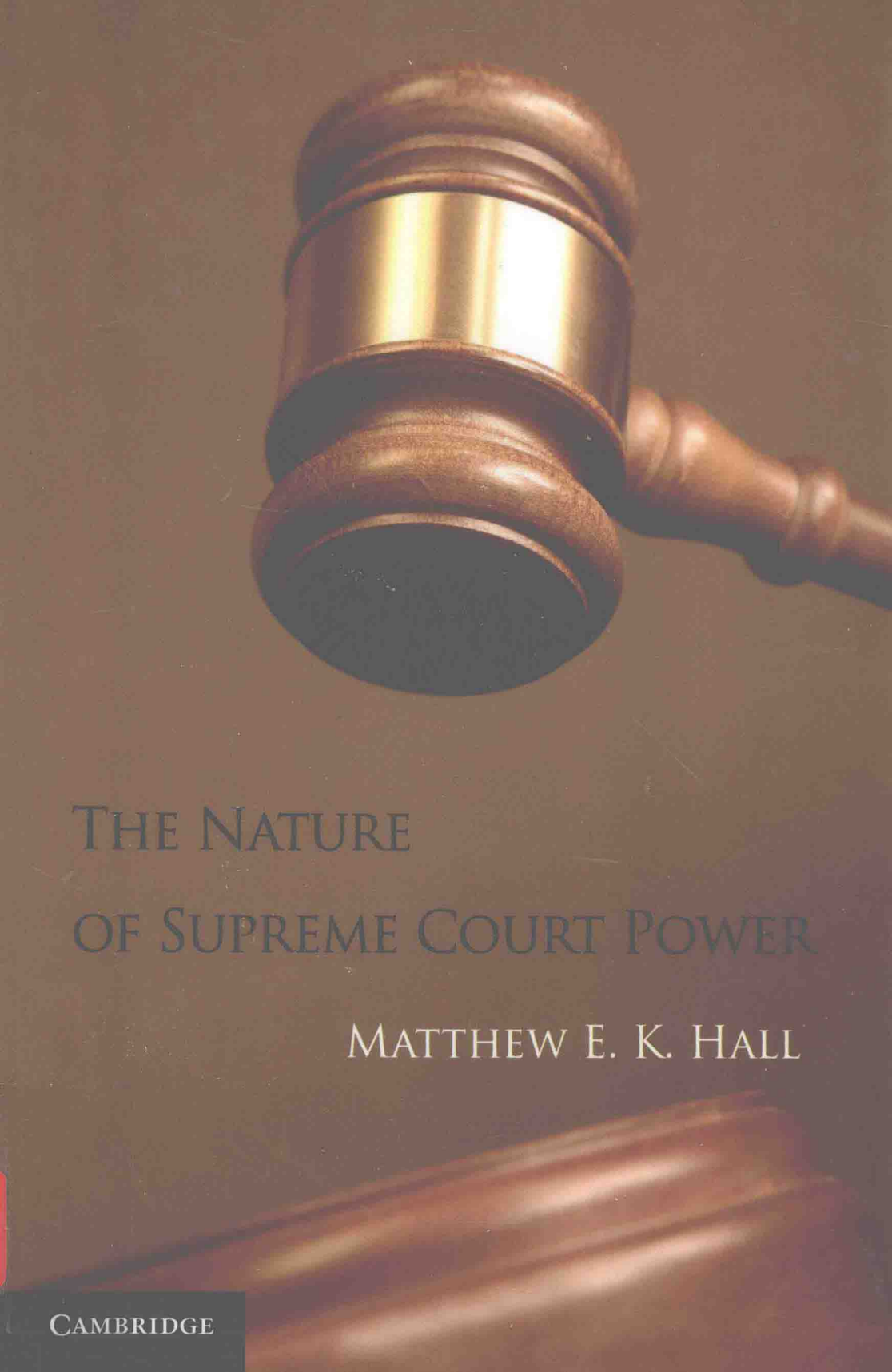

The Nature of Supreme Court Power

Matthew E. K. Hall

Cambridge

The Nature of Supreme Court Power

MATTHEW E. K. HALL
Saint Louis University

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9781107001435

First published 2011
Reprinted 2012

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Hall, Matthew Eric Kane.
The nature of supreme court power / Matthew Eric Kane Hall.
p. cm.
ISBN 978-1-107-00143-5 (hardback)
1. United States. Supreme Court – History. 2. Political questions and judicial
power – United States – History – Sources. 3. Judgments – United States – History.
4. Constitutional history – United States. 5. United States – Social conditions – Sources.
I. Title.
KF8742.H35 2010
347.73'26–dc22 2010031356

ISBN 978-1-107-00143-5 Hardback

The Nature of Supreme Court Power

Few institutions in the world are credited with initiating and confounding political change on the scale of the United States Supreme Court. The Court is uniquely positioned to enhance or inhibit political reform, enshrine or dismantle social inequalities, and expand or suppress individual rights. Yet despite claims of victory from judicial activists and complaints of undemocratic lawmaking from the Court's critics, numerous studies of the Court assert that it wields little real power. This book examines the nature of Supreme Court power by identifying conditions under which the Court is successful at altering the behavior of state and private actors. Employing a series of longitudinal studies that use quantitative measures of behavior outcomes across a wide range of issue areas, Matthew E. K. Hall develops and supports a new theory of Supreme Court power. Hall finds that the Court tends to exercise power successfully when lower courts can directly implement its rulings; however, when the Court must rely on non-court actors to implement its decisions, its success depends on the popularity of those decisions. Overall, this theory depicts the Court as a powerful institution, capable of exerting significant influence over social change.

