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PROBING THE POWER OF THE SUPREME COURT

Lawrence Baum*

TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* (2011). Pp. 334. Paperback \$30.99.

MATTHEW E. K. HALL, *THE NATURE OF SUPREME COURT POWER* (2011). Pp. 248. Hardcover \$80.82.

This is a time of great progress in research on the Supreme Court. Both political scientists and legal scholars have developed innovative formulations and approaches to analyses of issues concerning the Court. One virtue shared by much of this work is that it addresses broad issues that are relevant to students of the Court from multiple disciplines.

Tom Clark's *The Limits of Judicial Independence*¹ and Matthew Hall's *The Nature of Supreme Court Power*² exemplify that virtue. Both books probe what is probably the most important issue about the Supreme Court: its place in the system of public policy making within American government. Clark's concern is the constraints that limit the Court's ability to act as an independent policy maker.³ Hall's concern is the Court's efficacy when it undertakes policy initiatives.⁴ For both Hall and Clark, a central theme is the impact of public opinion on the Court's role.

At least at first glance, the Court seems powerful in the sense that the Justices have great freedom to make the decisions they prefer, but weak in the sense that it has limited capacity to make its decisions effective in practice. Each of these books questions one of those impressions. As Clark sees it, the state of public opinion limits the Justices' freedom to chart their own path as policy makers.⁵ In Hall's view, when the Court does act it often brings about major changes in public policy and social behavior.⁶ Neither of these conclusions is novel. But the creativity of the two authors' thinking and the care with which they carry out their analyses make each book a major contribution to our understanding of the Supreme Court's place in government and society.

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1. TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* (2011).

2. MATTHEW E. K. HALL, *THE NATURE OF SUPREME COURT POWER* (2011).

3. CLARK, *supra* note 1, at 3.

4. HALL, *supra* note 2, at 4–5.

5. CLARK, *supra* note 1, at 3.

6. HALL, *supra* note 2, at 5.

THE LIMITS OF JUDICIAL INDEPENDENCE

The impact of public opinion on Supreme Court decisions has long been a matter of interest for students of the Court. In part, this concern grows out of a normative concern with the Court's role as a "counter-majoritarian" institution,⁷ one that can and often does strike down laws enacted by elected officials. In a democratic system, how can such a role be justified for an unelected body whose members serve life terms?

One answer offered by some scholars is that the Court actually tends to reach decisions that are consistent with the views of majorities in the general public.⁸ Some possible mechanisms for congruence between the Court and the public do not rest on direct public influence on the Court: the appointment of Justices by popularly elected officials⁹ and the impact of political and social trends on both Justices and the general public.¹⁰ But some scholars have argued that the Justices do respond directly to the public. Several studies of ideological trends in public opinion and Court decisions provide evidence of covariation between the two,¹¹ and some studies point to a direct influence for the public.¹² Some legal scholars, analyzing historical patterns in the Court's policies and its political environment, have concluded that the Court generally avoids straying too far from public opinion in its decisions on major issues.¹³

7. Scholars frequently refer to the "counter-majoritarian difficulty" created by the institution of judicial review. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Bobbs-Merrill Co. 1962) (apparently the first time to use the term).

8. Research by Thomas Marshall on decisions that can be matched with questions on public opinion surveys provides evidence of this tendency, though a substantial minority of decisions diverges from the majority view. See THOMAS R. MARSHALL, *PUBLIC OPINION AND THE REHNQUIST COURT* (2008); THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989).

9. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957), for the classic discussion of this mechanism.

10. Likely examples include the effects of the women's rights movement of the 1960s and 1970s and heightened concern with illegal drugs beginning in the 1980s. On the legal status of women, compare *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding a state system that excluded women from jury service unless they volunteered for service) with *Taylor v. Louisiana*, 419 U.S. 522 (1975) (disapproving *Hoyt*). On illegal drugs, see, for example, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding federal regulations that mandated and authorized drug tests of railroad employees) and Justice Thurgood Marshall's dissent in *Skinner*: "There is no drug exception to the Constitution . . ." *Id.* at 641 (Marshall, J., dissenting).

