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Storm Center: The Supreme Court in American Politics

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STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS. By *David M. O'Brien*. New York: W.W. Norton & Co. 1986. Pp. 384. \$18.95.

In *Storm Center: The Supreme Court in American Politics* David M. O'Brien¹ offers a broad perspective on "the political struggles among the justices and between the Court and rival political forces"

1. David M. O'Brien received his B.A. (1973), M.A. (1974), and Ph.D. (1977) from the University of California, and is an Associate Professor in the Woodrow Wilson Department of Government and Foreign Affairs at the University of Virginia. He has been a judicial fellow and research associate in the Office of the Administrative Assistant to the Chief Justice in Washington, D.C. He is the author of several books and articles, including *THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT* (1981) (arguing against a public "right to know" under the first amendment) (reviewed at 81 MICH. L. REV. 880 (1983)); *PRIVACY, LAW, AND PUBLIC POLICY* (1979); *The Seduction of the Judiciary: Social Science and the Courts*, 64 JUDICATURE 8 (1980) (arguing against the use of social science in judicial decision-making); and *Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law*, 64 JUDICATURE 285 (1980) (same).

(p. 13). O'Brien's narrative spans the Court's entire history. *Storm Center* chronicles the rigors of an eighteenth-century justice riding circuit on horseback (pp. 101, 104-05), describes the varied and ignominious quarters the Court has inhabited through the years (pp. 105-08), and documents the Court's most recent institutional adaptations to its burgeoning caseload (pp. 135-46). *Storm Center* does not, of course, offer any insight into Chief Justice Rehnquist's and Justice Scalia's appointments given the recency of those events (*Storm Center* thus effectively ends with the demise of the Burger Court), but the book is nonetheless panoramic in scope and quite contemporary.

Because of its breadth, *Storm Center* does not give detailed treatment of any single incident or occasion, although the book makes *de rigueur* mention of nearly all the popular Court anecdotes — and many not so widely known. The reader is reminded that Justice Hugo Black was once a member of the Ku Klux Klan (p. 70), that Justice Abe Fortas was so close to President Lyndon Johnson that he wrote many of LBJ's speeches (p. 91), that the junior justice is the doorkeeper during the always private conference sessions (p. 185), and that Chief Justice Burger delegated the task of recording conference votes to Justice O'Connor in part because he made occasional mistakes recording those votes (p. 190). One also discovers that the justices once wore English wigs and colored robes.² In fact, the homilies reproduced throughout *Storm Center* are an unrestrained delight. When Justice Holmes voted against an administration proposal, President Theodore Roosevelt (who had appointed Holmes) observed that he could "carve out of a banana a Judge with more backbone than that!" (p. 83). Justice Jackson, reversing himself on a position he had taken as Attorney General, explained, "The matter does not appear to me now as it appears to have appeared to me then" (p. 82). And O'Brien, in describing how justices regard their places in history, repeats Adam Smith's words that they, like all political actors, desire "not only to be loved, but to be lovely" (p. 100).

This anecdotal style is in no way objectionable; rather, it complements *Storm Center's* organization quite well. The book is divided into the following successive sections: "A Struggle for Power"; "The Cult of the Robe"; "Life in the Marble Temple"; "Deciding What to Decide"; "Deciding Cases and Writing Opinions"; and "The Court and American Life." O'Brien begins by placing the Court in the stream of American politics, then attempts (as fully and accurately as is possible, one supposes) to describe how justices get to be justices,

2. P. 103. For an even more topical description of Court life, see the work sponsored by the Supreme Court Historical Society, M. HARRELL & B. ANDERSON, *EQUAL JUSTICE UNDER THE LAW: THE SUPREME COURT IN AMERICAN LIFE* (1982), produced in cooperation with the National Geographic Society and graced with the Geographic Society's typically high-quality, full-color photographic documentation. For the definitive work for practitioners before the Court, see R. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* (6th ed. 1986).

how they accept and decide cases, and what may happen once a decision is made. O'Brien has chosen to organize *Storm Center* much like earlier works which focus exclusively on the workings of the Court.³ Throughout *Storm Center*, Court anecdotes lend color and form to O'Brien's narrative, resulting in easy and enjoyable reading.

