

Engdahl has written an intellectually stimulating book that contains a number of interesting and useful ideas. At the same time, despite its own suggestions to the contrary, the book also fulfills the role of a more conventional Nutshell by providing helpful explanations of the evolution and modern status of various constitutional doctrines.

Engdahl's goal for his book, however, is more ambitious, for he attempts not only to describe, but also to defend, a scheme of judicially enforced limitations on congressional power. Yet in the context of federalism, no less than elsewhere, we need to know why the judiciary should be restricting the operation of the legislative process. If the appeal is to the wisdom of the framers, we need to know whether their judgments are still wise in the 1980s, and, if not, why their intentions should nonetheless continue to control. If the appeal is not so much to the framers as to functional considerations guiding the proper operation of our modern democracy, this functional analysis must be set forth and defended. Engdahl makes no serious effort on either front.<sup>8</sup> As a result, his attempt to shore up the law of constitutional federalism is incomplete, and therefore unsuccessful, because such an effort cannot succeed without a more persuasive theoretical foundation.

**STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS.** By David M. O'Brien.<sup>1</sup> New York, N.Y.: W. W. Norton & Company. 1986. Pp. 384. Cloth, \$18.95; Paper, \$9.95.

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Professor David M. O'Brien has brought forth a readable but serious book about the Supreme Court, appropriate for adoption in undergraduate upper division courses, or as collateral reading in law school courses in constitutional law, or simply as an introduction to the Court for intelligent laymen. From the perspective of a

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8. Indeed, his argument that the judiciary should enforce significant limitations on the power of Congress seems at least somewhat at odds with his critique of the Supreme Court's dormant commerce clause doctrine. In the course of that critique, he contends that "when debatable choices must be made among competing public interests, or between public and competing private interests, one might well wonder whether they ought not be made through the political rather than the judicial process," and he adds that "interests locally disadvantaged *do* have political representation in Congress."

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seasoned political scientist, Professor O'Brien covers the process of appointing Justices, the institutional life of the Court, and the implementation of its decisions. In a little over 300 pages, he refutes several familiar notions: that the Court should be apolitical; that the Justices are legal monks; that the Court is a collegial body; that it is primarily the Justices who write their opinions; that the denial of certiorari has no meaning; and that the Justices prize collective opinions more highly than those by individual Justices. While much of this will not come as a shock to the seasoned Court watcher, he or she, too, can benefit from insights developed by O'Brien in his service as a Judicial Fellow at the Supreme Court, from interviews and correspondence with all the sitting members of the Court save Antonin Scalia, from considerable research into the unpublished papers of various Justices, and from the exploitation of such under-utilized resources as transcripts of oral argument.

## I

While recognizing that the Supreme Court is a "temple of law," O'Brien also stresses that it is a "fundamentally political institution," that the Justices compete for influence and "the Court itself is locked in a larger struggle for power in society." He illustrates this in the first chapter with a discussion of *Roe v. Wade*, placing it in the context of the 1960s movement to liberalize abortion laws. O'Brien recreates the policy-making process within the Court on the basis of memoranda from the Brennan Papers in the Library of Congress. We see the pressures that Justice Blackmun was under from Justices Douglas and Brennan; why Blackmun sought re-argument; and the efforts—in retrospect appropriate—that Blackmun made at the time the opinion came down to insure accurate press coverage.

Like any good political scientist, O'Brien is aware that a Supreme Court decision is often merely one stage in a long political struggle. *Roe v. Wade*, he tells us, "left numerous questions unanswered and afforded ample opportunities for thwarting the implementation of its mandate." O'Brien then briefly indicates the reactions of interest groups, scholars, and others. Little of this is surprising in a text on the Supreme Court, but O'Brien highlights his points with a nose for relevant and vivid facts that are useful even for the Court sophisticate. He goes, for example, to the *Statistical Abstract* to learn that the number of illegal abortions declined from nearly 750,000 before *Roe* to an estimated 10,000 in 1980, while the number of legal abortions grew from 744,610 the year following the decision to over 1.5 million in 1981, and in 1982-83

there were an average of 426 abortions per 1000 live births. He also offers data from public opinion polls indicating that 46% favored the *Roe* decision and 45% opposed it, but that 60% oppose a constitutional amendment to make abortions illegal.

