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Book Review (reviewing Lee Epstein & Joseph F. Kobylka, The Supreme Court and Legal Change: Abortion and the Death Penalty (1992))

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saddled with an inferiority complex that says that the presidency field is not as good as the Congress field.

Although these statements may have been appropriate in the 1970s and early 1980s, they no longer seem as telling as they once were. True, anecdotes still exist in the presidency field, but they also exist in the Congress field. Participant-observer methods are used perhaps more in the study of Congress than in the presidency. There have also been many illuminating studies of single members of Congress. It is no longer true that qualitative presidency research is unsystematic. With growing use of presidential libraries and other sources, scholars are carefully piecing together the private decision-making records of many presidents and reaching well-documented conclusions about them. Other research skillfully blends qualitative data sets with quantitative analytic techniques. Quantitative research, in general, is also more advanced than many passages in the volume imply. Unfortunately, the book's literature review section does not include surveys of the three key subfields of presidential popularity, presidential communication, and presidential relations with Congress. These areas are arguably the most highly developed in the presidency field, involving parsimonious models, long timeframes, quantitative approaches, and generalizations that transcend individual presidents. Had they been included in the volume, some of the disputes about the state of the field would have been less glaring.

Still, the book's display of the problems of the field and the controversies within it is healthy. It will stir new scholars entering the field to make certain that their research bears none of these difficulties. It also will push scholars already in the field to guard against a return to the old ways. This is a book that all presidency scholars should take seriously.

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The Supreme Court and Legal Change: Abortion and the Death Penalty. By Lee Epstein and Joseph F. Kobylka. Chapel Hill: University of North Carolina Press, 1992. 417p. $45.00 cloth, $16.95 paper.

The question this book addresses—What explains changes in legal doctrine?—has attracted legal scholars in every generation. According to Epstein and Kobylka, the traditional answer—the logic of the law—has been largely replaced by behavioral social science answers that highlight the political nature of judicial decision making and, accordingly, focus on changes in judicial personnel and judicial attitudes. Other recent work highlights the role of the broader political environment as the main causal agent of doctrinal change. However, Epstein and Kobylka reject these modern explanations (at least as sole determinants) of legal change. They return to the traditional answer and argue that social scientists have overlooked legal argument as an important, if not the most important, explanation of doctrinal change. As they put it, it is "*the law and legal arguments as framed by legal actors* that most clearly influence the content and direction of legal change" (p. 7, emphasis original).

Relying on a comparative case study approach, Epstein and Kobylka examine the modern history of litigation aimed at invalidating the death penalty and creating and maintaining a constitutional right to abortion services. While examining a number of cases, they isolate four: *Furman* (1972) and *Gregg* (1976) for the death penalty, and *Roe* (1973) and *Webster* (1989) for abortion. In each set of cases, they argue that the "initial case established a clear doctrinal change or innovation," while the later case represented a "sudden shift in legal result" (p. 6). Focusing on "legal, doctrinal change," they wish to explain both the innovation and the "turnabouts" (pp. 7, 9).

In examining death penalty litigation, Epstein and Kobylka argue that the legal argument made by the abolitionists in *Furman* "profoundly influenced the two pivotal justices—White and Stewart" to join three of their brethren in striking down existing death penalty legislation (p. 81). Similarly, abolitionists lost their battle to invalidate the death penalty permanently in *Gregg* because they failed to persuade White and Stewart. Abolitionists' "emphasis on the absolute and immediate eradication of the death penalty," rather than on the more cautious "practical, process-based arguments" that appealed to the two justices (pp. 134–35), spelled defeat.

In the abortion arena, while Texas prepared poorly in *Roe*, prochoice forces, through a coordinated litigation strategy, "shaped" the legal environment and "provided" the justices with "much of their ammunition" (p. 201). Prochoice forces lost in *Webster*, because they failed to capture two winnable votes, those of O'Connor and Kennedy. They failed because they neither responded in a serious way to Solicitor General Lee's unduly burdensome standard (first enunciated in *Akron*) nor reached out to try to win the vote of Justice O'Connor, perhaps by appealing to her "liberal" soft spot, gender discrimination (p. 296).

Epstein and Kobylka examine and reject other plausible explanations for the case outcomes, including changes in judicial personnel and the broader political environment (e.g., public opinion and the actions of political leaders and government officials). Rather, they conclude that both abolitionists and prochoicers lost cases principally because of their inability to shift the grounds of their legal arguments. Falling prey to the "tyranny of absolutes," "initial 'liberal' victories were forged and then lost, in significant part, because their defenders doggedly clung to their understanding of the Court's logic. This fatally constrained their ability to shift argumentational grounds when those victories came under threat" (p. 311).

The great strength of this book lies in the rich, detailed, and complex case studies that comprise over fourth-fifths of it. Epstein and Kobylka are at their best in describing the machinations, arguments, and decisions that formed the litigation strategy. They present the most thorough and accessible overview of the history of death penalty and abortion litigation that I know. Chapters are studded with excellent tables and figures summarizing issues, parties, arguments, case holdings, and so forth. The tables and figures alone make the book a worthwhile addition to one's bookshelf. It is also fun to read: Epstein and Kobylka manage to add drama to the story, even though the reader knows the outcome. In the tradition of Vose's *Caucasians Only* (1959), Epstein and Kobylka plum the complex interrelations of activist, interest-group, judicial, and governmental action in a fascinating and thorough way.

