

general public as special pleaders for ideological causes or even as appendages to transitory political factions.”

**THE UNPUBLISHED OPINIONS OF THE WARREN COURT.** By Bernard Schwartz.<sup>1</sup> New York: Oxford University Press. 1985. Pp. ix, 470. \$29.95.

**SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT.** By Bernard Schwartz. New York: Oxford University Press. 1986. Pp. 245. \$19.95.

*David M. O'Brien*<sup>2</sup>

Both of these books fall into that growing genre of literature that might be dubbed “insiders’ ” views of the Supreme Court. As such, they are descendants of two other books that penetrated the marble temple in pathbreaking—though sharply differing—ways. The first, *The Unpublished Opinions of Mr. Justice Brandeis*, appeared in 1957 under the editorship of the late Alexander Bickel.<sup>3</sup> The second and more controversial work was *The Brethren*, written by two journalists, Bob Woodward and Scott Armstrong.<sup>4</sup> It is instructive to compare Professor Bernard Schwartz’s efforts with these predecessors.

## I

Bickel’s volume broke ground by bringing to light eleven opinions that Brandeis had suppressed for one reason or another. It remains rewarding reading not only for the opinions but for Bickel’s illuminating analysis. Professor Schwartz acknowledges a debt to Bickel. In his preface to *The Unpublished Opinions of the Warren Court*, he explains that when rummaging through collections of Justices’ papers for his biography of Earl Warren it occurred to him

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1. Edwin D. Webb Professor of Law, New York University.

2. Associate Professor, Woodrow Wilson Department of Government and Foreign Affairs, University of Virginia.

3. A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957).

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

that "it would be as worthwhile to publish these opinions as it was for Alexander M. Bickel to publish" those in his volume.

The presumption that publication of working drafts is necessarily "worthwhile," however, needs reexamination. Schwartz says that he is interested in "what might have been" had draft opinions commanded acceptance or been deemed appropriate to release. Any implication that they even come close to being as important as what was agreed to and issued by the Justices is unfortunate. The official reports clearly remain paramount. What and how much working drafts add to our knowledge of the Court largely turns on how they are used and what purposes they serve. The Justices' private papers obviously open up the judicial process, yet by themselves they make for no more (and usually less) illuminating reading than final published opinions. Whether we gain insight from a collection of them largely depends on the accompanying commentaries and explanations.

Bickel was encouraged to undertake his project by Justice Frankfurter, shortly after clerking for him. Frankfurter had perhaps a deeper understanding of and devotion to the Court's history than any other Justice. And he had Brandeis's working papers in his chambers for almost twenty years. But Frankfurter was also perturbed by Alpheus Mason's biographies of Brandeis and of Harlan F. Stone, especially the latter, which drew extensively on Stone's working papers. So, in August 1954, he sent Brandeis's papers (to which Mason had not had access) to Harvard Law School. With special access to them, Bickel undertook the task of placing Brandeis's philosophy of self-restraint and the work of the Court in "the proper perspective." Frankfurter subsequently sought to ensure that other jurists were properly enshrined in history. He enlisted Mark DeWolfe Howe, Philip Kurland, Gerald Gunther, and Max Freedman to write definitive "authorized" biographies of, respectively, Oliver Wendell Holmes, Robert Jackson, Learned Hand and, of course, Frankfurter.

At bottom, most such projects seek to fortify the places of their subjects in history. There are, however, some important differences. Bickel set out merely to illuminate and confirm Brandeis's stature as a consummate craftsman and advocate of judicial restraint. Schwartz, on the other hand, ambitiously seeks to persuade us that Earl Warren dominated the Court. In his words and emphasis, "It *Was* the *Warren* Court."

Schwartz's ambition is a burden that his volume cannot bear. To be sure, Warren's leadership, and his vision of simple justice, helped to create an egalitarian revolution that elevates him above

the ranks of most other Chief Justices. But Schwartz generally refuses to acknowledge the leadership of others who sat with Warren. In particular, he takes great umbrage at the suggestion, made by Dennis Hutchinson in a perceptive review, that his biography of Warren reveals more the leadership qualities of Justice Brennan than those of the Chief Justice.<sup>5</sup> (Only when he deals with the Burger Court in *Swann's Way* does Schwartz come close to giving Brennan his due.) Eleven cases serve as the basis for the chapters of *The Unpublished Opinions of the Warren Court*, which include thirty-one memoranda and opinions in various stages of undress. Yet there is not one from Justice Brennan, even though he often provided the intellectual and legal underpinning for Chief Justice Warren's moral intuitions, as well as being a talented consensus-builder. There is no hint of his major role in cleaning up Warren's drafts in such crucial cases as *Miranda v. Arizona* and *Terry v. Ohio*. Nor do readers learn about how he stitched together the Court's opinion in *Baker v. Carr*, which Chief Justice Warren later said was the greatest achievement of his years on the bench. Instead, Schwartz offers seven memoranda and draft opinions written by Warren or his clerks; five from Justice Douglas; and three each from Justices Black, Clark, Fortas, Harlan, and Stewart; as well as one from Goldberg and one from White.