In his second chapter O'Brien forcefully debunks the myth that appointments to the Supreme Court should be made on the basis of merit. Not only is merit difficult to define, but it "competes with other political considerations like personal and ideological compatibility, with the forces of support or opposition in Congress and the White House, and with demands for representative appointments on the basis of geography, religion, race, gender, and ethnicity."

The selection of a Justice is, as Harlan Fiske Stone put it, like a "lottery," and the verdict turns less on merit than on political visibility, support, and circumstance. O'Brien makes this point tellingly by referring to the appointment of Benjamin Cardozo, which has always been viewed as the quintessential triumph of merit. That it may have been, but it was also good politics: President Hoover had been badly embarrassed by the defeat of his nominee to succeed Edward Sanford in 1930, John J. Parker, and thus was searching for an appointee whose reputation was unimpeachable.

O'Brien also knows that presidents are not completely free to pack the Court with political associates and ideological kin, for other political factors intervene, such as religion, geography, race, and gender. In the aftermath of the Bork-Ginsburg fiasco, many will agree with O'Brien's reminder that such "Court packing" depends upon the state of presidential prestige and political expediency. Perhaps some of the unwise support for a constitutional amendment to limit federal judges and Justices to a fourteen-year term will not ebb.

The core of the book is three chapters which, more reliably than any other work, portray life behind the velvet curtain. Focusing upon the "process by which the Court establishes and maintains its internal procedures and norms and defines and differentiates its role from that of other political branches," O'Brien writes of the psychological interdependence of the Justices, their lack of political accountability, and the norms of secrecy, tradition, and collegiality.

In separate works, both O'Brien and I have attempted to come to grips with the effects of changed staffing patterns upon the Court's decision-making process.<sup>3</sup> We are not far apart in our con-

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3. J. Morris, *Can the Supreme Court be Led? A Reevaluation of the Role of Chief Justices* (Sept. 1986) (paper delivered at annual meeting of the American Political Science Association, Washington, D.C.). In revised form this discussion will appear in my forthcoming book on the Office of Chief Justice of the Supreme Court.

clusions. O'Brien argues that the Court has become increasingly bureaucratic and that this has reinforced the traditional independence of the Justices. I believe that he is the first scholar to capture the significance of the vast increase in the number of law clerks. His discussion of *Law Clerks in the Chambers* is the best guide I know to how clerks are being used by the Court. The clerks play an indispensable role in deciding what to decide. Although he nowhere states this explicitly, he implies that the Justices themselves rarely read petitions for certiorari.<sup>4</sup> O'Brien considers the expanded role of law clerks in screening cases "significant and problematic." He appears particularly concerned about the impact of the clerks upon the opening (September) conference of the term. Since the Justices only discuss in conference those petitions for certiorari which at least one Justice wants to discuss, and because the Justices discuss only one-fifth of the term's gate-keeping docket at the conference, perhaps sixteen percent of the work of the year is "screened out by law clerks and never collectively discussed and considered by the Justices." The clerks that do this screening ordinarily have been at the Court for less than three months.

O'Brien says that the clerks—whose work also includes the preparation of bench memoranda, comments on the responses of the Justices to the draft opinions from their chambers, cite checking and proofreading—are, in most chambers, writing the first drafts of opinions of the Court. As the term draws to a close, the clerks assume an even greater role in opinion writing.

O'Brien believes that the increase in the number of law clerks (from two per side judge in 1970 to four in 1976) has had a noticeable effect on the Court: opinions are longer and more heavily footnoted and the number of concurring and dissenting opinions has steadily increased. He argues, as I have, that delegation of work to larger staffs has partially transformed the Justices' role from judicial to administrative, and diminished their collegiality as well. Although he acknowledges that institutional norms promote a shared conception of the role of the Court as a tribunal for resolving only issues of national importance, O'Brien sees the Justices competing for influence in setting the Court's agenda. After examining Justice Brennan's docketbook for the 1973 Term, he states that the number of petitions unanimously granted had dropped from what it had been from 1947 to 1957 by half to less than 2%. Still, there was unanimity in most of the denials. O'Brien is particularly critical of the Court's refusal to explain why review is denied: "Although enabling the Court to manage its business, denials invite confusion

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4. Justice Brennan is an exception.

and suspicion . . . ." He is also critical of the increasing use of summary decisions.

