

# The Judiciary's Role in Hard (Health Care) Cases

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**Date :** April 7, 2016

Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 **Vand. L. Rev.** \_ (forthcoming 2016), available at [SSRN](#).

On March 2d, the US Supreme Court heard oral arguments in [Whole Woman's Health v. Hellerstedt](#), which will determine whether "TRAP laws" (targeted regulation of abortion providers) impose an unconstitutional undue burden on access to abortion, a medical or surgical procedure accessed by approximately one-third of US women of reproductive age. The Texas laws at issue require doctors who provide abortions to have admitting privileges in a hospital within 30 miles of their clinic, and abortion clinics that would otherwise operate like doctors' offices are required to adhere to extensive ambulatory surgery center licensure requirements. The cumulative effect of these laws would be to leave 25% of Texas's clinics operating — ten clinics for the state that is the [second largest](#) in land mass and population in the US. This opinion could decide whether the constitution protects a merely theoretical right to access abortion rather than a right that can actually be exercised by women across all parts of the nation. In *Rethinking Judicial Minimalism*, Professor Devins analyzes how this precipice has been reached from a judicial process and political perspective and reconsiders judicial minimalism as the superior procedural approach for contentious cases.

[Planned Parenthood v. Casey](#) and [Roe v. Wade](#) are the two key decisions interpreting the Due Process Clause to protect women seeking abortions from prohibitive state regulation. In Professor Devins' view, *Roe* was a "maximalist" decision that worked legislatively by creating a formal regulatory structure, and *Casey* was a "minimalist" decision that correctly discarded *Roe*'s "trimester framework" and allowed states to follow the vaguer "undue burden" standard, which meant that states could regulate abortion if they did not place substantial obstacles in the path of a woman seeking an abortion. [Professor Devins](#) notes that the minimalist approach to judicial power that [he has advocated](#) seemed the best mechanism for allowing the deliberative democratic process to reach policy compromises on hard questions. In the wake of *Roe* and *Casey*, many notable scholars and jurists (including Justice [Ginsburg](#)) agreed that states should have reached their own conclusions without the Court crafting a decision that delineated how and when states could regulate the abortion procedure, thereby usurping states' deliberative and political processes.

The trouble, Professor Devins writes, is that *Casey*'s judicial minimalist approach opened the state experimentation gates when, in hindsight, the political branches were becoming less functional. Professor Devins convincingly documents the historic moments that rendered the political parties more polarized and less able to intersect in their goals, which in turn diminished legislatures' ability to negotiate meaningful compromises because moderate voices were removed from each party. Professor Devins claims that this polarization hinders political processes, particularly when fraught issues are at stake. Thus, Devins argues, single-issue interest groups, such as Americans United for Life (AUL), have successfully drafted legislation enacted by many states, a process that would not have been possible in a more functional political era. The political story told here is not new, but it is succinctly documented and persuasively drives the article's conclusion that judicial minimalism may be dangerous when the political branches function sub-optimally.

The structural governmental ideas raised by Professor Devins are important for health care law and policy in the current moment. The Affordable Care Act could have acted as Professor Devins' case study too, as it also offers an example of political polarization and backlash, having been passed with little inter-party cooperation. This arguably has contributed to the endless stream of litigation challenging everything from the law in its entirety (*NFIB v. Sebelius*) to seemingly minor administrative rules (*Zubick v. Burwell*). The challenges have forced the Court to explore what it will do with major works of "unorthodox legislation" and its role in upholding, interpreting, and otherwise exploring the constitutionality and meaning of such legislation.

Thus, Professor Devins offers a fruitful inquiry not just for the questions before the Court in *Whole Women's Health* but in many other health care cases: is judicial maximalism or minimalism a better approach to hard policy questions in an era of political polarization? The article's case study convinced me that maximalism has potential in an era of questionable democratic deliberation. But, what if the maximalist approach ultimately is not the one that Devins favors, which encompasses Professor Chemerinsky's view that the Court should vindicate the rights of politically underrepresented minorities? I wished Professor Devins had engaged this counterfactual more deeply in Part III, as maximalism arguably has led in the modern era to decisions such as *D.C. v. Heller*, not just historic decisions such as *Roe v. Wade*, and the two are on opposite sides of ideological lines. To me, this highlights a general problem with structural arguments: they sometimes are substituted for substantive disagreement. I hope Professor Devins addresses the process over substance critique of structural theories more directly in future work.

Interestingly, striking down Texas's TRAP laws could be deemed an act of judicial minimalism, as it would be an application of the 'minimalist' Casey decision that asks whether a state has legitimate reasons to regulate abortion as it regulates other medical procedures. In this instance, Texas enacted laws written by AUL to decrease access to abortion, and the briefs and oral arguments revealed that these laws will likely harm women's health and do not address any known problem in abortion medical care (especially notable compared to riskier procedures that are significantly less regulated, such as colonoscopies). The Texas political process was allowed to proceed, and the Court need not extend itself to a maximalist approach to strike down TRAP laws. Even so, Professor Devins raises important questions about judicial process that have deeper implications for health care reform and other health care issues before the courts.

Cite as: Nicole Huberfeld, *The Judiciary's Role in Hard (Health Care) Cases*, JOTWELL (April 7, 2016) (reviewing Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 **Vand. L. Rev.** \_ (forthcoming 2016), available at SSRN), <https://health.jotwell.com/the-judiciarys-role-in-hard-health-care-cases/>.