Matthew E. K. Hall is assistant professor of Political Science and Law at Saint Louis University. He earned his Ph.D. in political science, with distinction, from Yale University. His work has appeared in *American Politics Review*, the *Journal of Empirical Legal Studies*, and the *Journal of Law and Policy*.

This book is dedicated to those who revere the courts as guardians of our personal freedoms and to those who revile the courts as saboteurs of democratic self-government. May the struggle to balance personal liberties and majority rule persist forever, for only this constant tension ensures that both will long endure.

Figures

Tables

Preface

When I was a sophomore in college, my friend and mentor Professor Laura Beth Nielsen assigned me to read Gerald Rosenberg's *The Hollow Hope* as part of a seminar on legal studies. Professor Rosenberg's compelling and controversial book piqued my interest in the role of courts in our society. Time, reflection, and my continued study of law and politics have only sharpened my interest in his project and my objections to his thesis. In many ways, this book is my term paper for that seminar, now eight years overdue.

I have been aided in this project by the helpful contributions of numerous scholars, including professors Paul Brace, Daniel Butler, Bradley Canon, Alan Gerber, Jerry Goldman, Mark Graber, Thomas Keck, Andrew Martin, Kenneth Scheve, Stephen Skowronek, and Peter Swenson, as well as my graduate school colleagues Stephen Engel, Judkins Mathews, Joshua Pheterson, Joseph Sempolinski, and the members of the Yale Graduate Student Colloquium on American Politics. I am indebted to each of them for their thoughtful suggestions and critiques.

I was fortunate to be directed through this process by an exceptional group of diverse scholars: professors Bruce Ackerman, Donald Green, Gregory Huber, and David Mayhew. These men have shaped my approach to the world around me – the questions I ask and the way that I answer them. I am grateful for their many invaluable insights, and it is my fervent hope that this manuscript reflects their influence on me.

Finally, I am thankful to my friends and family, without whose love and support I would never have been able to complete this work.

