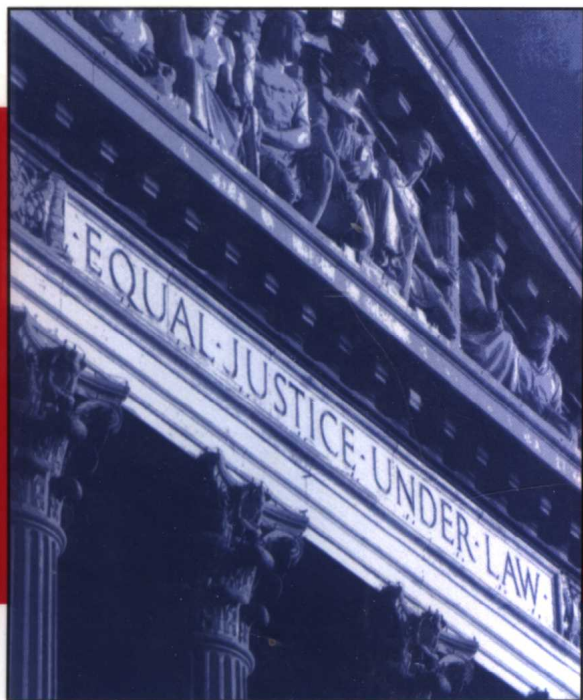


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IN AMERICAN POLITICS



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STORM CENTER

The Supreme Court in American Politics

FOURTH EDITION

DAVID M. O'BRIEN

UNIVERSITY OF VIRGINIA

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For Benjamin, Sara, and Talia

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Preface

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.

Within a week of the publication of the first edition of this book Chief Justice Warren E. Burger resigned, and less than a year later Justice Lewis F. Powell stepped down. With the elevation of William H. Rehnquist from associate to chief justice and the addition of Justices Antonin Scalia and Anthony Kennedy, the Supreme Court changed complexion. The second edition dealt with the changes in the life of the Court that occurred during the first few years of Rehnquist's chief justiceship and due to the addition of President Reagan's last two appointees. Shortly after that edition appeared the Court's leading liberal

and one of its most influential members, Justice William J. Brennan, Jr., retired in June 1991. One year later on the last day of the Court's term, his ideological ally, Justice Thurgood Marshall, announced that he would step down. Their replacement on the bench by Justices David H. Souter and Clarence Thomas reinforced the conservative shift in direction of the "Rehnquist Court." The third edition took account of how those further changes affected life within the marble temple and the Rehnquist Court's redirection and new uses of judicial power. This fourth edition takes into account President Clinton's first two appointees to the high bench and highlights the continuing changes forged by the Rehnquist Court in the areas of abortion, school desegregation, criminal justice, affirmative action, and federalism.

Throughout this fourth edition I have incorporated new material made available in the papers of Justices Thurgood Marshall and Lewis F. Powell, Jr., as well as those of President Richard M. Nixon. There is also much new research on how changes in the Court's composition affect its internal operations, deference to past rulings, and the doctrine of *stare decisis*, for example, along with the direction of judicial policy-making and constitutional politics. Discussions of the Court's growing docket and the justices' workload, conferences, oral argument sessions, agenda setting, and decision-making processes, as well as opinion-writing practices have thus been thoroughly updated. In addition, readers will find expanded treatments of the Court's relation to public opinion, critical elections, and partisan realignments, along with more emphasis on the politics of judicial policy-making and the institutional constraints and restraints on achieving implementation and compliance with its rulings.

The underlying themes and arguments appearing in the first edition, however, remain. As a political institution, the Court wields an antidemocratic power and is rarely held directly accountable for its decisions. Presidents invariably try to pack

the Court and, as Chapter Two shows, thereby influence public policy beyond their limited time in the Oval Office. Through their appointments, especially when filling a crucial seat or a number of vacancies in short order, Presidents may indeed leave their mark on the Court's policy-making. On the bench, however, justices are sovereign and may disappoint their presidential benefactors, as well as find it difficult to refrain from off-the-bench activities. Instead of leaving the world of politics behind, the justices form a small political elite that may wield potentially enormous power.

Life in the marble temple constrains judicial behavior and the politics of making law. In historical perspective, Chapter Three examines the institutional dynamics of the Court and the changing working relations among the justices, and argues that the Court has become increasingly bureaucratic in response to growing caseloads. In addition, 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 Four. In explaining how justices decide cases and the process of opinion writing, Chapter Five 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 because it not only possesses the power to manage its docket but to set its substantive policy-making agenda. 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.

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 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 a pluralistic society as by what the Court says. The Court's policy-making, as with its rulings on abortion and school desegregation, also evolves with changes in its composition and in the country. In sum, the Court's influence on American life rests on a paradox. Its political power is at once antidemocratic 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."