

STORM CENTER

THE SUPREME COURT
IN AMERICAN POLITICS



DAVID M. O'BRIEN
SIXTH EDITION

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DAVID M. O'BRIEN

UNIVERSITY OF VIRGINIA



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For Benjamin, Sara, and Talia

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. 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. The fourth and fifth editions dealt with President Clinton's two appointees to the high bench, as well as incorporated new material made available in the papers of Justices Thurgood Marshall and Lewis F. Powell, Jr., along with those of President Richard M. Nixon.

This sixth, thoroughly updated, edition incorporates additional materials from the papers made available since the last edition at the Ronald Reagan Presidential Library. There is also much new research on how changes in the Court's composition affect its internal operations, 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 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 conser-

vatives 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."

Acknowledgments

IN RESEARCHING and writing the first edition of this book, I incurred a large number of debts. It is fair to say that I might never have embarked on the project had it not been for Chief Justice Warren Burger and his assistant, Mark Cannon. The opportunities they afforded me as a judicial fellow, and then as a research associate, in the Office of the Administrative Assistant to the Chief Justice were invaluable. Both later took an interest in the book and generously spent time talking with me and clarifying various matters. Although they may not agree with all my views, I remain grateful for the insights and kindness they gave me.

The experience at the Court provided a perspective, but only began my inquiry. The inquiry led to an examination of the private papers of fifty-eight justices (over half of all the justices who ever sat on the high bench), as well as the papers of seven presidents. While most of the collections are open to the public, access to some requires special permission. For their permission to use certain collections, I am grateful to Justice William J. Brennan, Jr., Paul Freund, Eugene Gressman, William E. Jackson, Mrs. Carolyn Agger Fortas, Mrs. Hugo Black, Hugo Black, Jr., and Justice Lewis F. Powell, Jr.

Assistance at various libraries was crucial to the study. David Wigdor and his splendid staff in the Manuscripts Division of the Library of Congress were always helpful. Paul Freund, Erika Chadbourn, and Judith Mellins made my stays at the Harvard Law School Library fruitful. Others who deserve mention for their attention and assistance are Bill Cooper of the University of Kentucky Library; Nancy Bressler and Jean Holiday of the Seeley G. Mudd Manuscripts Library at Princeton University; Patricia Bodak Stark of the Yale University Library; Dale Mayer of the Herbert Hoover Presidential Library; Carole Knobil of Special Collections at the University of Texas School of Law Library; Cynthia Fox of the National Archives and Records Service; Marjorie Barritt of the Bentley Historical Library at the University of Michigan; Michael Kohl of Special Collections at Clemson University; Karen Rohrer at the Dwight D. Eisenhower Library; Nancy Smith of the Lyndon Baines Johnson Library; Charles Warren Ohrvall of the Harry S. Truman Library; Dallas R. Lindgren of the Minnesota Historical Society; Gail Galloway and Diane Williams of the Curator's Office of the Supreme Court of the United States; and David Pride of the Supreme Court Historical Society. No less helpful were the staffs of the Manuscripts Division of Alderman Library at the University of Virginia; the John Marshall Papers Project at the College of William and Mary; the John Fitzgerald Kennedy Library; the Gerald R. Ford Library; the Hoover Institution on War, Revolution, and Peace; the Franklin D. Roosevelt Library; the Columbia Oral History Project and the Rare Books and Manuscripts Division in Butler Library at Columbia University; the library of the Cardozo School of Law at Yeshiva University; the National Archives at College Park, Maryland, which houses papers of President Richard M. Nixon; the Washington and Lee School of Law's collection of Justice Lewis F. Powell's papers; and the Ronald Reagan Presidential Library in Simi Valley, California.

The justices' papers did not end my inquiry, but instead raised further questions. Interviews and discussions of my ten-

tative conclusions saved me from some (though possibly not all) errors of judgment. For their time and insights, I am indebted to Chief Justices Warren Burger and William H. Rehnquist and Justices William J. Brennan, Jr., Sandra Day O'Connor, Lewis F. Powell, Jr., Potter Stewart, and John Paul Stevens. I am also grateful to Mark Cannon, William T. Gossett, Jr., Fred Graham, Sidney Fine, Paul Freund, Alpheus T. Mason, Walter Murphy, and Benno Schmidt. Justices Harry Blackmun, Thurgood Marshall, and Byron White graciously corresponded with me about the book.

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The second, third, fourth, and fifth editions incurred even more debt. I am especially grateful to Erwin N. Griswold for sharing his intimate knowledge of the Court. Steve York, producer of the PBS special "This Honorable Court," was also particularly kind in sharing portions of interviews with members of the Rehnquist Court that, alas, failed to make the final cut for the film but that were immensely helpful in updating this book. Justices William J. Brennan, Arthur Goldberg, Lewis F. Powell,

and John Paul Stevens provided me with additional insights. I also benefited when incorporating new material on the battle over Judge Robert H. Bork's nomination from discussions with members of a Twentieth Century Fund Task Force on Judicial Selection, for which I served as rapporteur. Walter Berns, Lloyd N. Cutler, Philip Kurland, Jack W. Peltason, and Michael M. Uhlmann were very helpful, even when we disagreed. Others deserving special acknowledgment include Toni House, the Court's public information officer, and Tony Mauro, Ronald Collins, A. E. Dick Howard, Saul Brenner, William Coleman, Philip Cooper, Louis Fisher, Paul Freund, Herbert Kaufman, Milton Handler, Chief Judge Howard T. Markey, and E. Barrett Prettyman. Christopher Banks, Stephen Bragaw, and Steve Brown, three of my much valued students and research assistants, cheerfully lent their labor on different editions.

This sixth edition incurs still more debt. I am grateful for the favorable reception earlier editions received and for the suggestions and support of colleagues and students. Along with many of those listed above who remain helpful, I am indebted to the staff of the Manuscripts Room of the Library of Congress for assisting me, as they have for almost two decades on my trips to conduct research. At Norton, Donald Fusting, Hilary Hinzmann, and Amanda Adams were immensely helpful on the first edition, and Don was a faithful editor on the second and third editions. Steve Dunn served as the editor of the fourth edition, Sarah Caldwell was editor of the fifth edition, and Ann Marcy worked on this sixth edition.

Claudine, my wife, continues to make life a joy. With the addition of our daughter, Sara, the second edition was affectionately dedicated to her and her big brother, Benjamin. The fourth edition was rededicated to them as well as to our further addition and their little sister, Talia. This sixth edition is affectionately rededicated to our children.

November 2001
Charlottesville, Virginia

D. M. O.

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