Contents

1

Neither Force, Nor Will

> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
>
> Alexander Hamilton[1]

In June of 2007, the United States Supreme Court handed down its decision in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007; hereafter *Parents*). In his plurality opinion, Chief Justice John Roberts declared that the Fourteenth Amendment requires school districts to assign students "to the public schools *on a nonracial basis*" (*Parents* 2007, 84) and therefore prohibits the race-conscious programs in the Seattle and Louisville school districts designed to promote racial diversity. Sharon Browne, the principal attorney for the parents challenging the school's assignment process, called the rulings "the most important decisions on the use of race since *Brown v. Board of Education*" (Rosen 2007) and predicted that, like *Brown*, the Court's ruling would have "a tremendous impact on the rest of the nation" (Lambert 2007).

However, several legal scholars disagreed: "School districts are going to continue to do indirectly what they tried to do directly," said Peter H. Schuck of the Yale Law School. "There will be another layer of bureaucracy," said David A. Strauss, University of Chicago law professor, "but I wouldn't expect a large-scale retreat from what public schools have tried" (Rosen 2007). According to Michael Klarman of the University of Virginia School of Law, "Just as *Brown* produced massive resistance in the South and therefore had little impact on desegregation for a decade, this decision is going to be similarly inconsequential ... I don't think the court decision will make much difference either way" (Rosen 2007).

[1] *The Federalist 78.*

The juxtaposition of these viewpoints is particularly interesting because they differ, not only in their predictions regarding the effects of the *Parents* ruling, but also in their understandings regarding the effects of the *Brown* ruling. The traditional view of the Court's decision in *Brown v. Board of Education* (1954) suggests that "*Brown* really did transform society by stopping *de jure* segregation, and without *Brown*, schools would look very different" (Rosen 2007).[2] This view suggests the Supreme Court is a powerful institution, capable of promoting justice and protecting minority rights by enforcing its interpretation of the Constitution. However, the view of *Brown* advanced by Schuck, Strauss, and Klarman is consistent with a very different understanding of the Court. This alternate view depicts the Court as an almost powerless institution that may issue high-minded rulings but lacks the power to ensure that those rulings are actually implemented. These competing views weave in and out of the most prominent histories of the Supreme Court and the most prevalent scientific examinations of the Court's influence.

The U.S. Supreme Court was described as a relatively weak institution even before it existed. Arguing for the merits of the new federal Constitution in *The Federalist 78*, Alexander Hamilton assured his readers that "the judiciary, from the nature of its functions, will always be the least dangerous branch to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them ..." According to Hamilton, a

> simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to defend itself against their attacks. (Hamilton 1961)

Hamilton's description of a weak judiciary was borne out during the early years of the Supreme Court. The justices were originally forced to "ride circuit," travelling from town to town to hear lower-court cases. The first chief justice, John Jay, resigned from the Court to become governor of New York. When President Adams offered Jay a second appointment as chief justice, Jay refused, citing his poor health and arguing that the Court lacked "the energy, weight, and dignity which are essential to its affording due support to the national government" (Johnston 1890–93, 285). In the 1803 case *Marbury v. Madison*, Chief Justice John Marshall, speaking for the Court, strategically retreated in the face of political opposition from the president and Congress. Although *Marbury v. Madison* is widely credited with establishing the power of judicial review (Epstein and Walker 1995, 73; Irons 2006, 107), some scholars describe the Court as capitulating in this case, illustrating "the relative impotence of the federal judiciary during the first decades of the constitutional order" (Graber 1999, 28; see Graber 1998).

[2] Quoting David J. Armor, professor at the George Mason University School of Public Policy.

Examples of the Court's impotence extend well past the founding era. In *Worcester v. Georgia* (1831), the Court ruled that Indian tribes were "dependent domestic nations" with rights to lands they had not voluntarily ceded to the United States. President Andrew Jackson defied the ruling and ordered federal troops to expel Creek, Chickasaw, and Cherokee tribes from their lands (Irons 2006, 111). Chief Justice Taney's extremist proslavery decision in *Dred Scott v. Sandford* (1857) is said to have "doomed his cause to ultimate defeat" (Irons 2006, 177). In the decades that followed, the Court was subjected to court-packing, court-shrinking, and jurisdiction-stripping as the Radical Republicans worked to keep the justices in line (Irons 2006, 183; *Ex Parte McCardle* 1869).