11. See Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 494-95 (1997); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 89 (1993). The distinction between congruence and covariation should be made explicit. Congruence refers to agreement between the Court and the general public. In contrast, covariation refers to similar temporal trends. A Court that was always more liberal than the public but that moved in the same ideological direction as the public over time would show covariation with the public but not congruence. See LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 48 (1997).

12. See Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011) (finding evidence of a direct relationship); but see Micheal W. Giles, Bethany Blackstone & Richard L. Vining Jr., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293 (2008) (finding evidence suggesting that the relationship between public opinion and the Court's decisions results from changes in the Justices' attitudes rather than direct public influence).

13. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006). But see Richard H. Pildes, *Is the Supreme*

If the Justices really do respond to public opinion — and not all scholars accept this conclusion¹⁴ — what is their motivation? There is a general consensus on the answer: the Court lacks concrete power, so its effectiveness depends heavily on perceptions of its legitimacy as an authoritative decision maker. A Court perceived as legitimate can get people to follow its decisions; a Court without sufficient legitimacy is ineffective. As a result, the Justices have a strong incentive to act in ways that maintain public support.¹⁵

This is Tom Clark's position in *The Limits of Judicial Independence*: "the most effective limit on judicial independence is the need for institutional support from those who really wield power in a democracy — the people."¹⁶ His book probes the validity of that position empirically.

The book is distinguished from past work on the impact of the Justices' concern with Court legitimacy by its specific argument and the resulting empirical focus. Clark focuses on "Court-curbing" bills in Congress.¹⁷ These bills take several forms, of which three are the most common: changes in the selection and tenure of Justices or the size of the Court, limits on the Court's jurisdiction, and limits on judicial review of legislation.¹⁸

Clark argues that the introduction of these bills reflects the state of public opinion about the Court, especially the degree of support for the Court.¹⁹ For this reason, when the volume of Court-curbing bills is high, the Justices respond by acting to shore up public support, specifically by refraining from making decisions that might arouse public opposition.²⁰ By making this argument, Clark integrates the issue of public influence on the Court with the issue of congressional influence.²¹ In the process, he provides an answer to the question of why the Justices might worry about congressional attacks on the Court even though such attacks seldom result in the actual enactment of legislation that injures the Court.

Court a "Majoritarian" Institution?, 2010 SUP. CT. REV. 103 (2010).

14. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 424–28 (2002); Giles, Blackstone & Vining, *supra* note 12; Helmut Norpoth & Jeffrey Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994).

15. See Flemming & Wood, *supra* note 11, at 494; Mishler & Sheehan, *supra* note 11, at 89 n.3.

16. CLARK, *supra* note 1, at 4. When Clark refers to "institutional support," he uses the term as a synonym for "institutional (judicial) legitimacy" or "diffuse support." *Id.* at 17 n.16. The term "diffuse support" comes from David Easton. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965). Easton was distinguishing between diffuse support as acceptance of the legitimacy of an institution, as distinguished from "specific support" for its policies or short-term performance. *Id.* The application of this distinction to the Supreme Court is discussed in James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 356 (2003).

17. CLARK, *supra* note 1, at 19.

18. *Id.* at 36–44.

19. *Id.* at 124.

20. *Id.* at 176–80.

21. Two scholars have made an analogous linkage between the public and the President. Jeff Yates finds evidence that the President's level of public approval affects the Court's decisions in cases in which the President has an interest. JEFF YATES, *POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT* (2002). Timothy Johnson finds support for a link between the President's approval from the public and the Court's invitations to the Solicitor General's office to submit amicus briefs. Timothy R. Johnson, *The Supreme Court, the Solicitor General, and the Separation of Powers*, 31 AM. POL. RES. 426 (2003).

