Book Reviews

Kathleen E. Hull, Editor

The Nature of Supreme Court Power. By Matthew E. K. Hall. New York: Cambridge Univ. Press, 2011. 262 pp. $94.00 cloth.
Merely Judgment: Ignoring, Evading, and Trumping the Supreme Court. By Martin J. Sweet. Charlottesville and London: Univ. of Virginia Press, 2010. 240 pp. $35.00 cloth.

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Matthew E. K. Hall's *The Nature of Supreme Court Power* and Martin J. Sweet's *Merely Judgment* are impressive books that considerably advance our knowledge about the implementation and impact of Supreme Court decisions. Hall frames his study as a direct response to Gerald Rosenberg's thesis that the Court (and courts generally) " 'can almost never be effective producers of significant social reform' " (xiii; 160, quoting Rosenberg 2008: 422). Moreover, Hall argues, Rosenberg's view is emblematic of the decided weight of scholarly authority on the nature of the Court's power. The Court is generally seen as a highly constrained and weak institution (13–15). By contrast, Hall finds "that the Court possesses remarkable power to alter the behavior of [other] actors in a wide range of policy issues" (160). Sweet wants to make a different argument. He claims that "political institutions enjoy considerable discretion in deciding whether and how to follow the Court, because they can often defang would be plaintiffs" (5). Obviously, both authors cannot be right. As is often the case, as between Hall and Sweet, different theoretical approaches play a part in the competing interpretations. Notwithstanding the different approaches in play here, it seems to me that for the most part, Hall is right, and Sweet is wrong, although Sweet's study is well done and informative in many ways.

Like Rosenberg, Hall is committed to social scientific positivism. Through an objective case selection method (27, and Appendix I), he pinpoints no less than 57 "important" cases decided between 1954 and 2006, which he then groups into 27 issue areas for purposes of impact analysis. Hall's conception of power, like Rosenberg's, is one-dimensional: " 'A power relation, actual or potential,

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is an actual or potential relation between the preferences of an actor regarding an outcome and the outcome itself' " (7, quoting Nagel 1975). Hall's study, notwithstanding its incredible scope, is limited to seeking to observe whether the Court changes the behavior of other actors in the cases in which it actually attempts to do so by striking down laws.

The question is "Under what conditions is the Court powerful?" (14). The independent variables are twofold: (1) "the institutional context" of a decision, and (2) the degree of popular opposition to a decision. The first of these brings us to Hall's great insight. Vast research demonstrates that lower courts are generally faithful and reliable implementers of Court decisions (16). By "institutional context," Hall means "the distinction between Supreme Court rulings that can and that cannot be implemented by lower courts" (5). He calls issues for which the lower courts are primary in the implementation process "vertical issues," and issues for which they are not "lateral issues." He codes every case as either vertical or lateral. For popular opinion, Hall relies exclusively on public opinion data. This elegant model thus yields a two-by-two framework for inquiry. Hall hypothesizes that only very strong popular opposition in a lateral issue can defeat the Court when it intends to alter behavior, and it follows that the Court can prevail over public opposition (even very strong opposition) in vertical cases, but not lateral ones. It then remains for Hall to specify the relevant intended outcomes of the Court's decisions, and to find good data that can show us whether actors changed their behavior in response to them. Hall is well aware that his analysis is shot through with interpretation and judgment calls. To his credit, he does not try to standardize his measures across the cases, but rather clearly lays out his thinking about what research and information is available, which indicators or measures make the most sense in a given context, and so on.

In four successive chapters on cases and issues within each of his four categories, Hall convinces us of his thesis. The key chapter is the one on "unpopular vertical issues." It would be here that the skeptic's view would be both operative and wrong, according to Hall. Consider *Roe*, for example. *Roe* presents a vertical issue because the states cannot enforce abortion restrictions without criminally prosecuting violators. It is also true that the decision was unpopular in the South and Midwest. By disaggregating the data on public opinion and abortion rates, state by state, Hall shows that *Roe* made a profound difference, even in the face of public opposition, and that Rosenberg, in his lengthy discussion of *Roe*, "obscured" that "dramatic impact" (40). Flag desecration is another case in point. The same goes for the Warren Court's key criminal due process rulings. Hall's chapter on popular lateral issues also

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shows us that popularity is no guarantee of enactment, and that the Court is often a necessary unsticking agent of policy change. The only cases in which other actors have significant leeway to disregard the Court involve unpopular lateral issues, such as school desegregation immediately after Brown and school prayer. In the end, Hall's "key point" is that even if it is true that the Court holds neither the sword nor the purse, it does often hold the keys to the jails, and this can make all the difference (164).