Storm Center's anecdotal form allows O'Brien to make thorough use of his extensive sources. O'Brien cites and quotes much generally inaccessible material such as the justices' personal letters, diaries, and memoranda. By his own count, O'Brien's inquiry led to the examination of the papers of fifty-five justices (over half of all those who ever sat on the high bench) and of six presidents.⁴ Clearly, his was a scholar's opportunity unparalleled in recent times. Perhaps the only drawback to *Storm Center's* form is that O'Brien and his editors elected to gather the footnotes at the book's end, so that one must repeatedly flip back and forth through the book in order to read the notes in conjunction with the text. Mercifully, O'Brien's discussion is largely confined to the text itself.

O'Brien's major premise fares well under this use of the material. Briefly, his thesis is that the institutional dynamics resulting from the burden of a dramatically increased caseload have led to a more bureaucratic, less collegial, and less certain and predictable Court.⁵ Perceiving the Court's instability, the public and rival political institutions are more likely to resist its influence (p. 320), a development which is particularly threatening insofar as Court rulings are not self-executing (p. 14). O'Brien's thesis roughly parallels a point made by Richard Neustadt in *Presidential Power*⁶ regarding the Executive Branch, *i.e.*, that political actors must evaluate not only the effect of their actions on others, but also the effect of their actions on their own ability to wield power at a later date. Because this parallel exists (and by choosing, articulating, and then supporting this not-so-novel position), O'Brien fails to break new ground and thus disappoints the sophisticated reader. *Storm Center's* method is more derivative than original, its use of the material more encyclopedic than instructional, and its effect more corroborative than groundbreaking.

3. See, e.g., L. BAUM, *THE SUPREME COURT* (2d ed. 1985) (the Court, selection of cases, decisionmaking, Court impact on American life); S. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* (2d ed. 1984) (the Court's role, selection of justices, selection of cases, decisionmaking and opinion writing, Court impact on American life).

4. P. 17. Reacting in jest to O'Brien's evident pride in his own industry, this reader noted that one still must trust that O'Brien selected the pertinent half of the justices and the salient six presidents.

5. Pp. 14, 152-56. The Court's increased workload has spawned much concern and many proposals to alleviate the burden. See L. BAUM, *supra* note 3, at 104-07 (responses to caseload growth); G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* (1976); Note, *Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court*, 97 HARV. L. REV. 307 (1983).

6. R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* (passim) (1976).

In conceiving, researching, and writing *Storm Center*, O'Brien must have known that his work would be compared with Woodward and Armstrong's late-1970s, gossipy chronicle of life on the Burger Court, *The Brethren*.⁷ Quite tellingly, both titles, *The Brethren* and *Storm Center*, evoke Court images which are the antithesis of the Courts the authors actually describe. This fact is a testament to the sarcasm of Woodward and Armstrong and to overstatement by O'Brien. Notably, O'Brien's extraordinary access to Court sources stands in stark contrast to Woodward's and Armstrong's experiences in researching *The Brethren*. In writing *Storm Center*, O'Brien interviewed, discussed or corresponded with every member of the Court then sitting, and O'Brien's acknowledgements read like a who's who of the legal right-center (pp. 17-19). Moreover, O'Brien frankly divulges his indebtedness to Chief Justice Burger by stating that "I might never have embarked on the project had it not been for Chief Justice Warren Burger and his assistant, Mark Cannon" (p. 17). When researching *The Brethren*, Woodward and Armstrong asked for the assistance of Chief Justice Burger (who declined),⁸ and in *The Brethren* Chief Justice Burger appears everywhere as the antagonist.⁹

Indeed, that the justices so willingly collaborated with O'Brien on *Storm Center*, *The Brethren's* antidote, may be an indication of some of the justices' feelings about *The Brethren*. On the other hand, the willingness of the associate justices and others to share material with O'Brien may have been a gesture of deference to Chief Justice Burger, in whose Office of the Administrative Assistant to the Chief Justice¹⁰ the author worked, both as a judicial fellow and as a research associate. If Woodward and Armstrong gave the outsider's view, O'Brien might be perceived as the quintessential insider, although deference to O'Brien's academic credentials and integrity require that one regard his views as his own. In sum, if neither *The Brethren* nor *Storm Center* give an entirely balanced view of the inner workings of the Court, the latter surely comes closer to how the justices would *like* the Court to be perceived, which, although it may not be the best indication of reality, makes *Storm Center* worth reading for that fact alone.

— Nelson P. Miller

7. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

8. *Id.* at 3.

9. *E.g., id.* at 64-65.

10. For a more singular description of the Chief Justice's administrative functions than can be found in *Storm Center*, see P. FISH, *THE OFFICE OF CHIEF JUSTICE OF THE UNITED STATES: INTO THE FEDERAL JUDICIARY'S BICENTENNIAL DECADE* (1984).