While the book's great strength lies in the richness of its case studies, its weakness lies in the application of the

analytical framework to those studies. The authors address the book to the question of *why* the Court reached certain decisions, but it is more properly understood as an intensive study of *how* issues were presented to the Court. The theoretical argument as to why the Court reached certain decisions is less well developed and, accordingly, less powerful. In particular, Epstein and Kobylka do not fully explore alternate explanations, leaving their own position plausible but ultimately unpersuasive. Further, they claim causal influence without developing evidence to support more than correlation.

Because their main claim is that legal argument plays a major role in influencing case outcomes, they need to show how that influence works. Further, they need to develop a test and gather sufficient evidence to distinguish between their "legal argument" thesis and the competing explanations of Court personnel, political environment, and organized interests that they reject. For example, they credit the abolitionists' legal arguments with convincing Justices White and Stewart in *Furman*—and failing to convince them in *Gregg*—without providing any evidence other than their votes. They make a similar move in claiming causal influence for the legal arguments of the prochoice movement in *Roe*, and they suggest that a different argument could have carried O'Connor and Kennedy in *Webster*. Since the heart of their claim is that the legal arguments of the litigants are vitally important to case outcomes, these omissions render their theory ultimately unpersuasive.

Epstein and Kobylka devote insufficient space to exploring alternative explanations, particularly those that focus on the broader political environment. With the death penalty, an alternative explanation might point to factors like majority opposition to the death penalty in July 1966, rejection of it by Oregon voters in a 1964 referendum, an official request by the Johnson administration to Congress to abolish it in 1968, and falling execution rates throughout the 1960s, so that in 1968, for the first time in American history, there were no executions. After *Furman*, the story could not have been more different, the majority of states reenacting death penalties with the support of the U.S. solicitor general. A similar argument can be made with abortion. By the time of *Roe*, there was growing public support for abortion choice, little organized national opposition, widespread professional and elite support, and political reform leading to the performance of nearly six hundred thousand *legal* abortions in 1972, the year before *Roe*. After *Roe*, there was somewhat of a backlash, with the growth of an organized, national antiabortion movement and the enactment of restrictive legislation by a majority of states. With both the death penalty and abortion, the Court's decisions, it could be argued, simply mirrored these changes. While Epstein and Kobylka acknowledge these points, they provide no way of distinguishing their effects from those of the legal arguments.

There is also a question of whether *Gregg* and *Webster* represent as sudden and dramatic a departure from *Furman* and *Roe* as the authors suggest. *Furman* did not hold the death penalty unconstitutional per se; rather, it held the death penalty *as currently administered* unconstitutional. This strongly suggested that rewritten laws could be upheld. *Gregg* did just that. With abortion, *Roe* did not settle a whole host of issues from funding, to state provision of services, to spousal and parental consent. *Webster*, following a line of cases that Epstein and Kobylka canvass, filled in some of the gaps. In practice, it has made essentially no difference in the accessibility of abortion services. Thus, neither set of cases creates as dramatic a legal turnabout as Epstein and Kobylka argue. More importantly, both are consistent with some version of the traditional legal model, suggesting that they do not provide the best test cases for distinguishing between theories of legal change.

Overall, the lack of full theoretical development does not mar the depth and the richness of the empirical studies. *The Supreme Court and Legal Change* should become a standard text in courses examining litigation strategy. It also serves as a reminder to social scientists that the American judicial system, while clearly political, remains a *judicial* system immersed in the law.

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Minority Representation and the Quest for Voting Equality. By Bernard Grofman, Lisa Handley, and Richard Niemi. New York: Cambridge University Press, 1992. 174p. $34.95.

Grofman, Handley, and Niemi have written a very useful descriptive and historical analysis of the litigation surrounding the 1965 Voting Rights Act and its subsequent amendments. The authors devote much of their discussion to explaining the implications of the 1982 Amendment and its relationship to the 1986 case of *Thornburg* v. *Gingles*. The *Gingles* case helped establish a set of standards for evaluating the dilution of minority votes. By 1986 litigants no longer had to prove discriminatory intent as a prerequisite to a challenge.

After acknowledging in chapter one that the right to vote in the U.S. has been largely achieved, the authors signal their intent to focus on second-order discrimination and unequal outcomes in which the candidates preferred by racial minorities lose at a greater rate than the candidates preferred by racial majorities. The central theme that runs throughout the book's remaining five chapters is that the Voting Rights Act was intended to do more than simply give minorities the right to cast votes. The Act was also intended to assure them certain outcomes. Here the authors disagree with the legislative history presented by Abigail Thernstrom in *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Cambridge: Harvard University Press, 1987), and with others who argue that the 1965 Voting Rights Act was passed solely to guarantee black enfranchisement.

Grofman et al. argue that legislators who debated the merits of voting rights legislation were keenly aware that white racists would attempt to circumvent the law, by means such as at-large voting, runoff primaries, and gerrymandered districts. As a consequence, they designed the law with minority representation in mind. For these authors, minority representation is purely descriptive in nature and it occurs when elected officials belong to the same racial group as their constituents.

As is typical of advocacy literature, the authors go to great lengths to avoid admitting the significant progress that minorities have made in the political arena. After dismissing as aberrational the increasing number of black politicians elected in mainly white jurisdictions at all levels of government, we are told that at the congressional and state legislative levels, blacks are very unlikely to be elected from districts that are not majority minority (p. 134). Never mind that in 1990 forty percent