for abortions.

State action, although more variable, is generally stable. Louisiana, Utah, and Pennsylvania used *Webster* as a wedge to enact restrictive abortion regulations. But these states are the exception, not the rule. Where states have acted, they have generally stayed within the prevailing norms of public opinion, symbolically codifying abortion rights and/or enacting parental consent and notification provisions.<sup>152</sup> In the vast majority of states, moreover, the pre-*Webster* "status quo" remains the governing standard.

The Supreme Court seems quite comfortable with and is in part responsible for the current state of affairs. Court doctrine has both shaped and been shaped by elected branch decision-making. *Roe* nationalized abortion rights at a time when state reform efforts, while on the rise, could not guarantee success. Twenty-one years later, as reflected in the failure of statutory and constitutional amendment repeal efforts as well as *Casey*'s utilization of *stare decisis* to reaffirm *Roe*, the durability of the "central holding of *Roe*"<sup>153</sup> seems assured. The Court, however, has given way to elected branch counter-initiatives. Abortion funding restrictions have been upheld, some parental rights have been recognized, and the Court has left the development of administrative regulations to the political process. Furthermore, while rejecting Reagan and Bush administration efforts to overturn *Roe*, the "undue burden" test advocated by

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152. See Halva-Neubauer, *supra* note 147, at 32-41.

153. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 438 (1983).

Solicitor General Rex Lee in *City of Akron v. Akron Center for Reproductive Health, Inc.*<sup>154</sup> seems the governing standard in state regulation cases.<sup>155</sup>

The emerging equilibrium on abortion rights will not end this dispute. Pro-choice and pro-life interests are too polarized and too powerful for there to be a common ground on abortion. Abortion battles, however, may prove less fierce and less destabilizing. With public opinion and public policy in rough accord, there is little reason for elected government or the courts to disrupt this awkward balance.

Attaining an equilibrium, as Craig and O'Brien ably demonstrate, did require all branches and all levels of government to do battle with each other. This dynamic process has yielded a very nuanced, very delicate (if not very deliberate) compromise. That this interactive process may appear a bit too much like the making of sausage helps explain Craig and O'Brien's characterization of the abortion dispute as an "illustrative . . . [and] disappointing reflection" (p. xv) of the American system. Nevertheless, our system is one, as Justice Ginsburg rightly observed at her confirmation hearing, where courts "do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the states, and the people."<sup>156</sup>

The abortion dispute makes clear that this dynamic is never-ending. A state of perpetual change, rather than being problematic, is the greatest strength of this dynamic process. Changing circumstances demand that constitutional meaning not be too inflexible. Just as the judiciary leaves its mark on society, so society drives the agenda and decisions of the courts. "The great tides and currents which engulf the rest of men," as Justice Cardozo put it, "do not turn aside in their course and pass the judges by."<sup>157</sup> Elected government action, by treating the Constitution as part and parcel of everyday politics, ensures that constitutional doctrine and decision-makers operate within the confines of contemporary mores. *Abortion and American Politics*, despite its lapses, puts into focus this dynamic nature of constitutional decision-making.

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154. See 462 U.S. at 465 n.10 (O'Connor, J., dissenting).

155. See *supra* note 59.

156. Joan Biskupic, Ginsburg Stresses Value of Incremental Change, *Wash. Post*, July 21, 1993, at A-6.

157. Benjamin N. Cardozo, *The Nature of the Judicial Process* 168 (1921).