Clark's argument is informed by his interviews of officials and staff members in Congress and the Court. The people with whom he spoke include three Justices and ten former law clerks.²² Building on the interview evidence, he develops his argument through formal models that yield hypotheses about the linkages between public opinion and Court-curbing and the linkages between Court-curbing and Court self-restraint.²³

Clark's tests of those hypotheses are quantitative, although he also includes historical case studies to illuminate the relationships found in his quantitative tests.²⁴ To conduct these tests he uses substantial bodies of data on public opinion, legislation, and Court decisions. This data is analyzed carefully and thoroughly, with the use of sophisticated statistical methods. The results are presented in ways that enhance their accessibility to readers with a wide range of methodological backgrounds.

Clark draws in part on existing datasets. But the key dataset is one that he created himself, a comprehensive list of Court-curbing proposals introduced in Congress between 1877 and 2008.²⁵ These data have considerable value in themselves, and Clark makes them available for further analysis by presenting a full list of proposals in an appendix. He also presents a detailed descriptive analysis of historical patterns in Court-curbing in chapter two.²⁶

The linkage between public opinion and Court-curbing proposals is examined in chapter four.²⁷ In a series of analyses, Clark tests for the impact of negative public attitudes toward the Court and ideological divergence between the Court and public on the introduction of these proposals. Among an array of interesting findings, the most striking and most important is a strong direct relationship between negative public views of the Court and the volume of Court-curbing proposals.²⁸

Chapters five and six analyze the impact of these proposals on the Court's behavior as a decision maker.²⁹ One set of analyses focuses on the frequency with which the Court strikes down federal laws and the likelihood that the Court will strike down a law when it rules on the constitutional validity of the law.³⁰ The analyses show a strong impact for the volume of Court-curbing bills, even when public opinion about the Court is taken into account.³¹

Another set of analyses examines the impact of the ideological positions of members who sponsor Court-curbing bills on the ideological content of the Justices' votes in decisions interpreting federal statutes.³² Clark finds evidence of a significant impact, though the evidence is complex and somewhat mixed.³³ As in the analyses of

22. CLARK, *supra* note 1, at 273.

23. *Id.* at 87–121.

24. *See id.* at 238–52.

25. *Id.* at 276–97.

26. *Id.* at 25–61.

27. *Id.* at 122–58.

28. *Id.* at 144–45.

29. *Id.* at 159–254.

30. *Id.* at 164–66.

31. *Id.* at 169–93.

32. *Id.* at 216–17.

33. *Id.* at 220–35.

judicial review, there is also evidence that public opinion has a direct impact on the Justices' choices.³⁴

In carrying out these analyses, Clark makes methodological choices with insight and care. One strength of his inquiry is that he frequently uses multiple analyses to address the same questions, thereby building a more substantial body of evidence on those questions. As a result, there is a very solid basis for his interpretations of the evidence.

The most important question that could be raised about that interpretation is one that Clark himself points out: Court-curbing "may simply be a proxy for a number of elements in the political environment" that inform the Justices about the state of their institutional legitimacy.³⁵ In other words, the Justices may be responding to a generalized sense of the political atmosphere rather than the introduction of Court-curbing proposals. Even if this is the case, the findings as a whole provide substantial evidence that the Court responds to its political environment and that the public is an important part of that environment.

Clark's conclusions emphasize the limits that the public places on the Court. As he sees it, the Justices' desire to maintain the Court's legitimacy makes them attentive to signs of discontent and recognition of those signs causes them to rein themselves in.³⁶ Thus, he joins the set of scholars who do not see the Court as a strongly counter-majoritarian institution.³⁷

The *Limits of Judicial Independence* is an important contribution to our understanding of the relationship between the Supreme Court and the public. It is especially important for those of us who are skeptical about the Justices' motivations to act on a concern with the Court's legitimacy.³⁸ Evidence on how much the Court's decisional outputs affect its legitimacy is mixed.³⁹ But the Court is generally held in high regard by the public, at least relative to the other branches of the government.⁴⁰ And

34. In the analyses of judicial review, public support for the Court affected the Court's actions; in the analyses of statutory interpretation decisions, it was the public's ideological position that affected the Justices. *Id.* at 176, 181, 185, 191, 221, 229.