Turning to cases that are granted full review, O'Brien challenges the significance of the conference on the merits and associates its relative unimportance with the growth of separate opinions. It seems unlikely that many minds are changed as a result of the formal conference. Updating Henry Hart's classic (and controversial) 1959 article,<sup>5</sup> O'Brien concludes that each petition for certiorari on the "discuss list" is eligible for six minutes of consideration; each case that is set for oral argument can be given about twenty-nine minutes, or about three minutes per Justice, if they speak *seriatim*.

Two graphs illustrate the enormous increase in concurring, dissenting, and other opinions over the past half-century. In the last years of the Hughes Court (1937-40), the Justices produced about 144 institutional opinions per term and thirty-five concurring, dissenting, and separate opinions. From 1969 to 1980 the Burger Court averaged 138 institutional opinions and 193 concurrences, dissents, and separate opinions. Dissents were up by a multiple of ten. According to O'Brien this was due to several factors: individual opinions are now more highly prized than opinions of the Court; the docket now has few easy or uncontroversial cases; there is less time for judicial negotiation and bargaining; and there are more law clerks.

O'Brien's final chapter briefly considers the political struggles that occur *after* opinions are handed down. He stresses the importance of press coverage of the Court, the effect of ambiguity in opinions, and the relevance of public opinion. There is also an interesting discussion of the Court's "attentive public," its immediate constituents: the Solicitor General, Attorney General, and Department of Justice; counsel for federal agencies; states' attorneys general; and the legal profession.

## II

O'Brien's assessment of Chief Justice Burger, for whom he worked, can be gleaned from interesting comments in various parts of the book. He considers Burger more like Vinson than Warren,<sup>6</sup> noting that, like Vinson, Burger does not have a "legal mind" or a "taste for the law" outside the area of criminal procedure. He faults Burger for being under-prepared for conference, where he re-

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5. Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

6. O'Brien thinks Warren was "more than a skilled politician" and that he had "more intellectual ability than many critics give him credit for."

lied heavily upon his law clerks' memoranda. This very lack of forethought allowed him to join a perceived majority, enabling him to assign the opinion of the Court. O'Brien also recognizes that, despite the Chief's intellectual limitations, the Court in the 1970s and 1980s was moving in the direction of Burger's views, especially in criminal procedure, his favorite field.

Burger gets high marks as a court manager. At the end of Earl Warren's last term, the Court even lacked a xerox machine, and entire days were devoted to the delivery of opinions and the admission of attorneys to the Court's bar. Burger is credited with bringing "Taft's marble temple into the world of modern technology and managerial practices." Thanks to Burger, the Supreme Court building has a larger and more diversified workforce, new technology, and new, specialized offices. Among the overdue changes under Burger was the general limitation on oral argument to thirty minutes per side.

O'Brien gives Justice Powell deserved credit for his leadership in expediting the Court's disposition of its caseload. Powell supported creation of the central legal staff (the two Legal Officers), and he suggested the pooling of law clerks to work on petitions for certiorari. I would add that Powell persuaded each Justice to use a fourth law clerk, and he was a pioneer in using word processing equipment in his chambers.

*Storm Center* implies that Burger undercut his own leadership by not bringing some administrative matters to the conference, including his own proposal for an intercircuit tribunal. Furthermore, as a result of Burger's unwillingness to bear the burden of screening all the unpaid petitions for certiorari, the Chief Justiceship lost the central role it had had, since the time of William Howard Taft, in dealing with the *in forma pauperis* petitions. After Burger brought the problem to the conference, his colleagues rejected the options of either evenly dividing the petitions or employing a revolving panel of senior judges to sift them. Instead, they decided that each Justice would be responsible for *all* of the petitions, as they already were with paid cases. The added workload was offset by the addition of more law clerks and, later, the creation of the "cert pool" by a majority of the Justices. Essentially, then, responsibility for screening paid and unpaid cases passed from the Chief Justice (and his law clerks) to the law clerks from all the chambers.

O'Brien properly credits Burger with "considerable personal charm and a good sense of humor," "but also a temper." His opinion of Burger as a "social leader" is that he did "about all he can do to promote collegial relations within the Court," which is far more

charitable than some recent public comments of Justice Brennan. O'Brien concludes that Burger's great accomplishments were in the realm of judicial administration, but these are not discussed at any length.<sup>7</sup>

Professor O'Brien's assessment of the nine Justices as a working small group makes clear, at least to me, that the nine independent law firms—the Justices and their clerks—are where most of the important work is going on. Discussions among the Justices no longer play a central role. Collegiality has diminished as the caseload has increased; deliberation now occurs mostly in chambers before and after conference. Communication among the Justices tends to be written and formal. Truly collective decisionmaking, as in the Nixon tapes case, is exceedingly rare, having occurred perhaps two or three times in the past thirty years. O'Brien concludes:

The Court now functions more like a legislative body relying simply on a tally of the votes to decide cases than like a collegial body working toward collective decisions and opinions.