Schwartz's commentary lacks completeness and reliability. Part of the problem stems from his (occasionally silly) speculations about what might have happened if these opinions had commanded majority support. Other problems revolve around his selectivity in revealing and commenting on materials. The way in which he handles *Griswold* is illustrative. Schwartz suggests that if Douglas's first draft in *Griswold* had been accepted "it may be doubted that *Roe v. Wade* [the abortion case] and the other decisions based on the *Griswold*-created right would have been made." That, of course, is far from clear, and indeed quite dubious in light of the published and unpublished records of the Warren and Burger Courts.

Douglas's initial draft in *Griswold* (printed in the volume) would have rested the right of privacy solely on precedents extending first amendment protection to associational privacy. He was not entirely happy with the draft. Black, Warren, and some of the others had even more serious qualms about it. But the morning after receiving the draft, Brennan responded with an important

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5. Hutchinson, *Hail To The Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922 (1983). Thomas P. Lewis made a similar observation. Lewis, Book Review, 1 CONST. COMM. 334 (1984).

three-page letter that turned the opinion around. He pointed out the difficulties with the draft, and then suggested that what Douglas had done with the first amendment could also be done with other amendments. The constitutional right of privacy might be grounded in the penumbras of the first, third, fourth, and fifth amendments. Justice Douglas subsequently revised his draft along the lines indicated by Brennan.

Schwartz omits Brennan's crucial letter from his collection and, though quoting from it, fails to footnote it. When discussing the deliberations over *Griswold*, moreover, he fails to consider how seriously troubled Chief Justice Warren was about the creation of a constitutional right of privacy. In particular, there is no mention of the fact that Warren's notes for conference discussion of the case indicate that he would have had great difficulty with a case like *Roe v. Wade*—perhaps as much as Burger later did.<sup>6</sup> On the back of his law clerk's "cert memo" that he took into conference, Warren wrote, "I cannot say the state has no legitimate interest [in regulating contraceptives]—that would lead me to trouble on abortions."<sup>7</sup> Of course, we cannot know for certain how he would have voted in a real abortion case. And there is little value to idle speculation.

Unlike Bickel's collection, which included only finished drafts, Schwartz includes memoranda and first drafts that often are only sketches of a Justice's position. Their significance is often doubtful. Yet Schwartz makes much of them, both in his collection of unpublished opinions and in *Swann's Way*, and all in a manner that sharply differs from that of Bickel.

Bickel included no "casual gossip," only that which he deemed "relevant to a fair appraisal of the performance of public men."<sup>8</sup> Reasonable observers are likely to disagree about what that standard entails. Schwartz tends to be gossipy and this is largely because his conception of the judicial function is wholly political. While acknowledging the human limitations of the Court, Bickel presented Brandeis's papers "as a study in the art of opinion-writing." He wrote that "judges practice statecraft, which is an art, but also an intellectual discipline."<sup>9</sup> Bickel subscribed to Lon Fuller's premise: adjudication and legal reasoning have a moral force, and indeed constitute "a matter of morality." By contrast, Schwartz is more interested in particular issues of public policy. Somewhat surprisingly for a law professor, he treats the Court en-

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6. See D. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 24-38 (1986).

7. Earl Warren Papers, Box 267, Manuscripts Division, Library of Congress.

8. A. BICKEL, *supra* note 3, at viii-ix.

9. *Id.* at vii.

tirely as an arena for great political struggles. "The decision process in the Court," he says, "is essentially a political process." As a political scientist, I quite agree. It does not follow, however, that Brandeis, Bickel, and Fuller were wrong when they stressed the importance of craft.

Books of this sort inevitably raise the questions of whether and when the Justices' private working papers should be made available. Will they become less candid at conference and more reticent about exchanging their views in writing, if they anticipate publication? Bickel's disclosure came long after Brandeis's brethren had departed from the Court. Schwartz follows Woodward and Armstrong in publishing memoranda and draft-opinions of sitting Justices. In doing so, he rejects the traditional wisdom in Bickel's warning that, "More harm than good may be done by disclosing that which . . . may inhibit, or indeed, affect in whatever way, the current functioning of the institution."<sup>10</sup> For Bickel, the solvent was the passage of time; a very long time (ten to twenty years) had to pass before the Justices' working papers should be released.

Agreement on these matters seems unlikely. What is clear, however, is that more collections of Justices' papers are now available than at any other time in the history of the Court. In my view, disclosures are salutary (as long as they are not contemporaneous with the decisionmaking process) and may well bring more institutional accountability to the Court.