35. *Id.* at 20.

36. *Id.* at 261–62.

37. *Id.* at 262.

38. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1547–65 (2010) (discussing and rejecting the argument that Supreme Court Justices often act to bring their decisions in line with the views of the general public).

39. See James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120 (1992); Gibson, Caldeira & Spence, *supra* note 16; Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114 (1997); Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 J. POL. 676 (2003).

40. This has been the pattern, with occasional exceptions, in the Harris poll findings on public confidence in "people in charge of running" the Supreme Court, Congress, and the executive branch/White House since the mid-1960s. Confidence in the Court has declined considerably in recent years along with confidence in other institutions, but the Court still stands well ahead of Congress. See Humphrey Taylor, *Confidence in Congress and Supreme Court Drops to Lowest Level in Many Years*, HARRIS INTERACTIVE (May 18, 2011), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/780/Default.aspx>. The same is true of the Gallup Poll questions on "trust and confidence" in the three branches of government. See Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP POL. (Sept. 26, 2012), <http://www.gallup.com/poll/157685/americans-trust-judicial-branch->

even if the Court collectively has an incentive to act in ways that protect its legitimacy, it is not clear that individual Justices have sufficient reason to depart from their preferred positions in specific cases in order to achieve a marginal improvement in the Court's standing.

However, it may be that the Justices exaggerate the Court's vulnerability and thus overreact to signs of public disapproval. Clark's interviews with Justices and clerks add to the body of evidence that Justices do not perceive that they are free from concerns about legitimacy.⁴¹ If so, perhaps this is because Justices as a group are "risk-averse" in light of their uncertainty about the consequences of acting counter to public opinion.⁴² Perhaps the psychic benefits of personal and institutional popularity reinforce more practical concerns about public support and thereby strengthen the Justices' incentives to avoid decisions that arouse disapproval.⁴³ In any case, the Justices' perceptions of the need for the Court to act in ways that the public approves are what counts, rather than any conflicting reality, and the difference between the two may account for Clark's noteworthy findings.

THE NATURE OF SUPREME COURT POWER

Scholarship that describes and explains the choices of Supreme Court Justices as decision makers is far more extensive than scholarship on the impact of the policies that the Court promulgates. The doctrinal innovations of the Supreme Court on civil liberties issues under Chief Justice Earl Warren led to a flurry of research on the actual effects of the Court's decisions in government and society.⁴⁴ But once the Warren Court began to fade into history, research on the Court's impact declined. The less dramatic policies of the Burger Court and its successors did not pique scholars' interest in the way that the civil libertarianism of the 1950s and 1960s had done.⁴⁵ Undoubtedly, the difficulties of studying the Court's impact empirically also discouraged scholars from undertaking further research.

Recent research on the effects of Supreme Court decisions deals primarily with the responses of lower courts to those decisions.⁴⁶ That focus reflects an interest in the operation of judicial hierarchy as well as the availability of lower court decisions to analyze. This research has accomplished a great deal in illuminating the judicial

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41. CLARK, *supra* note 1, at 68–69.

42. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 66 (2006).

43. *Id.* at 66–70.

44. *See generally* STEPHEN L. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970); THE IMPACT OF SUPREME COURT DECISIONS: EMPIRICAL STUDIES (Theodore L. Becker & Malcolm M. Feeley eds., 2d ed. 1973).

45. *See generally* BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (2d ed. 1999) (discussing the state of scholarship on the impact of the Court's decisions as of the late 1990s).

46. *See generally* David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003); Jennifer K. Luse, Geoffrey McGovern, Wendy L. Martinek & Sara C. Benesh, "Such Inferior Courts...": *Compliance by Circuits with Jurisprudential Regimes*, 37 AM. POL. RES. 75 (2009); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994).

hierarchy in practice, but it does not address the broader effects of the Court's decisions on government and society.

