

# STORM CENTER

*The Supreme Court in American Politics*

DAVID M. O'BRIEN

UNIVERSITY OF VIRGINIA

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W • W • Norton & Company

New York • London

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*For Benjamin*



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## *Preface*

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THE Supreme Court, Justice Oliver Wendell Holmes observed, is a “storm centre” of political controversy. The Court stands as a temple of law—an arbitrator of political disputes, an authoritative organ of law, and an expression of the American ideal of “a government of laws, not of men.” But it remains a fundamentally political institution. Behind the marble facade, the justices compete for influence; the Court itself is locked in a larger struggle for power in society. This book is about the political struggles among the justices and between the Court and rival political forces in the country.

As a political institution, the Court wields an antidemocratic and countermajoritarian power. Those who sit on the high bench are not elected and are rarely held directly accountable for their decisions. Their power and prestige stem from the authority to interpret the Constitution but rest with public expectations of expertise, independence, impartiality, and reasoned judgment. The justices constitute a kind of secular priesthood, yet the Court is not a meritocracy. Presidents invariably try to pack the Court and, as Chapter 2 shows, thereby influence public policy beyond their limited time in

the Oval Office. On the bench, however, justices are sovereign. They frequently disappoint their presidential benefactors and find it difficult to refrain from off-the-bench activities. Rather than leave the world of politics behind, justices form a small political elite with enormous power, a unique history, and the awesome responsibility of maintaining the constitutional principles of free government and human dignity.

Life in the marble temple constrains judicial behavior and the politics of making law. In historical perspective, Chapter 3 examines the institutional dynamics of the Court, the changing working relations among the justices, and the way the Burger Court has become increasingly bureaucratic in response to growing caseloads. Unlike any other federal court, the Supreme Court now has virtually complete discretion over its selection of cases and sets its own agenda for policy-making. The justices' control over deciding what to decide and the processes by which they select cases are examined in Chapter 4. In explaining how justices decide cases and the process of opinion writing, Chapter 5 shows why there is now less collective deliberation than there used to be and how the Court has come to function more like a legislative body. Critics of unpopular rulings have often castigated the Court for being a "super legislature." I aim to show that the Court has instead come to *function* more like a legislative body. As one justice puts it, "decisions have become more of an event, rather than a process." The justices now place less of a premium on collegial deliberations leading to institutional decisions and delegate more responsibilities to larger staffs within the Court. These and other institutional trends in turn lead to less certainty, stability, and predictability in the law.

Although the Court has come to function like a roving commission monitoring the governmental process, its rulings are not self-executing. The Court depends on other political institutions and on public opinion to carry out its decisions. But those forces may also curb the Court. The limitations of

Supreme Court policy-making are considered in the final chapter, but the basic conclusion may be stated at the outset: the Court is a guardian of the substantive value choices in the Constitution, but by itself holds less power to change the country than either liberals or conservatives often claim. Major confrontations in constitutional politics, like those over school desegregation, school prayer, and abortion, are determined as much by what is possible in a system of free government and in pluralistic society as by what the Court says. The Court's influence on American life rests on a paradox. Its political power is at once anti-democratic and countermajoritarian. Yet that power, which flows from giving meaning to the Constitution, truly rests, in Chief Justice Edward White's words, "solely upon the approval of a free people."