These extreme tactics foreshadowed the famous showdown between the Court and President Franklin Roosevelt over New Deal economic policy. After the Court invalidated many of Roosevelt's most ambitious legislative enactments, the New Deal Democrats began to contemplate various methods of reversing the Court. The most popular proposal was a plan to "pack the Court" by allowing President Roosevelt to appoint a new justice for every sitting member over seventy and one-half years of age. The plan would have allowed Roosevelt to appoint as many as six new justices; however, the proposal never came to fruition. Once again, the Court retreated, reversing its previous rulings, yielding to the elected branches, and initiating a so-called "Constitutional Revolution" (Irons 2006, 316; *West Coast Hotel v. Parrish* 1937; *National Labor Relations Board v. Jones & Laughlin Steel Corp.* 1937).

Each of these events from the Court's history involves distinct institutional dynamics: in *Marbury*, the Court strategically ducked a controversial issue; in *Worcester*, the Court failed to implement its ruling; in *Scott* and *Lochner*, the Court was overwhelmed by political backlash. Yet, despite the differences between these cases, each one suggests the Court's underlying lack of power. In classrooms and textbooks, these episodes are frequently explained as evidence that Hamilton was correct: The courts control neither the "sword" nor the "purse."

In contrast, some scholars argue that the courts have been particularly influential during specific periods of American history. For example, Steven Skowronek describes the period between the end of Reconstruction and the beginning of the New Deal as an era of "courts and parties," during which judges played a major role in shaping public policy, especially economic regulation (Skowronek 1982). During the so-called *Lochner* Era at the beginning of the twentieth century, the Supreme Court struck down a wide range of state and federal laws aimed at regulating labor conditions and expanding the role of the government. Although the New Deal eventually reversed most of these policy choices, reformers were not successful at overcoming judicial will for almost half a century. This long period of judicial activism may indicate that the Court is only effective at postponing policy change, but even the act of delaying may shape the form a policy will eventually take. For example, by striking down the programs enacted during Roosevelt's first one hundred

days, the Court radically altered the economic policies that eventually emerged during the 1930s (Gillman 1993).

Scholars also frequently depict the 1950s, 60s, and 70s as a period during which the Supreme Court had an unusually strong influence over policy creation. The Warren and Burger Courts issued numerous groundbreaking opinions in a broad range of policy areas, purportedly altering public policy regarding race relations, civil liberties, criminal law, prison administration, political representation, environmental regulation, privacy, and the role of religion in public life. More recently, the Rehnquist Court has made significant changes in the structure of American politics through its revival of federalism. By breathing new life into the Tenth and Eleventh Amendments and reducing the scope of the previously all-encompassing Commerce Clause, the Court has fundamentally altered the role of state governments and limited the ability of the federal government to impose its will in several policy domains (see *United States v. Lopez* 1995; *Seminole Tribe v. Florida* 1996; *Alden v. Maine* 1999; *United States v. Morrison* 2000).

Many of these decisions have been extremely controversial, often provoking strong public reaction and raising objections that the Court is undermining democratic self-government (Waldron 1999, 332; Tushnet 1999; Kramer 2004). The classic articulation of these concerns is Alexander Bickel's "countermajoritarian difficulty." According to Bickel, the fundamental difficulty with the role of courts in the American political system is the concern that judicial review "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens ... it is the reason the charge can be made that judicial review is undemocratic" (Bickel [1962] 1986, 16–7). If Court rulings always prevail over majority will, then Bickel's difficulty undoubtedly poses a serious dilemma for those hoping to reconcile judicial review with democratic principles; if, however, the Court is effectively powerless, then Bickel's difficulty is little more than a hypothetical concern.

