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## Using the Papers of U.S. Supreme Court Justices: A Reflection

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STEPHEN WERMIEL

## Using the Papers of U.S. Supreme Court Justices: A Reflection

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ABOUT THE AUTHOR: Fellow in Law and Government at American University Washington College of Law and coauthor with Seth Stern of *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010), for which the authors had access to the papers, files, and correspondence of Justice William J. Brennan, Jr. Professor Wermiel was the Supreme Court correspondent for *The Wall Street Journal* from 1979 to 1991. For various research projects, he has used the papers of fifteen Supreme Court Justices.

## USING THE PAPERS OF U.S. SUPREME COURT JUSTICES: A REFLECTION

### I. INTRODUCTION

This essay examines the benefits and drawbacks of writing about the U.S. Supreme Court using the papers<sup>1</sup> of the Justices and how the work of Professor James F. Simon highlights the benefits.<sup>2</sup> The benefits are that the Justices' papers provide invaluable understanding of the Court's decisionmaking process, the influences that are significant, and how much substance actually matters. The papers shed light on why important legal doctrines developed in certain ways and what arguments held sway, identify rules that may be on thin ice in terms of underlying support, and show the nature of the working relationships among the Justices, which are critical to the Court's ability to function, and what happens if and when those relationships break down.

The drawbacks that may derive from using the Justices' papers include treating the notes of Justices at their private conferences as verbatim summaries of discussions, using evidence of internal uncertainty and division on the Court in close cases to attack the validity of Court rulings, and overinterpreting critical or negative comments in documents to reflect rifts or feuds where none may have actually existed or where the context may be different than what a Justice intended.

This essay will briefly plot the historical development of reliance on the papers of Justices for Supreme Court research and will then reflect on some of the benefits and drawbacks, drawing on examples in the work of Professor Simon and others who have written about the Court.

### II. FROM SACROSANCT SECRECY TO ARCHIVAL ACCESS

The internal deliberations of the U.S. Supreme Court were considered secret and sacrosanct for much of the nation's history. It was widely assumed and respected that the Justices required secrecy to preserve the quality and candor of their discussions of cases.<sup>3</sup> Without this secrecy, the assumption went, the caliber of deliberations, and ultimately of decisionmaking, would be diminished.

It is not that authors did not write about the Supreme Court. They did write judicial biographies and constitutional analyses.<sup>4</sup> They just did their scholarly work

1. Typically, the papers of a Justice may include draft opinions, exchanges of memos among the Justices approving of or requesting changes in opinions, memos from law clerks, handwritten notes, and notes taken of the discussions at the Court's closed-door conferences where cases are discussed and decided.
2. This essay is prompted by *Supreme Court Narratives: Law, History, and Journalism*, the *New York Law School Law Review's* symposium, which was dedicated to the work of Dean and Professor Emeritus James F. Simon, who has written about the Supreme Court both with the private papers of Justices and without them. Symposium, *Supreme Court Narratives: Law, History, and Journalism*, 57 N.Y.L. SCH. L. REV. 423 (2012–2013), available at [www.nylslawreview.com/supreme-court-narratives-law-history-and-journalism/](http://www.nylslawreview.com/supreme-court-narratives-law-history-and-journalism/).
3. For a discussion of the potential dangers of disclosure of secret Court deliberations, see Henry J. Friendly, Book Review, 106 U. PA. L. REV. 766 (1958) (reviewing ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957)).
4. See, e.g., CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1944); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* (1941); THOMAS REED POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* (1956); MERLO J. PUSEY, *CHARLES EVANS HUGHES* (1951); CARL BRENT SWISHER, *ROGER B. TANEY* (1935).

without questioning whether insights from the Court's inner sanctum might be helpful; looking for those insights was not part of the norm. It is also not that Justices did not preserve collections of their papers until more recent times. There are numerous collections of Supreme Court papers that predate the last fifty years and that presumably provide valuable insights into the Court's inner workings and into particular decisions.<sup>5</sup>

The old norm is no more. For more than fifty years now, the internal deliberations of the Justices have fascinated legal historians, lawyers, political scientists, and other students of the Court. The change began suddenly with the publication in 1956 of a biography of Chief Justice Harlan Fiske Stone in which the author, Alpheus Thomas Mason, for the first time drew on "slip opinions in various stages of preparation, memoranda to and from members of the Court, and Stone's own record of the manner in which certain crucial decisions were hammered into shape."<sup>6</sup> This momentous occasion, using Stone's internal Court papers, was soon followed by Alexander Bickel's publication in 1957 of a collection of unpublished Court opinions written by Justice Louis Brandeis.<sup>7</sup>