One consequence of this lack of collegiality, of course, is the plethora of individual opinions which may be more highly prized by the Justices than opinions of the Court. It was one thing for a Justice or two to believe that his place in history might be due largely to his dissents. It is quite another for most Justices to think that their reputation will be determined largely by their concurring opinions, and possibly even by those opinions in which they concur in part and dissent in part. Justice Stewart reflected sadly that even though the business of the Court is to give institutional opinions, "that view has come to be that of a minority of justices."

### III

*Storm Center* is based upon considerable archival research. The papers of Chief Justices Taft, Hughes, Stone, Vinson, and Warren, of Associate Justices Frankfurter (Black, Murphy, Reed, Sutherland, and Van Devanter) among others, were culled, as were oral histories given by Justices Clark, Marshall, Jackson, and Douglas. O'Brien also employed the relevant collections in the Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, and Ford Libraries. While his research rarely yielded startling insights, there are some interesting (and occasionally amusing) pieces of information. We learn, for example, that Hugo Black left a note in his private papers to "correct for posterity any idea about Pres.

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7. For a good discussion, see Tamm & Reardon, *Warren E. Burger and the Administration of Justice*, 1981 B.Y.U. L. REV. 447-521.

Roosevelt's having been fooled about my membership in the Klan.'” The Fortas papers yield a strong objection from Potter Stewart in 1969 to referring to “what is going on in Vietnam as a ‘war.’” An oral history interview with Felix Frankfurter (who comes off badly in this book, as he has in much recent scholarship) yielded this gem, although readers may differ as to whether it reveals more about Robert F. Kennedy, Arthur Goldberg, or Frankfurter himself:

What does Bobby understand about the Supreme Court? He understands about as much about it as you understand about the undiscovered 76th star in the galaxy. . . . He said Arthur Goldberg was a scholarly lawyer. I wonder where he got that notion from.

We also learn that Charles Evans Hughes permitted FDR to run a telephone line from the White House to the Court in order to learn immediately the Court's decision in the *Gold Clause* cases, and that Justices Brennan and Marshall have programmed the computer system in the office of the Clerk of the Supreme Court to print automatically all dissents from denials of certiorari where capital punishment is involved.

*Storm Center* contains thirteen tables and charts, several of which are very valuable. One table, for example, lists all major legislation affecting the jurisdiction and business of the Court since 1789. O'Brien updates the work of Frankfurter and Landis and Eugene Gressman in another table, providing the number of cases by subject matter (twenty categories) over various intervals from 1825 to 1980. In another table he compares the average number of dissents per term of “great dissenters” from William Johnson to the second Justice Harlan with the members of the Burger Court.

Occasionally, O'Brien gives an incomplete picture because he relied too much upon primary sources. He discovered in papers of the Truman Library that the Truman administration considered nominating Florence Allen as the first female Justice, but O'Brien missed the far more important campaign for Allen's elevation during the Roosevelt administration, a story chronicled by Beverly Blair Cook.<sup>8</sup>

I was frustrated only in those few places where O'Brien's revelations were not footnoted in sufficient detail to permit a clear idea of their basis without undertaking a trip to a presidential (or other) library. Among these is the statement that Charles Evans Hughes was “notoriously inclined to keep the best opinions for himself”; that Cardozo strongly disapproved of Hughes's Court-packing let-

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8. Cook, *The First Woman Candidate for the Supreme Court—Florence E. Allen*, 1981 Y.B. SUP. CT. HIST. SOC'Y 19.

ter and would have refused to sign it; and that Stone cultivated FDR and offered advice "even on the Department of Justice's strategies and conduct of criminal prosecutions."

