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SUPREME COURT POLITICS

The Institution
and Its Procedures

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SUSAN LOW BLOCH
THOMAS G. KRATTENMAKER

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SUPREME COURT POLITICS:

THE INSTITUTION AND ITS PROCEDURES

By

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Tributes

Three people planted the seeds of this book in the 1960s. Professor Glendon A. Schubert published *Constitutional Politics* in 1960. Subtitled “The Political Behavior of Supreme Court Justices and the Constitutional Policies That They Make,” this book introduced wider audiences to the view that the political and institutional dimensions of the Supreme Court could be studied systematically and that such study could enhance one’s appreciation of the quality of U.S. constitutional law. Professor J. Roland Pennock’s seminar in Public Law and Jurisprudence at Swarthmore College and Professor Louis Henkin’s seminar on The Supreme Court at Columbia Law School made this study come alive and raised many of the questions explored in this book.

Most of our work has consisted of a lot of research, seeking materials that might shed light on the politics of the Supreme Court. For magnificent help in conducting this research, we are indebted to hundreds of Georgetown University Law Center students¹ who have taken our seminar and found ever better materials for subsequent students to study. Most especially, we have been blessed in the past few years with a succession of energetic, dedicated, and talented research assistants who are virtually co-authors of this book. Each deserves a personal paragraph of thanks, but we have to settle for thanking them collectively. Thanks, then, to Mark Adams, Sharon Albright, Patrick Brown, Matthew McCabe, Katherine Miller, and Marc Sorini.

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Our families have helped us keep this project going, by pretending to be interested in reading the final product and by making space available, in countless ways, for the time necessary to get it done. Bless you, to Rich, Rebecca, and Michael Bloch and to Bevra, Ken, and John Krattenmaker.

¹ At the time we wrote this book, Thomas G. Krattenmaker was Professor of Law at Georgetown University Law Center.

The debt we owe to all the people mentioned above is incalculable. In the final analysis, however, what really drove us to organize and create this book was the inspiration we received from Justice John M. Harlan and Justice Thurgood Marshall, the finest public servants we have ever known and the best bosses we have ever had. If readers find things of value in this book, as we hope they will, please let that discovery be another testament to the memories of these great justices.

A Note on Editing

We did not want the materials selected for this book to appear as thirty second sound-bites, so we have tried to let our authors have their say. But we have been ruthless in trying to hold everyone to central points and we have cut out most of the citations.

Consequently, the reader should know that the original versions of the writings excerpted below are often quite different, at least in form, from the way they are presented here. Footnotes have been dropped without indicating their demise and, where large chunks of text have been edited out (rather than a word or two inside a sentence), these omissions are not generally indicated.

Our overriding intent, however, has been to reproduce faithfully the facts, arguments, and conclusions presented. If you think we have erred in this regard, please let us know.

Lots of people helped us put these pages together. Everyone who works in the Office of Administration at Georgetown University Law Center made a substantial contribution to this effort. Particularly heroic assistance, for which we are deeply grateful, came from Charles Barnes, Mary Ann DeRosa, Lenard Gavin, Toni Patterson, and Vicki White. In addition, one of our own students, Antonio Anaya, provided invaluable proofreading assistance.

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INTRODUCTION

A. SCOPE AND PURPOSES OF THE BOOK

Two generations ago, then-professors Frankfurter and Landis, in their classic treatise, *The Business of the Supreme Court*, wrote that “the history of the Supreme Court, as of the Common Law, derives meaning to no small degree from the cumulative details which define the scope of its business, and the forms and methods of performing it—the Court’s procedure, in the comprehensive meaning of the term.”¹ We take our cue from this observation. Like Frankfurter and Landis, we believe that the Supreme Court’s substantive output, as any other organization’s, is influenced by the structure of the institution, its personnel and its procedures.

As lawyers, scholars, students, or citizens, we care principally about the end results of the Supreme Court’s processes—the three or four volumes of decisions the Court hands down each year. These decisions constitute, in a very practical sense, our constitutional law. But if we are to comprehend that law fully, we should know something about the institution that generates it. For those who wonder where all this constitutional law comes from, and how it gets made, this book provides some answers.

The Constitution itself has very little to say about the Supreme Court of the United States (as it is officially designated). Article III mandates that there shall be one Supreme Court, grants the justices life tenure and protection against diminution in salary, and defines the Court’s jurisdiction.² Article II distributes power over the process of appointing justices,³ and Article I implies that one of the justices should serve as Chief Justice.⁴

The Framers left the other institutional details of the Court and its processes to be worked out over time. Thus, it was left to Congress, the President, the Court, or the habits of history to answer such questions as: What kinds of people get appointed to the Court? What kinds of cases will the Court adjudicate? How do these cases get onto the Court’s docket? How might the process of case selection influence the kinds of cases chosen for plenary review? How do the justices, individually and collectively, reach their decisions and draft their opinions? What roles

1. Felix Frankfurter & James Landis, *The Business of the Supreme Court* vi (1928).

2. U.S. Const. art. III, §§ 1, 2.

3. U.S. Const. art. II, § 2.

4. U.S. Const. art. I, § 3.