This turn of events was shocking to some. When the Stone biography was published, Justice Hugo Black told his son, Hugo Jr., that when the Justice retired or died, portions of his Court papers should be burned, including notes from the Justices' conferences and some exchanges of memos.<sup>8</sup> Concerned that the publication of conversations between Justices would inhibit the exchange of free ideas, Hugo Jr. did burn a substantial portion of Black's papers as directed.<sup>9</sup> Publication of the Brandeis opinions triggered debate more than shock. Henry Friendly, a respected New York lawyer, former Brandeis law clerk, and later a judge on the U.S. Court of Appeals for the Second Circuit, wrote a review of Bickel's book in 1957.<sup>10</sup> He suggested that there might be no harm in the disclosure of the Brandeis opinions because sufficient time had elapsed, but that when the issue was papers involving Justices who were still sitting on the Court, "perhaps some such restriction ought to

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5. For example, the Manuscript Division of the Library of Congress houses the papers of Chief Justice Roger Taney, the first Justice John M. Harlan, Justice Horace Gray, Chief Justice Melville W. Fuller, and Justice Salmon P. Chase, just to name a few.

6. ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW*, at xi (1956).

7. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957).

8. HUGO BLACK, JR., *MY FATHER: A REMEMBRANCE* 250–51 (1975) (describing Justice Black's instructions to his son to retrieve the Justice's papers from the courthouse and promptly destroy them; Hugo Jr. recalled his father's concern that "publishing the notes of conversations between Justices inhibited the free exchange of ideas" among the members of the Court). A similar account was told to the author by Justice Brennan. Interview with William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, in Wash., D.C. (Oct. 24, 1986). Black's concern was that Court memos he had written that were part of Stone's papers had been taken out of context in Mason's book.

9. BLACK, *supra* note 8, at 251–52, 255.

10. Friendly, *supra* note 3.

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be imposed by rule of the Court if the good taste of authors does not produce voluntary observance.”<sup>11</sup>

The Stone and Brandeis books broke the ice, but they did not immediately shift the paradigm from author analysis of the Supreme Court to revelation of inside details. There were many Supreme Court books written in the 1960s and 1970s that did reflect the author’s access to the private papers of Justices.<sup>12</sup> Still, the idea that there was a story behind the opinions and behind the secrecy of the Supreme Court had just begun to take hold. Reporters began to take an interest in the functioning of the Court as an institution.<sup>13</sup>

But the paradigm did shift with several works contributing to the change. Richard Kluger’s seminal study of the *Brown v. Board of Education* school desegregation ruling, published in 1976, relied to some degree on internal Court papers to help reconstruct what took place behind the scenes in the Court.<sup>14</sup> By far the most controversial penetration of the Court’s secrecy came in 1979 with Bob Woodward and Scott Armstrong’s publication of the bestseller *The Brethren*.<sup>15</sup> The authors interviewed Justices and many law clerks and amassed internal documents to chronicle the deliberations of the Court for the period from 1969 through 1976. The authors explained that they hoped to break through the secrecy because “the Court, unlike the Congress and the Presidency, has by and large escaped public scrutiny.”<sup>16</sup> The content of the book was based on “internal memoranda between Justices, letters, notes taken at conference, case assignment sheets, diaries, unpublished drafts of opinions and, in several instances, drafts that were never circulated even to the other Justices.”<sup>17</sup> Publication of the book caused much consternation inside the Court, both before its release and after it hit the bookstores.<sup>18</sup> The preparation of *The Brethren* was done by the authors collecting Court papers directly from former law clerks and

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11. *Id.* at 766.

12. *See, e.g.*, J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968); *see also* WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE 20TH CENTURY: THE OLD LEGALITY 1889–1932 (1969); WILLIAM F. SWINDLER, COURT AND THE CONSTITUTION IN THE 20TH CENTURY: THE NEW LEGALITY 1932–1968 (1970); WILLIAM F. SWINDLER, COURT AND THE CONSTITUTION IN THE 20TH CENTURY: THE MODERN INTERPRETATION (1974).

13. *See* Nina Totenberg, *The Supreme Court: The Last Plantation*, NEW TIMES, July 26, 1974, at 26 (describing oppressive working conditions for laborers at the Supreme Court).

14. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 819, 822–23 (1976). According to the source notes, Kluger used the papers of Justices Harold H. Burton and Felix Frankfurter, among other materials.

15. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

16. *Id.* at 1.

17. *Id.* at 4.