#### IV

*Storm Center* is one of the best books on the Court published for the general public since Anthony Lewis's classic, *Gideon's Trumpet*. It is far more reliable, though less fun, than *The Brethren*. While it lacks the literary felicity and penetration of John P. Frank's *Marble Palace*, that book is out-of-date and out-of-print. Bernard Schwartz's *Super Chief*, a history of the Warren Court, was a brilliant contribution to our knowledge of the inner workings of the Court, but its 772 densely packed pages tell more about the penguins than even the penguin keepers would want to know! Its popular spinoff was not a very good book.

*Storm Center* is particularly well-suited for use in upperclass undergraduate courses in political science dealing with constitutional law and the Supreme Court. Its appearance is most timely, as the best short history of the Court is twenty-seven years old;<sup>9</sup> the only volume with more than four case studies deals with no case beyond 1954;<sup>10</sup> and the one collection of biographical sketches of the Justices is now out-of-print.<sup>11</sup>

What we do have available are well-executed but dry paperback texts, focusing largely upon the selection of Justices, gate keeping, decisionmaking, and decisional outputs;<sup>12</sup> others considering the federal court system as a whole, with separate chapters on the Supreme Court,<sup>13</sup> and still others treating both the federal and state judicial systems.<sup>14</sup> An instructor might choose to assign any of several fine anthologies focusing on constitutional interpretation,<sup>15</sup> or concentrating more broadly on the judicial process.<sup>16</sup> Finally, one may assign more specialized books about the appointment of Justices and their characteristics,<sup>17</sup> the Reagan administration and the

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9. R. McCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

10. *QUARRELS THAT SHAPED THE CONSTITUTION* (J. Garraty ed. 1964).

11. A. DUNHAM & P. KURLAND, *MR. JUSTICE* (rev. ed. 1964).

12. E.g., L. BAUM, *THE SUPREME COURT* (2d ed. 1985); S. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* (2d ed. 1984).

13. H. BALL, *COURTS AND POLITICS: THE FEDERAL JUDICIAL SYSTEM* (2d ed. 1987); R. CARP & R. STIDHAM, *THE FEDERAL COURTS* (1985); S. GOLDMAN & T. JAHNIGE, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* (3d ed. 1985).

14. E.g., H. ABRAHAM, *THE JUDICIAL PROCESS* (5th ed. 1986); L. BAUM, *AMERICAN COURTS* (1986).

15. E.g., M. CANNON & D. O'BRIEN, *VIEWS FROM THE BENCH* (1985).

16. E.g., W. MURPHY & C. PRITCHETT, *COURTS, JUDGES & POLITICS* (4th ed. 1986).

17. H. ABRAHAM, *JUSTICES AND PRESIDENTS* (2d ed. 1985).

Court,<sup>18</sup> or the Court's procedures and customs.<sup>19</sup> *Storm Center* offers the alternative of a readable, reliable, up-to-date, general book on the High Court. College and law school professors take note.

I regret the necessity of adding one unpleasant fact: the binding of my hardcover copy was exceedingly flimsy. *Caveat emptor*.

### SEPARATION OF POWERS—DOES IT STILL WORK?

Edited by Robert A. Goldwin<sup>1</sup> and Art Kaufman.<sup>2</sup> Washington, D.C.: American Enterprise Institute for Policy Research. 1986. Pp. xi, 193. Cloth, \$21.50; paper, \$11.00.

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I confess that I would have abandoned this volume somewhere in midstream had I not committed myself to review it. As it turned out, that would have been a mistake. I would have missed the final essay, a gem by James Ceaser, which rebuts much of the formalism and reformism of the previous essays.

The problems begin with the title. Most of the eight essays in the book do not really answer the question it poses: does the separation of powers still work? Rather, we have here a poorly joined debate about whether the American political system suffers from deadlock and whether, since the deadlock results from the separation of powers, constitutional changes are necessary. It is an argument that has been floating around for some time but that has been given a new immediacy and audience—or funding—by the Bicentennial. The real subject is perceived policy-making deadlock and political fragmentation in American government. A systematic analysis of the separation of powers in contemporary American policymaking is nowhere in sight.

By now the protagonists are familiar. Lloyd N. Cutler, Washington lawyer and member of the Carter administration, opens the volume with an adaptation of an academic lecture that had appeared in *Foreign Affairs* in 1980. Noting the difficulty of assembling congressional majorities behind coherent programs (which, it

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18. E. WITT, *A DIFFERENT JUSTICE: REAGAN AND THE SUPREME COURT* (1986).

19. J. SCHMIDHAUSER, *JUDGES AND JUSTICES* (1979).

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