Many readers will no doubt want to quibble over the way Hall codes particular cases and issues, or with the way he defines and measures intended behavioral changes. But with Hall's excellent book "quibbling" takes on a special significance. Ultimately, *The Nature of the Supreme Court's Power* is like Rosenberg's *The Hollow Hope* in that its analytical rigor and lively writing style invite us to think much more deeply and rigorously about the Court and its powers.

I do have one larger concern about Hall's argument. Hall's conception of power implies a particular logic in the search for causality. The specific empirical propositions to be tested take the form of "if, then" statements: "If x is true, then we should be able find evidence for x if we look at, measure, observe trends in, or count, a, b, c, and d." When confronted with this logic, it makes sense to ask whether things that cannot be objectively observed and measured are nevertheless somehow important to a political, as opposed to a strictly behavioral, understanding of the Court's power (McCann 1992). For example, Hall offers extended analyses of both *Mapp* and *Miranda* and their cascading effects on the behavior of police, prosecutors, and judges. However, he never once acknowledges that the exclusionary rule is entirely derivative (its operation depends on just what the courts say the Fourth Amendment means), that the Court has managed to weave a fine tapestry of exceptions to the warrant requirement, that much court-backed searching and seizing now takes place under the guise of "consent," or that working around the constraints of *Miranda* did not prove terribly difficult. Hall shreds Rosenberg's empirical case about *Roe* and its connection to abortion rates, but what are we to make of the fact that several states now have but one beleaguered abortion provider? Can the subsequent trajectory of the politics of abortion be explained, at least in part, as a function of activists' overreliance on courts, the legal framing of the issue in terms of privacy, and/or the judicialization of the controversy in general? (Silverstein 2009: 122–23) These are difficult, important, and much-debated questions, and Hall's approach cannot address them.

These concerns about the relevance of contested social and legal meanings bring us back, finally, to Rosenberg's thesis. Rosenberg's claim was not really that the Court is ineffective or powerless

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in some global sense, but that those without wealth and power, or those championing minority viewpoints or interests, could not rely on the courts to achieve their particular goals. He was justly criticized for failing to understand and account for the complexities of law, politics and change (see, e.g., McCann 1994; Keck 2009; NeJaime 2012). However, Hall has taken aim at the global claim. Hall convinced me that the Court did alter much behavior, and in many cases in which scholars heretofore might have doubted it. He did not convince me that we should dispense with Rosenberg's essentially political concerns about law, courts, and social change.

Sweet's *Merely Judgment* is a fascinating study of the impact of the Court's decision in *City of Richmond v. J. A. Croson Co* (1989), which struck down the city's Minority Business Enterprise (MBE) set-aside program. Unlike Hall, Sweet takes an interpretive case study approach, one that relies heavily on interviews, document analysis, and thick description. He offers fine-grained treatments of how *Croson* played out in three cities: Philadelphia, Portland (Oregon), and Miami. In a single chapter, Sweet also offers briefer analyses of the impact of Court decisions in the areas of hate speech on college campuses, school prayer, flag desecration, and the legislative veto.

