

# REVIEWS

## Opinions as Rules

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*The Unpublished Opinions of the Warren Court.* BERNARD SCHWARTZ.  
Oxford University Press, New York, 1985. Pp. ix, 470. \$29.95.

### I.

Like most others in my trade, I tend to look at Supreme Court opinions horizontally rather than vertically. The context of evaluation for a Supreme Court opinion is largely limited to *other* Supreme Court opinions, including the Supreme Court opinions of the past as well as those of the future. Yet although the temporal scope may be large, the judicial activities we consider are all on the same level. We are concerned with Supreme Court opinions largely insofar as they are consistent with, inconsistent with, better than, or worse than other Supreme Court opinions.

Looking at Supreme Court opinions largely in the context of other Supreme Court opinions is much like studying the ocean from the deck of the *Queen Elizabeth II*. There is a big world below the surface, one we will not see if we restrict our attention to what is on the top. To look at Supreme Court opinions vertically, therefore, is to consider and evaluate those opinions in the context of their interpretation and application by institutions and individuals below the Supreme Court in the interpretive hierarchy.<sup>1</sup> To consider *United States v. Grace*,<sup>2</sup> for example, from a vertical per-

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<sup>1</sup> I have considered this issue previously, in somewhat more general terms, in Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J.L. REF. 1 (1983). See also Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35 (1985); Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974); Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807-11 (1982); LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

<sup>2</sup> 461 U.S. 171 (1983).

spective is not to consider how a case allowing people to picket on a public sidewalk in front of the Supreme Court building fits with a series of Supreme Court cases involving the public forum, or picketing, or government buildings. To consider *Grace* from a vertical perspective is to see how that decision will be understood and interpreted by appellate courts in the state and federal systems which are confronted with similar situations; it is to determine how the decision will be viewed by trial courts; and it is to ascertain how the decision will be followed by the prosecutors and police officers who must make and enforce the largely unwritten small-scale rules about who can do what in which places.

When we look at Supreme Court opinions from a vertical perspective, a whole new range of factors emerge for consideration, and a whole range of old factors drop out. The rigor of the Supreme Court's reasoning becomes less important, and so does the way in which a Supreme Court opinion is or is not consistent or coherent with other Supreme Court opinions. Fine distinctions between holding and dicta are rarely relevant; indeed, the very question of what the Court held at all becomes increasingly less important as we follow an opinion down the hierarchy. For when we are in the pit of actual application, we will discover that it is not what the Supreme Court held that matters, but what it *said*. In interpretive arenas below the Supreme Court, one good quote is worth a hundred clever analyses of the holding.

If I am correct about this impression, then the language of an opinion takes on a special significance. Although we may remain interested in language that explains the Court's reasoning, and although we may remain interested in language for its literary or persuasive power, in thinking vertically about a Supreme Court opinion we now must be interested in the way that the language of the opinion operates like a statute.<sup>3</sup> For in the lower courts, application of a pithy statement, a summary of a holding, or a three-part test is likely to look very much like application of a statute. The language will be carefully analyzed, and discussions of why one word rather than another was used will be common. For example, application of the three-part establishment clause test of *Lemon v. Kurtzman*,<sup>4</sup> or the four-part commercial speech test of

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<sup>3</sup> The idea I express here is developed more fully in Schauer, *Precedent*, 38 STAN. L. REV. (forthcoming 1987), and bears a close resemblance to Ronald Dworkin's idea of precedents having an "enactment force." RONALD DWORGIN, TAKING RIGHTS SERIOUSLY 111 (1977); see also RICHARD WASSERSTROM, THE JUDICIAL DECISION 35-36 (1961).

<sup>4</sup> 403 U.S. 602 (1971).

*Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>5</sup> does not look substantially different from what we would have expected had those tests been enacted as subsections of the first amendment.

