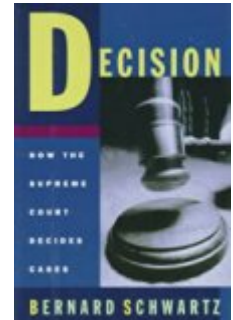


Bernard Schwartz. *Decision: How the Supreme Court Decides Cases.* New York: Oxford University Press, 1996. xii + 272 pp. \$27.50, cloth, ISBN 978-0-19-509859-4.



Reviewed by Mark Siegel

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The United States Supreme Court, whose decisions have impacted not just the United States but in some cases the entire world, operated in cloistered secrecy for its first two-hundred years. Finally, in 1979, with Woodward and Armstrong's book *The Brethren*, the veil overhanging the Court's decision-making process was lifted—but only a few inches. Over the past eighteen years, due in large part to Justice William Brennan's willingness to reveal his private papers to serious researchers, the inner-workings of the Court have been more substantially revealed in a series of books, of which *Decisions* is the latest.

This reversal of the Court's practice of absolute secrecy has been followed by a number of other Justices but remains controversial. Several of the Justices currently sitting on the Court have stripped documents from their own files and questioned whether, without the traditional promise of confidentiality, they can openly argue their views during the decision-making process. Judicial conferences, they fear, may degenerate from candid discussions of legal realities to posturing for the benefit of biographers. Schwartz, on

the other hand, as author of some of the most prestigious books about the the Supreme Court, believes that revealing to the public the Court's inner workings is the only means by which this institution can be understood and, perhaps, the judges judged.

As a practicing attorney, I agree with Schwartz. Many of us were drawn to the law by the elegance of its logic and very practical potential for making fair decisions by which a complicated society can function. When Supreme Court opinions often seem encrypted or simply inexplicably unfair, it is time for justices to set aside self-concern for their historical images and restore a measure of confidence to the judicial process. As Schwartz notes, unlike the executive and legislative branches of American government, the Court's authority is moral, not physical. This does not mean the Court's decisions are likely to be either more or less politically motivated than they have in the past. One has only to look at some of the most shameful opinions it has handed down, despite the absolute privacy of its decision-making process (holding, on the dawn of the Civil War,

that people could be treated as property and, during World War II, that citizens could be imprisoned because of their national origins), to recognize, as Schwartz notes, that the Supreme Court reflects the history of the nation. But it does not take the training of a Supreme Court Justice to weigh the personal discomfiture of nine individuals against the moral authority of an institution, of a nation.

Often based on interviews and previously unpublished documents, *Decision* illustrates the operation of the Court in a selection of cases from the past fifty years. While the cases themselves are some of the most important and controversial, they also have been chosen to illustrate the functioning of the Court itself as "nine little law firms" more or less effectively marshalled by the Chief Justice. Schwartz demonstrates at length the powerful leadership of Earl Warren (known in the Court as "Super Chief") in leading the Court to then controversial decisions in desegregation (*Brown*) and criminal law (*Miranda* and *Gideon*), as well as the relative ineffectiveness of Warren Burger (whose opinions concerning separation of legislative and executive powers were stuffed in *Humphrey*) and William Rehnquist (rebuffed in *Webster* in his attempt to overturn *Roe v. Wade*'s abortion standards). He also discusses a number of lesser known cases as "mirrors of the men" who decided them. But the book is essentially dedicated to revealing the decision-making process itself, from the physical layout of the Court to its Christmas parties, from the verbal confrontations of the 1950s to computerized information exchange in the 1990s. Schwartz outlines the deliberative process from *certiori* decisions (where Court members decide which will be the lucky one-in-a-thousand-cases it reviews), through preparations for hearing, argument, consultation and negotiation, and opinion drafting and announcement.

The author offers succinct, understandable explanations of most basic legal procedures for

the lay reader that will rarely bore the expert; his insider information on crucial Court opinions will titillate those with even a passing recollection of the headliner cases of the second half of this century, while proving particularly fascinating for the legal professional interested in the finer points of case law. *Decision* is an important document for any intelligent reader who wants to know not only what legal decisions like *Roe* and *Webster* say, but what they truly mean and why they mean it.

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