# Politics by Other Means

By Calvin TerBeek

*Review of* Judicial Politics in Polarized Times, *by* Thomas M. Keck
University of Chicago Press, 2014

On February 10, 2015, Abigail Fisher, who was denied undergraduate admission to the University of Texas at Austin, asked the Supreme Court to hear, for a second time, her claim that UT's race-conscious admissions policy violates her right to equal protection under the Constitution. Supporters of affirmative action are unlikely to welcome this news. The Court will probably agree to hear Fisher's case, and Justice Kennedy's vote will probably decide Fisher's latest challenge. Kennedy dissented in a 2003 case upholding the University of Michigan Law School's race-conscious admissions policy (*Grutter v. Bollinger*), and he wrote the opinion in "*Fisher I*" telling the lower courts to take a more searching look at UT's admissions policy. If affirmative action in public universities falls by the Court's hand, this will mark a signal triumph for the New Right movement.

The judicial reception of affirmative action is recounted by political scientist Thomas Keck in his new book. In an in-depth examination of affirmative action and three other hot-button cultural issues -- LGBT rights, gun rights, and abortion -- Keck argues that scholars and the popular press have misunderstood the judicial politics of culture wars. Keck targets some standard views: that judges are " activists" who implement their policy preferences and thwart the democratic will; that they are ineffectual constitutional actors because they cannot implement their rulings without the support of the legislative and executive branches; and that they are failed activists who provoke backlash from the political branches and movement activists.

Keck contends that the courts, especially the federal judiciary, are central players in the policymaking process and produce results that are largely consistent with majoritarian preferences. For Keck, the "countermajoritarian difficulty," long the obsession of legal academics, is not a description of empirical reality. Courts act as a moderating influence on the democratic process by granting constitutional rights to each side of these controversial issues, but not to the extent the partisans might like. Our real concern, Keck maintains, should not be judicial activism, but "partisan

capture" of the judiciary, where courts grant rights to one side but not the other, exacerbating rather than moderating partisan tensions.

Keck has amassed some impressive evidence for this view. Consider abortion rights. As Keck points out, the Supreme Court's 1992 *Planned Parenthood v. Casey* ruling, which upheld the core of *Roe v. Wade* but allowed states to place certain restrictions on abortion, gave neither side of the abortion debate a clear victory (207). Abortion with some restrictions remains available, and this is consistent with public opinion supporting a restrained version of *Roe* (172).

Or consider the sustained attack on affirmative action by conservative public interest firms and what Keck calls "wildcat litigation" by private parties not part of the social movement litigation milieu. Keck marshals evidence that courts are in line with public opinion when they strike down affirmative action policies. For example, in response to a federal appeals court ruling, UT resorted to a plan, signed into law by then-Governor George W. Bush, allowing public high school students who graduated in the top 10 percent of their class admission to the state's public universities. The plan avoided explicit racial quotas and yet had the goal and effect of ensuring continued representation of minorities in the state's universities. Without court intervention, it is likely that affirmative action would exist in Texas universities but in different form.

Keck contends that courts have also played a moderating role in the areas of guns and LGBT rights. While the Supreme Court elevated gun rights to constitutional status via the (in?)famous opinion by Justice Scalia in *Heller v. District of Columbia*, Keck shows that courts – both state and federal – have been unwilling to rule out all forms of gun control. Instead, courts have glossed onto the Second Amendment an allowance for "reasonable" regulations on gun ownership, such as felon-in-possession bans (91). Finally, the remarkable success of the LGBT rights litigation is well-known. Given the numerous veto points that exist in Congress and state legislatures, the judiciary has led the way in striking down same-sex marriage bans in many states -- some of which were enacted as recently as 2004. Public opinion appears to be catching up with the courts, and so perhaps these rulings can now be considered majoritarian.

Thus, at least in these four areas, it seems clear that courts matter — at a minimum, in shaping policy even if it always is hard to know whether the effect is significant or not — and that they seem to avoid extremes. Keck is also persuasive that

the backlash thesis, at least in its strongest form as championed by Michael Klarman, is overstated. There was certainly a backlash against pro-same-sex marriage court rulings in the 1990s and the early-2000s, but in the last decade, the backlash was reversed.

> How are we to explain these events? Keck writes:
>
> > One reason for this broad support [by the public for the decisions of judges] is that, across all four issues that I have examined, judges have regularly refused to give rights advocates everything they wanted. Abortion rights advocates want abortion on demand, LGBT rights advocates want full marriage equality, color-blind advocates want a strict ban on race-conscious affirmative action policies, and gun rights advocates want an unfettered right to carry any kind of firearm they want. None of these demands have been supported by national democratic majorities, with the exception of full marriage equality from 2011 to the present. But only with occasional exceptions, none of these things were ordered by courts either. On the whole, what courts have actually ordered has been respect for a more modest set of rights claims (196-97).