However, those broader questions have been the subject of some important books since the 1970s. A series of studies by political scientists raised fundamental questions about the Court's efficacy. Stuart Scheingold's *The Politics of Rights* questioned the value of litigation as a means to bring about social change.⁴⁷ In *The Courts and Social Policy*, Donald Horowitz made a sweeping argument against the efficacy of judicial activism on social issues, an argument based in part on the ground that court decisions often fail to achieve their intended impact.⁴⁸

More than a decade later, Gerald Rosenberg mustered a body of evidence on racial equality and other issues to argue that the courts are ineffective in bringing about social change.⁴⁹ Echoing Scheingold's conclusion, Rosenberg argued that those who seek societal reform would do better to focus their energies on arenas other than the courts.⁵⁰ The breadth and depth of Rosenberg's evidence and the eloquence of his argument made his book influential. It also inspired rebuttals from scholars such as Michael McCann, who argued that litigation on comparable worth in pay had in fact produced significant results.⁵¹

Matthew Hall's *The Nature of Supreme Court Power* returns to the question of the Court's efficacy.⁵² Responding directly to Rosenberg in part, Hall analyzes the Court's impact on a set of policy issues and concludes that the Court does hold considerable power to affect public policy and society.⁵³

Hall focuses on "behavior outcomes," which are "the behaviors of state and private actors that the Court intends to alter through its rulings."⁵⁴ More specifically, Hall seeks to quantify the proportion of "behavior conformity" with a Court policy, "the Court's causal effect on the most relevant behavior outcome in that issue area."⁵⁵ He argues that the Court's ability to affect those outcomes depends chiefly on two factors.⁵⁶ The first is whether lower courts acting alone can implement policy change. The book refers to issues as "vertical" if they can be implemented by lower courts without external assistance, "lateral" if they cannot.⁵⁷ The second is the extent of public support for the Court's ruling. The simplicity of this theory is striking because we might expect — and most scholars in this area have assumed — that the impact of Supreme Court decisions

47. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (Univ. of Mich. Press, 2d ed. 2004) (1974).

48. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

49. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008). The original edition of the book was published in 1991.

50. *Id.* at 428–29.

51. MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994). See also *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* (David A. Schultz ed., 1998).

52. HALL, *supra* note 2, at 4–5.

53. *Id.* at 156–65.

54. *Id.* at 7.

55. *Id.* at 24.

56. *Id.* at 4–5.

57. *Id.* at 16–17.

depends on a wide range of forces.⁵⁸ The most noteworthy forces absent from the theory are the personal preferences of judges and other public officials who are responsible for implementation of decisions. In the case of judges, that absence reflects the evidence that Hall cites for the conclusion that “lower courts are highly responsive to Supreme Court rulings.”⁵⁹

Hall used a systematic set of procedures to identify decisions between 1954 and 2005 to analyze.⁶⁰ His search was appropriately limited to “cases in which the Court invalidates a law or practice” in the form of a federal law or a widely adopted state law and to “especially important Supreme Court rulings.”⁶¹ Ultimately, he selected fifty-nine decisions involving twenty-seven issues, thereby giving his study an impressive range. One result of his criteria and procedures is that the great majority of the issues fall in the field of civil liberties, and only a few represent the Court’s work in the economic arena.

Based on his two independent variables, Hall puts the twenty-seven issues into four categories: “popular⁶² vertical issues” (only two issues fall in this category, the Religious Freedom Restoration Act and the Pentagon Papers case), “unpopular vertical issues” (such as abortion, Miranda warnings, and sovereign immunity), “popular lateral issues” (such as reapportionment and affirmative action in college admissions), and “unpopular lateral issues” (such as school desegregation and school prayer).⁶³ Each category is the subject of a chapter in which Hall works through the issues in turn.