Sweet's specific puzzle goes something like this: *Croson* was both clear and stringent. While the decision did not completely outlaw MBE programs, it did require state and local governments to make factual findings to ground claims of racial discrimination in contracting (in the form of "disparity studies"), and, in addition, to meet a set of five hurdles to ensure that any programmatic responses would be "narrowly tailored." Sweet makes his case for both the clarity of *Croson* and the flouting of it by elected officials by tracking litigation against MBE programs in the lower courts after 1989. He identifies 60 cases. Of these, 36 progressed to a constitutional ruling on the merits and, of these, 31 resulted in the invalidation of the program at issue (49). The problem for Sweet is that these 31 invalidations pale in comparison with what seems to remain thereafter: the 20 odd cases derailed before the courts reached the merits, the 197 disparity studies conducted by governments after *Croson*, and the hundreds of MBE programs that governments maintained or re-enacted. What we have here, he says, is a "breakdown in the ongoing conversation about affirmative action" (58).

Sweet provides a useful general framework for thinking about the processes through which enforcement litigation fails to materialize and elected officials thereby "checkmate" the judiciary to avoid compliance. He distinguishes among and discusses "social, legal and political barriers" to post-decision enforcement. This interpretive framework makes a valuable contribution to the literature

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(17–22). An additional virtue of case study research is that, when it is done well, as it is here, readers are given ample resources to quarrel with the author about what it all means. I respectfully disagree with Sweet about what it all means.

One problem with Sweet's argument that "checkmate moves" often trump the Court is its accuracy, even in the context of the impact of *Croson*. The won–loss record on legal challenges to MBE programs, combined with indirect evidence that MBE programs survive in some form in many places, does not necessarily support Sweet's larger claim. To really support it, we would have to find examples of vigorous MBE programs in operation, and Sweet does not show us any. Moreover, Sweet's case studies provide further reasons to doubt that his interpretation of his data holds up. He sees "legislative supremacy" in two of his three cases, but I saw only the very "judicial primacy" that he says is missing. After *Croson*, Philadelphia immediately faced litigation backed by Associated General Contractors (AGC), a national interest group spearheading legal challenges to MBE programs. The city fought hard, but lost in court and lost its program. In Portland, a lawsuit against the county government eliminated the county's program. Portland City officials, by contrast, orchestrated a remarkable political process to enact a new MBE program, which included all interested parties, including AGC. AGC won major concessions, and the "bundle of compromises" that emerged contained a vastly scaled down MBE program limited to contracts for $200,000 or less, and under which white-owned firms receive a majority of the contracts (90). No lawsuit followed, because no one had any reason to sue. Sweet concludes that Portland operates "an unconstitutional program" in "defiance of *Croson*" (92). However, I very much doubt that Portland's process and its outcomes would displease Justice O'Connor. In Miami, the vast bulk of contracting dollars came from Dade County (109). After *Croson*, AGC filed two successive lawsuits against the county and eventually eliminated its program (98). The City's MBE law remained on the books, but it was entirely ignored in practice. It was merely a splendid bauble that elected officials could point to in making symbolic appeals. Sweet calls this, too, "checkmate," but in fact Miami tipped over its own King after about the fifth move.

Another problem with Sweet's argument is that, against the backdrop of Hall's framework, we can see that all but one of Sweet's cases (flag desecration) present "unpopular, lateral issues." The opportunities for noncompliance in Sweet's other cases (hate speech, school prayer, and the legislative veto) are well known and not surprising. Without defending his case-selection process, Sweet has investigated the cases most likely to support his normative position, but his empirical evidence still comes up short.

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Quibbles and objections aside, Matthew Hall and Martin Sweet have given us engaging and well-written books that offer new frameworks for inquiry, create new knowledge, and challenge us to think anew about the complexities law, courts, and the politics of implementation and impact.

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American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power. By Stephen M. Engel. New York: Cambridge Univ. Press, 2011. 408 pp. $32.99 paper.

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In his engrossing study of the interactions of elected officials and the Supreme Court, Stephen Engel finds scholarly literature inadequate to explain a history in which anti-judicial hostilities recur while judicial authority appears to have become more secure over time. Scholars who simply trace anti-Court sentiment to the justices' unelected status cannot account for the leavening over time of politicians' anti-judicial responses. By contrast, studies that focus on the development of a norm of judicial supremacy cannot explain the continued efforts of politicians to draft bills that undercut judicial authority. Engel has a greater appreciation for scholars who maintain that judicial power serves to entrench partisan policy aims. Yet these studies fail to consider how politicians' preferences

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