## II.

Once we recognize the extent to which the words of an opinion take on a canonical role not unlike that played by the words in a statute, the process of writing those words rather than other words becomes particularly important. And that, for me, is what makes the enterprise pursued by Professor Schwartz in this book most fascinating. Schwartz, in the process of researching his recent biography of Earl Warren,<sup>6</sup> discovered in the Warren files a large number of draft opinions by Warren and others. In many instances, he determined, the draft opinions differed from the final opinions not only in the alignment of Justices, but also in the inclusion or exclusion of key phrases or lines of reasoning that might very well have sent the path of law in a different direction.

This book reprints in full a number of the most important of the drafts in which the differences between the drafts and the final result seem likely to have made a large doctrinal difference for the future. For example, a draft of Justice Douglas' opinion in *Griswold v. Connecticut*<sup>7</sup> decides the case not on privacy grounds, but as a freedom of association case, using the word "privacy" only once and then plainly as an afterthought. Justice Fortas' early draft in *Time, Inc. v. Hill*<sup>8</sup> would not have applied the standards of *New York Times Co. v. Sullivan*<sup>9</sup> to false-light privacy cases. *Shapiro v. Thompson*<sup>10</sup> was first decided on rational-basis grounds, avoiding any significant discussion of the right to travel or of fundamental rights.

Schwartz includes in the book the draft opinions in eleven cases. In addition to the three just mentioned we find *Alton v. Alton*,<sup>11</sup> *Dayton v. Dulles*,<sup>12</sup> and *Perez v. Brownell*,<sup>13</sup> along with *Trop*

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<sup>5</sup> 447 U.S. 557 (1980).

<sup>6</sup> BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* (1983).

<sup>7</sup> 381 U.S. 479 (1965), included in *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* at pp. 227-39. All further uncited page references are to *THE UNPUBLISHED OPINIONS*.

<sup>8</sup> 385 U.S. 374 (1967), included at pp. 240-303.

<sup>9</sup> 376 U.S. 254 (1964).

<sup>10</sup> 394 U.S. 618 (1969), included at pp. 304-93.

<sup>11</sup> 347 U.S. 610 (1954), included at pp. 22-43.

<sup>12</sup> 357 U.S. 144 (1958), included at pp. 45-75.

<sup>13</sup> 356 U.S. 44 (1958), included at pp. 77-98.

*v. Dulles*,<sup>14</sup> *Kennedy v. Mendoza-Martinez*,<sup>15</sup> *Bell v. Maryland*,<sup>16</sup> *Estes v. Texas*,<sup>17</sup> *Maxwell v. Bishop*,<sup>18</sup> and, naturally, *Brown v. Board of Education*.<sup>19</sup> Each collection of drafts is bracketed by Schwartz's preliminary descriptions and concluding discussion of the case. This commentary is most useful to the extent that it describes the preliminary alignments of the Justices and the behind-the-scenes process from argument to conference to drafts to final opinions. Schwartz also puts the issues that were central to the case into their legal context and explains what might have been the doctrinal consequences had the case ultimately been decided along the lines of a particular draft rather than along the lines of the final product actually published in the *United States Reports*. These capsule analyses seem likely to be quite useful to the non-specialist, although in most cases they will seem overly simplistic to those more sophisticated in the particular areas.<sup>20</sup>

As written, this book is likely to be of greatest interest to professional Court-watchers who are interested in the Justices, in the institution of the Supreme Court, and in the process of Supreme Court adjudication in political and psychological terms. For these people, the ones for whom *The Brethren*<sup>21</sup> was the best read since their childhood days when they devoured the good parts of *Peyton Place* in a dark corner of the public library, *The Unpublished Opinions of the Warren Court* will be an essential part of their collection. It will also be quite useful to those whose major preoccupation is doctrinal nuance—tracking the tortuous path of levels of scrutiny and categories of analysis. This is undoubtedly important, and so is thinking about the Supreme Court as composed of nine real human beings, with human strengths and weaknesses. But for me, as I suggested at the outset of this review, the opportu-

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<sup>14</sup> 356 U.S. 86 (1958), included at pp. 99-108.