This process can be illustrated by the relatively straightforward example of school prayer.⁶⁴ Hall appropriately classifies this issue as an unpopular lateral issue: public opinion data makes it clear that most people disagreed with the series of Supreme Court decisions prohibiting certain religious exercises in public schools, especially in the South, and implementation of these decisions ultimately was a product of decisions by school officials rather than judges.⁶⁵ Hall reasonably concludes that the Court’s goal was to eliminate a range of “religious exercises in public schools.”⁶⁶ Some empirical studies analyzed compliance with the first two (and most important) decisions on this issue⁶⁷ in 1962 and 1963.⁶⁸ The studies’ availability allowed Hall to compute fairly precise estimates of the level of behavior conformity by region, based on the extent to which

58. See WASBY, *supra* note 44, at 243–68; James F. Spriggs, II, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RES. Q. 567, 571–74 (1997).

59. HALL, *supra* note 2, at 16.

60. *Id.* at 167–172.

61. *Id.* at 22.

62. By “popular,” Hall means that the Court’s decision or decisions on the issue were popular with the public.

63. *Id.* at 25.

64. *Id.* at 130–36. See *Engel v. Vitale*, 370 U.S. 421 (1962).

65. HALL, *supra* note 2, at 130–36.

66. *Id.* at 131; see *Engel*, 370 U.S. 421.

67. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel*, 370 U.S. 421.

68. See, e.g., KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* (1971); H. Frank Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. POL. Q. 189 (1968). A more recent study is Kevin T. McGuire, *Public Schools, Religious Establishments, and the U.S. Supreme Court: An Examination of Policy Compliance*, 37 AM. POL. RES. 50 (2009).

schools actually eliminated the practices that the Court prohibited.⁶⁹

Analysis of some other issues could not be so straightforward because of several difficult methodological challenges. For some cases, it is uncertain how to characterize the Court's goals and thus to measure its impact against those goals.⁷⁰ In some instances, measurement of public opinion was made more difficult by an imperfect match between cases and survey questions or an absence of relevant questions.⁷¹ And for some decisions, such as the Court's application of the exclusionary rule for searches and seizures to the states in *Mapp v. Ohio*,⁷² the evidence on impact is mixed and ambiguous, so there is room for different judgments.⁷³

In light of these challenges, Hall does an impressive job of amassing relevant evidence from a wide range of sources and analyzing it carefully to reach his conclusions. Just as important, he is thorough and meticulous in laying out the evidence he gathered and showing how he uses that evidence. Readers are given the information they need to determine whether they agree or disagree with Hall's judgments. In those important respects, the book is a model of good social science.

Drawing together his case studies, Hall concludes that each of his key independent variables captures a condition that is highly favorable for the Court's success in exercising power.⁷⁴ On vertical issues in which the Court's decisions can be implemented by lower courts, the Court "tends to succeed" even when public opinion is unfavorable.⁷⁵ The Court also tends to succeed when public opinion is favorable, even on lateral issues on which lower courts cannot implement the Court's policies by themselves.⁷⁶ In contrast, "the Court tends to fail at exercising power when it issues unpopular rulings in lateral issues."⁷⁷ Taking into account this mixed pattern of results and the inevitable limits of his study, he argues, his evidence demonstrates that the Court has considerable power to achieve even ambitious goals.⁷⁸

Just as it is possible to disagree with Hall's judgments about some individual issues, there is certainly room to disagree with his broad conclusions. Yet even those who are inclined to disagree need to take the book's evidence seriously. In particular, many of Hall's case studies underline the importance of Supreme Court decisions as

69. HALL, *supra* note 2, at 132–33, 135.

70. One example is *Texas v. Johnson*, 491 U.S. 397 (1989), the case in which the Court struck down state prohibitions of flag desecration. HALL, *supra* note 2, at 44–46.

71. For example, on the application of the federal minimum wage law to state and local governments, invalidated by the Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), there were only questions about raising the minimum wage in general. HALL, *supra* note 2, at 120–21.

72. *Mapp v. Ohio*, 367 U.S. 643 (1961).