## II

If Warren is the hero of *The Unpublished Opinions of the Warren Court*, Burger is the villain of *Swann's Way*. Here again, Schwartz follows the lead of Woodward and Armstrong, rather than Bickel, and retells in a more detailed, though less interesting way, a tale told in *The Brethren*.

*The Brethren* was widely attacked for factual errors, lack of documentation, and for being too gossipy and at times in bad taste, as well as for its conclusions about the Court. Schwartz's book contains fewer factual errors, though occasionally he makes rather sweeping (and, I think, mistaken) generalizations, such as a reference to "the Supreme Court's role as primary lawgiver in the American system." Drawing on Justice Harlan's papers and some other collections, he painstakingly documents revelations contained in *The Brethren*. He is likewise gossipy, though without falling into bad taste. But whereas Woodward and Armstrong built their story

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10. *Id.* at viii.

primarily on the gossip of law clerks, Schwartz bases his on that of Justices. For example, he asserts that Earl Warren was "the 'ideal' conference head, in Justice Stewart's phrase to me." Of course, Justice Stewart may well have been right. But why should we accept such assertions at face value, or as an accurate representation of how others who served with Warren and Burger felt? Professor Schwartz provides no analysis or explanation.

Schwartz's story comes out of *The Brethren*, and will be familiar to those who have read that book. *Swann* came to the Court in Chief Justice Burger's second year in the center seat and presented the important issue of whether federal district judges have the power to order busing in order to achieve some measure of integration. Fifteen years after *Brown*, the vast majority of black children in Charlotte, North Carolina, still went to overwhelmingly black schools. President Richard Nixon, who appointed Burger for his conservative judicial philosophy, had taken a stand against court-ordered busing. The stage was set for a major confrontation within and without the Court.

After hearing oral arguments, the Justices met in their weekly private conference to discuss *Swann* and other pending cases. Burger led the discussion, suggesting that no votes be taken, just as Warren had initially done when considering *Brown*. At the same time, Burger indicated that he sympathized with the Nixon administration's opposition to court-ordered busing. Justice Black spoke next and was similarly unhappy with busing as a judicially-fashioned remedy. But there then emerged a solid majority for upholding the lower court's order. Douglas, Harlan, Brennan, White, and Marshall all more or less agreed. Potter Stewart and newly appointed Harry Blackmun were more tentative, but inclined to go along with the majority.

What angered Douglas, and also troubled some of the others, was that Burger decided to draft an opinion for later conference consideration. By tradition, the Chief Justice has the power to assign opinions when he votes with the majority at conference. If he does not side with the majority, then it falls to the senior Associate Justice in the majority to assign or undertake the draft opinion; in *Swann* that would have been Douglas.

When Burger later circulated his initial draft (reprinted by Schwartz in an appendix) it was, says Schwartz, "negative and indecisive in tone." In particular, he took a restrictive view of the power of courts to remedy segregated schools and refused to expressly uphold the lower court's order. What happened in the weeks that followed was an exchange of memoranda, circulation of

various draft opinions, along with threats of dissenting opinions, and crucial negotiations and deliberations among the Justices. Schwartz describes this process in greater detail than Woodward and Armstrong, though with few new revelations. The only new insight is how great a role Justice Brennan had, particularly in pushing Stewart to take a stronger position (Douglas was largely and mistakenly credited with this role in *The Brethren*). In the end, the negotiations led to an acceptable opinion for a unanimous Court upholding the lower court's busing order.

The conclusions of *Swann's Way* are remarkably similar to those of *The Brethren*. For Schwartz, as for Woodward and Armstrong, Burger is a one-dimensional villain. Burger's undertaking to assign and draft the opinion in *Swann* (and in other cases like *Roe* where he appeared to be in the minority) indeed gives the appearance of a sharp break with the traditions of the Court. But Schwartz tenders no careful examination of possible explanations for Burger's conduct. Without attempting a full explanation here, far more consideration needs to be given to his background and working style, and how he differed from Warren in ways that were unrelated to the fact that Burger is more conservative. Burger was a more typical lawyer and in some ways much less ideological than Warren. As a result, he sometimes appeared too indecisive about his positions and votes. For Burger, even more than some of the others, virtually everything turned on how opinions were written. (Whether one approves of his opinions—politically or legally—is a different matter.) This attitude also inclined him to try to control the assignment and drafting of opinions. Not surprisingly, he sought to obtain majority support for rulings that as closely as possible reflected his own views. All Justices, more or less, try to do that. Burger was often forced to compromise, as in *Swann*, but so were the others. Schwartz, like Woodward and Armstrong, apparently fails to appreciate fully this phenomenon, so central to the internal dynamics of the Court.

Despite their faults, Schwartz's books contribute to our understanding of the Court. Such works are important, for as Frankfurter put it, "Until we have penetrating studies of the influence of these men we shall not have an adequate history of the Supreme Court, and, therefore, of the United States."<sup>11</sup>

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11. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 6 (1964).