<sup>15</sup> 372 U.S. 144 (1963), included at pp. 109-42.

<sup>16</sup> 378 U.S. 226 (1964), included at pp. 143-90.

<sup>17</sup> 381 U.S. 532 (1965), included at pp. 191-226.

<sup>18</sup> 398 U.S. 262 (1969), included at pp. 394-444.

<sup>19</sup> 347 U.S. 483 (1954), included (along with *Brown II*, 349 U.S. 294 (1955)) at pp. 445-70.

<sup>20</sup> For example, the discussion of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), announces that had plaintiffs been able to use false-light privacy suits to evade the strictures of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "[t]he result might have been a chilling effect that would have discouraged press ardor in vindicating First Amendment rights." P. 298. And even if Justice Clark had not changed his vote in *Estes v. Texas*, 381 U.S. 532 (1965), causing Justice Stewart's draft majority opinion to become a dissent, it seems at least an overstatement to say that "the TV camera might be as common in the courtroom as it is in other areas of American life." P. 223.

<sup>21</sup> B. WOODWARD & S. ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979).

nity to examine draft opinions is most useful insofar as it gives insights into the role of the Supreme Court as maker of rules, and it is to this that I now turn.

### III.

The Supreme Court has not, to say the least, shown itself to be a particularly good rulemaker. Indeed, the Court tends to be so bad at the process of rulemaking that it lays itself open to fundamental challenges to its authority precisely because of the unworkability of the standards it sets forth.<sup>22</sup> Perhaps such standards are the result of a justifiable desire to retain flexibility for the Court in future cases. In any event, the Court, like most commentators, often appears to be blissfully ignorant of the vast world of the law that lies beneath it. What else could explain "excessive entanglement,"<sup>23</sup> "appeal to the prurient interest,"<sup>24</sup> or "minimum contacts"?<sup>25</sup> Now all good and most bad lawyers know that these phrases have become theory-laden terms of art, acting as little more than shorthand abbreviations for a substantial corpus of case law. The cases rather than the abstract phrases delineate, for example, what is or is not an entanglement, what kind of interest is prurient, and what kind and how many contacts with a state exceed the "minimum" threshold. But how has this common law development come about? How much of it is a product of additional Supreme Court opinions and how much a product of the actions of lower courts? How long has it taken to develop this corpus of interpretation, and what have been the consequences of the intervening uncertainty? Even with the interpretive cases and commentary, is there still enough guidance for those who need it to do their jobs?

None of these is an easy question, and none of these questions has an easy answer. But the impression that is left after reading the draft opinions in Professor Schwartz's book is that the issues of how to guide and control those to whom Supreme Court opinions are addressed simply never comes up.<sup>26</sup> The drafts do not turn

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<sup>22</sup> See Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. (forthcoming 1986).

<sup>23</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

<sup>24</sup> *Roth v. United States*, 354 U.S. 476, 487-89 (1957), *perpetuated in Miller v. California*, 413 U.S. 15, 24 (1973), *further perpetuated in Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2800 (1985).

<sup>25</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>26</sup> It is possible that these issues arise, but that Professor Schwartz's sample selects not for these issues, but only for substantive ones. If that is so, then one wonders what leads someone who is clearly part of the constitutional law culture to focus on some kinds of cases

substantially on disputes about the specificity of the language to be used, on the kinds of examples, if any, to be included in an opinion, or on whether the holding of the Court should be encapsulated in some rule-like test. These matters, of crucial importance to those vertically below the Supreme Court, seem not to be a significant part of the deliberative agenda.