73. Hall emphasizes the body of evidence showing that *Mapp* brought about very substantial changes in police practices, but there is also evidence of considerable noncompliance with rules for searches even after the Court's extension of the exclusionary rule to the states. HALL, *supra* note 2, at 50–61; *but see* Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315 (2004); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 369 (1999).

74. HALL, *supra* note 2, at 156–57.

75. *Id.* at 156.

76. *Id.*

77. *Id.*

78. *Id.* at 156–65.

tools that people can use to their advantage by asserting legal rights in or out of court.

This finding is all the more impressive in light of the dominance of civil liberties cases in the study and the dearth of cases about economic issues.⁷⁹ In general, economic actors — and especially businesses — are in a relatively good position to take advantage of legal rights that courts accord them. The apparent impact of the Court's decisions on taxation of out-of-state sales,⁸⁰ regulation of credit card operations,⁸¹ and hiring of replacement workers for striking employees⁸² exemplifies this position. Beneficiaries of decisions favoring civil liberties are often in a much weaker position. It was quite appropriate to Hall's purposes that the Supreme Court decisions he analyzed were not fully representative of the Court's output by subject matter. Had the set of decisions been more representative, it is likely that Hall would have found even stronger evidence for his conclusion.

CONSIDERING THE IMPLICATIONS

As noted earlier, the attributes of the Supreme Court suggest that the Justices are largely free to reach the decisions they see as desirable but weak in their capacity to exert an impact on other government institutions and society as a whole. Between them, Tom Clark and Matthew Hall challenge both of those impressions.

Clark's challenge is part of a body of scholarship that points to constraints placed on the Court by public opinion. His conception of those constraints is novel in that he sees the introduction of Court-curbing bills as a key mechanism that communicates to Justices the need to move away from policies that have triggered public disfavor.⁸³ His findings, based on a solid and impressive set of analyses, require that we give attention to that path.

In contrast with Clark, Hall is fighting more against the tide than with it. The evidence that some major Court policies have failed to achieve their expected effects has led many scholars to conclude that the Court has only limited impact on government and even less impact on society as a whole.⁸⁴ Grappling very effectively with serious

79. *See id.* at 25.

80. *See* Quill Corp. v. Heitkamp, 504 U.S. 298 (1992) (effectively exempting retailers from collecting sales taxes from customers in states in which the retailer lacked a physical presence). That exemption later provided an advantage for companies selling over the Internet, and evidence indicates that it contributed to the growth of that sector of retailing. *See* Eric T. Anderson, Nathan M. Fong, Duncan I. Simester & Catherine E. Tucker, *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. MARKETING RES. 229 (2010).

81. *See* Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978) (allowing banks to charge any interest rates allowed by the state in which they were based). That decision spurred some states to allow high interest rates on credit card balances and spurred banks to move their headquarters to those states. *See* MATTHEW SHERMAN, CTR. FOR ECON. AND POL'Y RES., A SHORT HISTORY OF FINANCIAL DEREGULATION IN THE UNITED STATES 5–6 (2009).

82. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938) (allowing employers to hire replacement workers to permanently supplant workers who were on strike). After a period of more than four decades in which employers made little use of that decision, President Reagan's use of it in the strike of federally employed air traffic controllers in 1981 was the catalyst for other employers to follow suit, and their doing so was one source of the decline in the strength of the labor movement. *See* Peter T. Kilborn, *Replacement Workers: Management's Big Gun*, N.Y. TIMES, Mar. 13, 1990, at A24.

83. CLARK, *supra* note 1, at 20–21.

84. *See supra* notes 44–52.

methodological challenges, Hall produces noteworthy evidence of the Court's capacity to achieve the Justices' policy goals.⁸⁵ In doing so, he changes the debate over the Court's efficacy. Like *The Limits of Judicial Independence*, *The Nature of Supreme Court Power* merits careful consideration by legal scholars and political scientists who seek to understand the place of the Supreme Court in government and society.

85. HALL, *supra* note 2, at 156–65.

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