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Book Review

Thomas M. Keck, *Judicial Politics in Polarized Times.* Chicago: The University of Chicago Press Books, 2014. 352 pp. ($77.27 cloth, $23.40 paper).

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In *Judicial Politics in Polarized Times*, Thomas Keck adds to contemporary scholarly accounts of judicial politics relying on his own analysis of two decades of litigation in the salient areas of abortion, affirmative action, gay rights, and gun rights to describe the role of the courts in times of political polarization. In Keck's description of polarized America, supporters on both the left and right engage in litigation continually to achieve their goals. Judges have reacted to the constant litigation not "simply as umpires, tyrants, or servants of whoever won the last election, but also by demonstrating their distinctive judicial values and practices." Therefore, the author contends that the policies and politics of the contemporary culture wars are greatly different than they would have been if the constitutional litigation did not exist.

Judicial Politics in Polarized Times should be placed on the required readings list for political science and legal studies undergraduate students that desire to further comprehend the complex sub-field of judicial politics during a time of polarized national politics. The book is a prolific source of data that analyzes the complex interplay between court rulings and movements for and against policy change in four politically salient issue areas. The only recognizable drawback of the book is the tedious chronological descriptions of the legal wrangling between interest groups in both the federal and state court arenas.

In chapters one and two, Keck describes in great detail the evolution of the legal standards of abortion case law during the Clinton, Bush and Obama administrations. The author cogently shows how new judicial appointments to the nation's highest court changed the Court's approach to abortion bans. Keck methodically covers gay rights and affirmative action legal maneuvering to demonstrate how policy advocates on both sides of the issue constantly seek to reverse legislative defeats by convincing judges to block enforcement of recently enacted policies. Although most efforts are unsuccessful, the author emphasizes the point that such lawsuits will likely continue in the near future because of their potential benefits to the interest groups' members, political agenda and publicity.

As a result of the partisan divide across the federal judiciary, Keck casts doubt in chapter three on the notion that judges ought to be described as neutral umpires. Moreover, he finds that both voters and judges are for the most part equally polarized on partisan lines, despite the fact that the voters are expressing policy preferences and the judges are asked to apply existing legal rules. Keck's research reveals that Democratic judges' vote more similarly to their partisan counterparts in the legislative branch than do Republican judges. In contrast, Republican judges vote like Republican legislators only on the affirmative action issue. Keck believes that these patterns are likely the result of the constraining force of legal doctrine from the United States Supreme Court. The author pleads with federal judges to vote in less polarized ways. He acknowledges that despite Democrats having won the popular vote in five of the last six presidential elections, the Republican Party will remain close to majority control of the federal courts. Keck concedes that federal judges need not be perfect umpires, but they do need to endorse bipartisan interpretations of the law with some continuity.

In chapter four, Keck emphasizes that most rights-based lawsuits continue to be unsuccessful. On both sides of the ideological spectrum, partisan activists solicit judges to reverse democratically enacted policies far more often than judges actually do so. According to the author's data analysis, the federal appellate judges ruled favorably on only 33.4 percent of the rights claims that they heard. Keck is quite thorough in citing invalidated policies across the ideological spectrum to illustrate the point that the U.S. Supreme Court has adopted a bipartisan approach to thwarting the democratic will of the legislative branch of government. The author maintains that judicial politics is sometimes an avenue of democratic politics rather than an alternative to it.

In chapter five, following a discussion of Dahl's thesis that the US Supreme Court decisions are consistent with national public opinion and Rosenberg's contention that the Court's rights-protecting decisions tend to be inconsequential and counterproductive, Keck presents an opposing statement that both popular and unpopular rulings consistently have significant effects on policy, in both intended and unintended directions. The author analyzes four categorical responses to court rulings that clarify the complex set of actual reactions to controversial judicial decisions. The four overlapping categories are resistance, compliance, compromise and innovation. Therefore, when confronted with a rights-protecting judicial decision, legislators most of time have a range of policy responses available to them. Keck maintains that legislative and executive officials occasionally respond to policy change from the judicial branch with more radical policy changes. He contends that even temporary legal victories may have the effect of provoking significant policy experimentation before they are undone. For example, in the same sex marriage issue area, the judicial decisions of the Massachusetts Supreme Court

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altered the status quo by prompting a slow but steady proliferation of state-recognized legal categories for heterosexual relationships. Judicial rulings are part of an ongoing policy process rather than an end to political discussion.

In the last chapter, Keck evaluates whether the interaction of judicial and legislative branches of government is producing policy outcomes that are adequately responsive to the democratic will. Then, he underscores the main point of the book that contentious rights-protecting judicial decisions are rarely final in any substantial way. The author contends that neither the court rulings of the past years nor the story of judges as umpires fully explains the role that courts have been playing. Keck rebukes the argument that courts are powerless institutions and instead maintains that their decisions have profound political effects. For further research, Keck suggests that scholars interested in the long-term policy impact of litigation, should meticulously distinguish between investigations whether litigation words as compared to whether litigation matters. In addition, the author goes on to say that lawyers and judges reshaped political development and policy outcomes in fundamental ways. He admonishes researchers to be on the lookout for a range of potential unintended consequences. Keck advocates that scholars should eschew the attempt to isolate the independent effects of separate policymaking institutions acting in the same legal sphere, and instead compare the actual policy change that emerged from the interaction of judicial, legislative, and administrative lawmaking with the counterfactual policy change that one might expect to have surfaced from a system of legislative and administrative institutions acting alone.

Keck points out that at least three of the four policy issue areas that were examined in the book would be significantly different in the absence of independent judges and rights advocates determined to appeal to those judges. The author finds that the LGBT rights litigation interesting because it has proven essential both where the public is hostile to gay rights and where the public is supportive. The lesson learned is that rights-based litigation campaigns may sometimes push policy forward even when they ignite significant counter mobilization and do not maintain consistent judicial support. Another lesson drawn by Keck is that rights-based litigation can sometimes hold policy stable in the face of considerable pressure for regression. In contrast, the gun rights litigation was not as necessary because they do not lose in the legislative arena very often. Keck claims that from the policy advocates' viewpoint, litigation does not always work but under certain conditions it may serve as a valuable tool. From the policy analysts' perspective, the outcomes are precisely unintelligible without examining the role played by lawyers and judges in several ongoing policy conflicts.

In conclusion, Keck emphasizes the point that judges do not have the last word in rights-protecting decisions because they more often trigger continual conflict. In the abortion issue area, Justice Scalia has complained that *Roe v.*

Wade rendered compromise unlikely for the future and mandated that the entire issue to be resolved uniformly at the national level. The author thinks it's misleading to characterize landmark decisions as an end to democratic deliberation and debate. He instructs scholars that the true legitimacy question is not the frequency or scope of judicial review but its bipartisan deployment. Without significant constraints, partisan judges are likely to overreach, protecting broad conceptions of the legal rights that are supported by their coalition, while ignoring legitimate rights claims advanced by their partisan and ideological opponents. Keck believes that bipartisan judicial activism would be more popular, feasible and overall preferable. He does not consider judicial restraint to be an effective restraint to judges. As long as courts are politically balanced, the entire judiciary can protect both abortion rights and gun rights. In the final analysis, Keck argues that bipartisan judicial activism is the best vision of the judicial role. The author states that popular majorities have consistently rejected the proposition that courts should stop protecting rights altogether. Although everyone will not agree with Keck's conception of bipartisan activism, a considerable majority of the public will be willing to accept it because the courts regularly protect rights that they cherish.