rise to judicial supremacy may be more troubling from a democratic perspective than judicial supremacy per se" (*Political Foundations of Judicial Supremacy* [Princeton University Press, 2007], 295).

Nevertheless, the language of the US Constitution does provide clear and effective means to enforce the limited judicial role advocated by McDowell. In *Federalist*, No. 78, Hamilton notes the "natural feebleness" of the Court and its ultimate dependence on the other branches. Congress and the president possess the political legitimacy and the constitutional powers to control the courts, yet choose not to exercise them. McDowell admits "changing the public mind is never easy" (8). If recent expansion of judicial power constitutes a sin, opponents need to do more than scapegoat medieval Aristotelians, English common lawyers, progressive professors, and willful justices. Any successful argument for judicial restraint must first account for the institutional and political reasons why—even today—elected officials and the American people they represent allow the US Supreme Court to grow ever more powerful.

–Frank J. Colucci

CHECKMATE MOVES

Martin J. Sweet: *Merely Judgment: Ignoring, Evading, and Trumping the Supreme Court*. (Charlottesville: University of Virginia Press, 2010. Pp. xi, 220. $35.00.)

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Merely Judgment is a study of how elected officials in three cities reacted to a decision of the US Supreme Court, and what that reaction tells us about the power of the Court and the protection of constitutional rights. First and foremost, it is a detailed empirical study of the reaction of Philadelphia, Portland, Oregon, and Miami to the US Supreme Court's 1989 decision *City of Richmond v. J. A. Croson Co.*, requiring that governmental affirmative action programs in contracting at the state and local level be held to the strict scrutiny standard of the Fourteenth Amendment. Second, Sweet "explores the question of what happens *after* the Supreme Court decides a case" (2). To his dismay, he finds that elected officials have an array of tools to ignore, evade, and trump constitutional requirements, which he labels "'checkmate' moves" (4). Thus, third, Sweet aims to "make the case that we ought to prioritize judicial determinations about the nature of constitutional rights above those of the elected branches of government" (5).

The book is divided into an introduction, five chapters, and a conclusion. The first chapter presents a detailed examination of *Croson*, placing it in the context of ongoing debates and Court decisions about affirmative action. Chapters 2, 3,

and 4 present in-depth empirical studies of the legislative response to *Croson* in Philadelphia, Portland, and Miami. In chapter 5 Sweet extends the analysis to the political reaction to Court decisions in four additional areas. The concluding chapter argues for enhanced judicial power, what Sweet calls "judicial primacy," to ensure the protection of constitutional rights.

The most interesting and impressive chapters are the three city studies. Based on extensive interviews with key actors, Sweet unsurprisingly finds "contingent and varied responses" to *Croson* (58). Philadelphia attempted to defend its program, resulting in fourteen years of litigation and six federal court decisions. "Ultimately the view from the judiciary would, appropriately, come to rule the day" (60) and Philadelphia abandoned its program. Sweet concludes that the "back-and-forth nature of the dialogue between the courts [and] the elected branches … is the mark of a successful constitutional dialogue" (72). In contrast, in response to *Croson*, Portland produced a "hefty fourteen-volume report … which was used by the city … to establish new MBE programs designed from the contours of *Croson*" (77). The city worked closely with the leading contractors' interest group to craft a program both could accept. Sweet characterizes the result as an unsuccessful dialogue and the continuation of a program he believes is unconstitutional. Finally, Miami chose to leave its affirmative action program untouched but not to implement it. This both allowed elected officials to take credit with affirmative action supporters for having such a law on the books but avoid litigation by not implementing it. Sweet considers this "very much a mixed success in terms of constitutional dialogue" (94).

In chapter 5 Sweet expands his analysis with a brief overview of legislative reactions to Court decisions in hate speech, flag burning, legislative vetoes, and school prayer. As in Portland and Miami, Sweet finds that "governments wishing to maintain unconstitutional programs may do so as long as they are able to fashion litigation avoidance techniques" (124). Noting that litigation is "not cost-free" (157), he highlights the "social, legal, and political barriers to litigation" (157). He is particularly worried about street-level bureaucrats using unconstitutional laws on the books against "constitutionally protected actions" (151) such as flag burning and hate speech.

Turning to the theoretical, Sweet's major concern, unlike almost all Supreme Court scholars, is that the "Supreme Court's role in constitutional decision making … has in essence been rendered subservient to the elected branches of government" (163). Rather than judicial supremacy, he sees "a constitutional monopoly coming from the elected branches" (157–58). Believing that "there are too few lawsuits to effectively end the persistence of unconstitutional laws" (158), Sweet writes that "checkmate imperils the entire premise by which our rights are protected" (154). Thus, he concludes that "more deference must be given to the courts, and the era of checkmate moves must come to an end" (168).

The strength of *Merely Judgment* is its empirical work. In contrast, the analytical and theoretical arguments are underdeveloped and overstated.

For example, why did Sweet choose these three cities to study? Are they representative of the typical reactions of cities to *Croson*? Are they outliers? Similarly, what is the measure of the "widespread elected branch evasion of Supreme Court doctrine" (157) that he alleges? Further, what are the contours of the concept of "checkmate"? Increasing the costs of litigating is not a checkmate move in the sense of ending a game. Rather, in some cases, but by no means all, it decreases the likelihood of litigation.

Sweet's definitions of "successful" Court–elected branch interactions and dialogue are not clear. For example, Sweet finds that in Portland "a legitimate attempt was made to follow the judicial conception of a constitutional affirmative action program" (87). He notes that the "city spared few resources in seeking the best possible disparate study that money could buy" (80) and "followed the Supreme Court's prescriptive advice in how to craft a constitutional affirmative action program" (91). Yet he considers Portland an example of an unsuccessful Court–elected branch interaction. Similarly, Sweet reports that Dade County, Florida, defended its affirmative action program for a decade and only conceded when a federal court imposed personal liability on Dade County commissioners. Sweet considers Dade County an "example of a successful court–elected branch interaction" (97). On what criteria are Philadelphia and Dade County successful examples of Court–elected branch interaction and dialogue while Portland is not? Could it be that Sweet finds Portland an unsuccessful dialogue because it was able to maintain a modified affirmative action program? This reading is supported by the distasteful "Underbelly Epilogue" (119–23) that Sweet attaches to the Miami chapter. It tells the sad story of Arthur Teele, an African-American, and corruption in minority contracting. It adds nothing to the argument other than suggesting that many affirmative action programs are corrupt.

Finally, and most importantly, Sweet's argument for judicial primacy is underdeveloped. On the one hand, for the methodological reasons raised above, his characterization of judicial subservience as widespread is not persuasive. On the other hand, the distinction between judicial primacy and judicial supremacy is not clear. In his three affirmative action cases, the Court was primary. In each case there was dialogue and in each case existing affirmative action programs ended. The Court's views prevailed. A more persuasive argument would carefully delineate the difference between the two concepts.

In addition, in order for Sweet to be persuasive that the Court should play a more primary role in protecting constitutional rights, he needs to show that the Court does a better job of protecting constitutional rights than the other branches as a matter of both practice and theory. Nowhere in the book does he do this. Thus, his argument is enticing but not persuasive.

Overall, *Merely Judgment* presents good case studies with an underdeveloped theory of judicial decision making and the role of the Supreme Court.

–Gerald Rosenberg