Conceivably, the materials that Professor Schwartz provides us are either too early or too late in the drafting process to indicate whether this kind of quasi-legislative exercise has been part of the contemplations of individual Justices or deliberations of the Court as a whole. With the exception of the odd deletion of a line here and there,<sup>27</sup> these are quite clean documents. Unless all the Justices of the Warren Court were able to produce drafts this well researched and written the first time around, there is another set of drafts that might be even more illuminating. Where are the handwritten notes, or the handwritten first drafts?<sup>28</sup> Where is the typed draft with subsequent additions, deletions, interlineations, and related marks of the kind that we all know is part of our work? Where, if anywhere, are the communications between Justices about what words to change, and how? Where are the clerks in the process? And where, if at all, are the "semi-final" drafts, in which basic positions and alignments are fixed, but in which the process of fine-tuning the drafting takes place in earnest?

This last question is the one that I find most illuminating. For it would seem sensible, once it was decided what the Court was going to do and how it was going to do it, for the Court to devote some time to drafting an opinion that tried to talk to those to whom the opinion ought to talk. The class of addressees will, to be sure, vary from case to case. In some cases the Court might be concerned with lower courts, in other cases it might be concerned with lawyers advising state and local governments, in others it might be concerned with non-supervisory public officials such as police officers, and in others it might be concerned with citizens themselves.<sup>29</sup> But serious thought about this issue, let alone about how

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and not on others.

<sup>27</sup> See, e.g., pp. 175, 324, 365.

<sup>28</sup> The drafts from *Brown* are in fact transcribed from handwritten drafts by Chief Justice Warren. See pp. 451-55, 463-65.

<sup>29</sup> Regrettably, the constitutional culture seems to have assumed away this last possibility. Perhaps the most significant thing of all about Supreme Court opinions is the fact that incredibly few people read them. If opinions were written so that they could be published in *Time* magazine, and understood by *Time*'s average reader, we would obviously lose something in terms of analytic precision and possibly even in terms of rhetorical elegance.

to address these people once we decide who they are, seems conspicuously absent from the Supreme Court's processes.

If we wished to pursue this matter further, we might wish for a more comprehensive version of Professor Schwartz's admirable enterprise. It would be interesting to have printed in one place every version of an opinion, from first handwritten draft to final official version, complete with "redlining" or an equivalent process so that changes along the way, in language as well as in substance, would be clearly marked. If we had access to such documents, it would be possible to focus more clearly on the process by which rules in the form of opinions are promulgated, and perhaps even urge changes in that process. From what is presented in this book, a reasonable conjecture might be that such a process simply does not exist, that the kind of drafting precision that one expects from a formal legislative or rulemaking process is largely ignored in the formulation of Supreme Court opinions. If those opinions are merely the language in which the Supreme Court speaks to itself, or engages in a dialogue with legal scholars or the law review graduates who are clerks to state and federal appellate judges, then greater precision in their drafting may be unnecessary. But if those opinions are also, and perhaps even substantially, the language in which the Supreme Court speaks to all other judges, to lawyers, to public officials, and (hopefully) to the citizenry, then it seems as if rethinking the process is in order.

#### IV.

My colleague Sallyanne Payton has suggested to me that what I am really thinking about is the "managerial" responsibility of the Supreme Court, and I am inclined to believe that she is right. If we view the Supreme Court as the manager of a very substantial part of the legal system in the United States, then how would we evaluate its performance of this function? In thinking about this, try to imagine what would happen on the production line at General Motors if the managerial functions of Roger Smith and the board of directors were exercised by a series of memoranda among the directors about the philosophy of automobile manufacture, or about what should be done in specific cases of production failure. One could imagine a scenario where the lack of guidance to those below would result in no cars being built. In a more likely scenario, cars

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But is it not possible that we might gain even more by sending out the message that this is *everyone's* Supreme Court, and *everyone's* Constitution?

would continue to be built, but more of the important decisions would be made by lower-level management. The question, then, for our purposes, is whether the Supreme Court should be making the important decisions and seeing to it that they are implemented or whether those functions should be relinquished to those below.

I am not sure that the Court is providing the desired guidance or making and implementing the important decisions. The kinds of materials that Professor Schwartz presents and explains provide significant support for my doubts. For me the most valuable lesson from seeing the unpublished opinions of the Warren Court is not in seeing what they contain, but in seeing what they do not.