It is unlikely that either of these perspectives accurately depicts the Supreme Court's power. Surely the Court's rulings have significant consequences at least occasionally; otherwise lawyers and interest groups would not invest so much time, money, and energy into bringing cases before the Court and trying to win them. However, in a system of government designed to balance political power among separate branches, it would be surprising if the Court were always totally successful at altering policy. The true nature of the Court's power most likely lies somewhere between these extremes. The question then becomes, when is the Supreme Court powerful and when is it not? What factors distinguish those situations in which the Court is resisted, undermined, or simply ignored from those in which the Court initiates sweeping political and social change?

I will argue that the Supreme Court's ability to alter the behavior of state and private actors is dependent on two factors: the institutional context of the

Court's ruling and the popularity of the ruling. The probability of the Court successfully exercising power increases when:

(1) its ruling can be directly implemented by lower state or federal courts; or
(2) its ruling cannot be directly implemented by lower courts, but public opinion is not opposed to the ruling.

However, the probability of the Court successfully exercising power decreases when:

(3) its ruling cannot be directly implemented by lower courts and public opinion is opposed to the ruling.

The distinction between Supreme Court rulings that can and cannot be implemented by lower courts is a critical point that has gone unnoticed by other scholars of judicial politics. In contrast with most prominent empirical studies of judicial power, I find that the Supreme Court has extensive power to alter the behavior of state and private actors in a wide range of politically salient issue areas.

My study is limited to an examination of the Supreme Court's power to alter behavior when it attempts to do so. My goal is not to advance a normative argument regarding this power. Undoubtedly, my empirical argument has normative implications; my findings may inspire and embolden those who support judicial activism in order to promote particular political agendas, while simultaneously disheartening proponents of judicial restraint who decry the antidemocratic nature of the Court's power. However, my primary objective is to set the stage for this debate by asking how powerful the Court is and, more importantly, under what conditions it is more or less powerful.

My examination of Supreme Court power proceeds as follows: In Chapter 2, I explore competing theories of Court power and present a new theory of the conditions that determine whether the Court can successfully exercise power. In Chapter 3, I discuss the methodological issues involved in measuring judicial power and selecting cases for examination. I then apply the methods developed in Chapter 3 to test my theory on four types of Supreme Court rulings: those rulings that face little popular opposition and can be directly implemented by lower courts (Chapter 4), those rulings that face strong popular opposition and can be directly implemented by lower courts (Chapter 5), those rulings that face little popular opposition and cannot be implemented by lower courts (Chapter 6), and those rulings that face strong opposition and cannot be implemented by lower courts (Chapter 7). In Chapter 8, I summarize my findings and consider their implications for the future study of the Supreme Court and its role in American politics.

2

When Courts Command

> Armed with the power of determining the laws to be unconstitutional, the American magistrate perpetually interferes in political affairs ... Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.
>
> Alexis De Tocqueville[1]

> By itself, the [Supreme] Court is almost powerless to affect the course of national policy.
>
> Robert Dahl[2]

In this chapter, I begin by developing a working definition of judicial power. I then consider several competing theories of Supreme Court power and the expectations these theories offer about the Court's ability to influence other actors. Most empirical studies of Court power find that the Court is a relatively weak political institution, but numerous positive theorists insist that it should be capable of altering behavior, at least in certain limited circumstances. Next, I suggest several factors that may influence whether the Court is successful at exercising power based on well-established findings from the judicial politics and electoral politics literatures. Specifically, I will argue that the probability of the Court exercising power depends on the institutional context and popularity of its rulings. Finally, based on these factors, I present a new theory of Supreme Court power.

DEFINING JUDICIAL POWER

Understanding when the Supreme Court is capable of exercising power requires a clear definition of judicial power. I base my definition on Jack Nagel's conception of power in his seminal work on the subject: "A power relation, actual

[1] Tocqueville (1945, 279–80).
[2] Dahl (1957, 293).