Keck argues that the judiciary recognizes (some of) the rights claims of both liberals and conservatives because the presidency has alternated between the two parties often enough that neither side has been able to fully entrench a federal judiciary with judges sympathetic solely to liberal or conservative rights claims. The result, Keck argues, are courts that are largely producing majoritarian rulings. A majority supports some legal abortion, but not unfettered access. Blanket handguns bans are unpopular with national polling majorities. The Court has struck down such bans. To be sure, Keck details how rights advocates use courts as veto points to prevent recently-enacted legislation (challenges to abortion restrictions), dismantle existing policy ripe for target (affirmative action policies), or provide judicial ballast for legislative change (removing procedural requirements blocking a potentially successful ballot initiative). But the same basic story obtains for each culture-war area surveyed: courts produce majoritarian results (15, 254, 257-58).

It is not clear, however, that this theory best explains the dynamic at work. Keck's majoritarian courts thesis relies on majoritarian electoral voter theory: Keck refers to the "median voter" or "median [polling survey] response," (e.g., 14, 173, 180) when setting forth the national polling data to support his thesis. But in an important paper

co-authored with Benjamin Page, Martin Gilens provides evidence that elites and business interests have an outsized impact on policy, and the majoritarian electoral voter theory suffers in empirical comparison. Moreover, the research on elites shows that they, and even the "merely" affluent, are socially liberal, but economically conservative. Gilens' research has further demonstrated in some detail that if policy on social issues such as abortion and LGBT rights was not skewed toward affluent preferences, it would be more conservative.

These findings are important for describing the state of play in these culture-war areas because many federal judges are elites, especially as one moves up the judicial ladder. Based on judicial salary alone, Gilens' affluence metric includes federal court judges. Thus, elite and affluent preferences might do some work in explaining the judicial politics of these culture war issues.

Consider the judicial politics of abortion. It is well-known, as Keck notes, that polling on abortion matches up, by and large, with the Supreme Court's abortion jurisprudence. However, Keck also details how federal courts have struck down abortion-restrictive state legislation that is supported by majorities within those states (188-190). Given this, the totality of what courts are doing with abortion seems better explained by elite preferences than by median preferences. If the courts were simply majoritarian, abortion jurisprudence would be more conservative.

Elite preferences also seem to have some explanatory purchase in regard to LGBT rights. Keck notes that the courts "led the way" on this issue (184-86). Federal courts, and some liberal state high courts, were largely sympathetic to LGBT activists when the litigants could not make headway with the presumably more majoritarian state legislatures and Congress. Yet if federal courts were leading the way, then they were necessarily ahead of median-voter sentiment.

Consider further how elite preferences might help explain judicial attitudes toward affirmative action. Keck notes that affirmative action, including in higher education, is opposed by substantial majorities (181). In *Grutter*, Fortune 500 companies submitted amicus briefs urging the Court to uphold affirmative action. As one scholar noted, the Fortune 500 companies did not intervene in *Grutter* because of civil rights concerns. Instead these entities insisted that affirmative action was essential to the companies functioning in a competitive, global marketplace. Perhaps most

salient, the elite support for affirmative action was explicitly noted by Justice O'Connor in her majority opinion.

This does not square with the idea of majoritarian courts. To be sure, the courts have adopted the conservative or majoritarian line on affirmative action in a number of other contexts (e.g., race-conscious employment decisions), and Justice Kennedy might very well write a majority opinion in "*Fisher II*" striking down Texas's admissions policy. But one might hesitate before concluding that the Court is simply acting in a majoritarian fashion if this comes to pass. It might be Justice Kennedy's personal distaste for affirmative action, or, more interestingly, a nod to the *conservative* legal elite. Affirmative action may be a "false positive" for the majoritarian courts thesis if Kennedy's as-of-now hypothetical opinion in Fisher's case follows his past complaints about affirmative action.

The majoritarian courts thesis appears to be on its strongest ground when it comes to gun control. Keck documents that majority public opinion is on the side of the Supreme Court's ruling in *Heller* striking down a blanket handgun ban in Washington, D.C. (180). At the same time, the public supports moderate forms of gun control, and for the most part the courts have upheld them.

Finally, even if Keck's majoritarian courts thesis is correct, another issue arises. To help make his case for majoritarian courts, Keck relies on the regime politics literature (171) to argue that judicial rulings in these culture war areas are majoritarian in nature by pulling "state outliers" into line with national sentiment – the canonical example of this being the Warren Court's criminal procedure and civil rights decisions pulling the South into the modern era of race relations. But this thesis is disputed among scholars as being descriptively inaccurate and glosses over the issue of whether the "state outliers" thesis might raise its own countermajoritarian concerns. After all, if a court is overturning laws passed by the putatively democratic process in a particular state for not being in line with a national sentiment, this raises the issue of majoritarian courts being majoritarian according to one's preferred definition of the majority. Chicago and Wyoming, for example, are vastly different "laboratories" when it comes to gun control policy, national public opinion to the side. Cries of federalism usually turn on whose political ox is being gored.

But perhaps my instincts about elites are wrong and Keck is right. Keck has seemingly read every pleading, brief, opinion and order in any piece of litigation involving abortion, LGBT rights, gun rights, and affirmative action filed in the past generation. And not only has he digested all this information, he lucidly conveys the victories and defeats in courtrooms across the country in both state and federal courts. Keck is also to be commended for studying the often-neglected role state courts have on these culture war issues. This book should be read by anyone who wants a better understanding of the role courts play in the culture wars.

*CALVIN TERBEEK is a prospective Ph.D. candidate in political science at the University of Chicago. He blogs at* Balls & Strikes.