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# Decision: How the Supreme Court Decides Cases

Martin D. Gelfand

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## BOOK NOTES

**DECISION: HOW THE SUPREME COURT DECIDES CASES. By Bernard Schwartz. [New York: Oxford University Press] 1996. Pp. 272. \$25.00.**

Was the Warren Court a blip on the modern Supreme Court jurisprudential radar screen? A rare glimpse of justice actually accomplished by the United States' highest judicial authority? A model for the next Chief Justice whomever that may be? *Decision* leads its readers, Warren Court critics notwithstanding, to answer all of the above questions in the affirmative. Focusing mainly on Warren Court actions while contrasting them with actions by preceding and succeeding Courts, Professor Bernard Schwartz provides a pedagogical analysis of how the Supreme Court can be led to accomplish great things, or be managed into mediocrity. Schwartz leaves his readers no doubt as to his position that Chief Justice Earl Warren is the model for leadership while Chief Justices Stone, Vinson, Burger, and Rehnquist miss the mark.

In an unfootnoted review of the last half-century of Supreme Court history, through interviews with both named and unnamed justices, Supreme Court law clerks, other Court watchers, rare Court papers and memoranda, and previously published sources such as Justice William O. Douglas's *Autobiography*, Schwartz takes us behind the U.S. Supreme Court's red velvet curtain for an engaging and informative tour. In *Decision*, Schwartz cites Justice Potter Stewart attempting to define the qualities that made Warren a great leader of the Court:

If [Justice Hugo] Black was the intellectual leader of the Court, Warren was the *leader* leader. [Warren] didn't lead by his intellect and he didn't greatly appeal to others' intellects; that wasn't his style. But he was an instinctive leader whom you respected and for whom you had affection, and . . . , as the presiding member of our conference, he was just ideal.<sup>1</sup>

In perhaps Schwartz's most poignant example of Warren's leadership, he observes that in *Brown v. Board of Education* (1954), when the case was first discussed on December 13, 1952, then-Chief Justice Fred M. Vinson stated that he was not ready to overrule *Plessy v. Ferguson*.

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<sup>1</sup> BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 75 (1996).

Informal vote counts among the justices indicated that the decision might have gone either way, but by the narrowest 5-4 margin. When Vinson died suddenly before reargument, Justice Felix Frankfurter remarked to his clerks, "This is the first indication that I ever had that there is a God."<sup>2</sup> When the *Brown* conference opened again a year later, the new Chief Justice cut through to the key issue:

I don't see how in this day and age we can set any group apart from the rest and say that they are not entitled to exactly the same treatment as all others. To do so would be contrary to the Thirteenth, Fourteenth, and Fifteenth Amendments. They were intended to make the slaves equal with all others. Personally, I don't see how today we can justify segregation based solely on race.<sup>3</sup>

Warren's opening of the conference turned the Court from the viewpoint that *Brown* addressed a hot-button political issue toward what he saw as the real issue: racism and the fact that under the law that "the Negro is an inferior race."<sup>4</sup> Despite the external political ramifications, the remaining *Plessy* proponents were obliged to join an unanimous *Brown* decision. According to Justice Abe Fortas, "[i]t was Warren's great gift that, in presenting the case and discussing the case, he proceeded immediately and very calmly and graciously to the ultimate values involved – the ultimate constitutional values, the ultimate human values."<sup>5</sup>

Schwartz places Warren on a pedestal with Chief Justices John Marshall and Charles Evans Hughes. He bemoans the fact that progressively more of the Court's work is done by clerks and not the Justices themselves. However, *Decision* is not merely a paean to Earl Warren's leadership and humanity (though it does come close). Several chapters are dedicated to inside information about how some famous (or infamous) decisions would have come out much differently but for vote switches and focus shifts between draft opinions. *Roe v. Wade* (1973), for instance, originally struck down the Texas abortion statute on vagueness grounds, avoiding altogether the issue of a state's substantive right to prohibit abortions. Yet, one theme rings out clearly: Schwartz's admiration for Chief Justice Earl Warren. Under this heading, Schwartz provides valuable lessons to students of the Court, including, hopefully, some of its current and future members.

*Martin D. Gelfand*

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<sup>2</sup> *Id.* at 96.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 89.

**THE INTERNATIONAL LAWYER'S DESKBOOK. EDITED BY  
LUCINDA A. LOW, PATRICK M. NORTON, AND DANIEL M.  
DRORY. [WASHINGTON, D.C.: SECTION OF INTERNATIONAL  
LAW AND PRACTICE, AMERICAN BAR ASSOCIATION] 1996. Pp.  
432. \$85.00 (\$75.00 FOR SECTION MEMBERS).**

The American Bar Association's Section of International Law and Practice has put together a detailed, yet simple and useful guide to international legal practice. Spanning such topics as international commercial transactions; political risk insurance; international payment methods; international antitrust law; U.S. taxation of international transactions; international family, environmental, wills and trusts, labor and employment, and customs law; and international litigation and commercial arbitration, the *Deskbook* provides a complete first-hand source for beginning research; answering basic questions regarding international legal issues.

Each chapter begins by introducing the presented topic, defining the issues, and outlining the subsequent sections of the chapter. Then applicable law for the discussed topic is offered, highlighting the major issues common to the topic and warning the reader of any potential caveats that demand notice. Each chapter ends with a section entitled Sources of Assistance. This briefly annotated bibliography offers the reader suggestions for general source materials including books and periodicals. When applicable, the section lists applicable statutes, treaties, and even institutional contacts such as the World Bank and OPIC.

Although aimed generally at the practitioner, the *Deskbook* is also useful to law students by providing them an organized overview of international legal transactions and laws that are creating litigation and arbitration problems today. Moreover, the *Deskbook* targets all students of today's increasing use of computerized legal research by including in each chapter's Sources of Assistance section, a listing of available on-line services applicable to the legal issue at hand.

The *Deskbook* is a necessary addition to the bookshelf of every practitioner whose practice even considers international legal ramifications. This quick resource guide could save the legal practitioner hours in investigating common international legal issues.

*Lauren M. Moran*