18. For an account of the reaction to the book and the effort to figure out who the sources were, see David J. Garrow, *The Supreme Court and The Brethren*, 18 CONST. COMMENT. 303 (2001). Another account containing details of the reviews for the book is Alexander Wohl, *Those Who Do Not Remember the Past . . . Closed Chambers—An Eerie Echo Eighteen Years After The Brethren*, JURIST: BOOKS-ON-LAW (May 1998), available at <http://jurist.law.pitt.edu/lawbooks/pamay98.htm>.

perhaps Justices themselves; the authors apparently did not make much use, if any, of collections of Justices' papers held at archives such as the Manuscript Division of the Library of Congress, perhaps because of restrictions on access to those materials at the time.<sup>19</sup>

Just four years after *The Brethren's* release, the largest foray into the collections of the private papers of Justices came with the publication in 1983 of a lengthy and detailed account of the Warren Court.<sup>20</sup> The book, *Super Chief*, made extensive use of collections of Justices' papers at the Library of Congress and elsewhere.<sup>21</sup> The author, Bernard Schwartz, was provided access to collections that were otherwise still closed to researchers, including the full Warren Court files of Justice William J. Brennan, Jr.<sup>22</sup> Schwartz created detailed accounts of major Warren Court cases, describing the private conference discussions of the Justices based on the notes taken by various members of the Court and outlining the drafting of and negotiating over opinions among the Justices. One reviewer said the book more closely resembled "an annotated set of internal minutes for October Terms 1953 through 1968."<sup>23</sup>

Unlike *The Brethren*, which created a furor over the sanctity of the Court's deliberations, *Super Chief* prompted little or no reaction just four years later. One reason might be that *The Brethren* dealt with a more contemporaneous period of Court decisions; it was published in 1979 and covered decisions as recent as 1976. The proximity made the disclosures seem more important and more dramatic. *Super Chief*, in contrast, was not published until fourteen years after the last decisions discussed in the book. When *The Brethren* was published, most of the Justices discussed in the book were still sitting on the Court, while for *Super Chief* only a few were still sitting at the time of publication.<sup>24</sup>

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19. WOODWARD & ARMSTRONG, *supra* note 15, at xviii–xix. When *THE BRETHREN* was published in 1979, the Manuscript Division of the Library of Congress housed papers that covered the period from 1969 to 1976 for Chief Justice Earl Warren, who had retired at the start of the period, Justice Hugo L. Black, Justice William O. Douglas, and Justice William J. Brennan, Jr. But there were a variety of restrictions that limited the access to these papers and that likely made them off limits to authors Woodward and Armstrong. There continue to be some restrictions on who can access the manuscripts, even for those that are accessible online. See *Using the Collections*, LIBRARY OF CONGRESS MANUSCRIPT READING ROOM, <http://www.loc.gov/rr/mss/mss-use.html> (last visited Oct. 18, 2012).

20. The Warren Court bears the name of Chief Justice Earl Warren, who presided from 1953 to 1969.

21. BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY*, at xii (1983).

22. Justice Brennan joined the Warren Court in 1956. In interviews for the biography written by this author, SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 490–91 (2010), Justice Brennan acknowledged that he gave Bernard Schwartz access to his Court papers.

23. Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 927 (1983).

24. In 1983 when *SUPER CHIEF* was published, the only Justices in the book who were still sitting on the Court were William J. Brennan, Jr., Thurgood Marshall, and Byron White. When *THE BRETHREN* was published in 1979, Justices discussed in the book who were still sitting on the Court were Chief Justice Warren Burger and Justices William J. Brennan, Jr., Potter Stewart, Byron White, Thurgood Marshall, Lewis F. Powell, Jr., Harry Blackmun, William H. Rehnquist, and John Paul Stevens.

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A second reason for the difference in public reaction may be that *The Brethren* was written in dramatic prose by two visible and prominent journalists and marketed with a high degree of emphasis on the breach of the Court's secrecy;<sup>25</sup> *Super Chief* was issued by an academic press and written by a law professor in clinical narrative. What the two books share, however, is the changing of the paradigm. After the publication of *The Brethren* and *Super Chief*, the standard operating procedure for many—though certainly not all—books about the Supreme Court and biographies of Justices seemed to shift to extensive reliance on inside information, canvassing of Justices' papers, and interviews with former law clerks and others with knowledge of the inner workings of the Court.<sup>26</sup> There are, of course, still authors who choose to emphasize their own analysis and do not rely on access to Court papers or to inside information.<sup>27</sup>

Still another book that contributed to the culture of inside information about the Court was written by Edward Lazarus,<sup>28</sup> a lawyer who clerked for Justice Harry A. Blackmun in the October Term 1988.<sup>29</sup> Lazarus explained that while his clerkship provided him insight into how things work at the Court, he did independent research and gathered documents that were not derived from his clerkship.<sup>30</sup> His book, *Closed Chambers*, stirred up some controversy because it depicted the Court in highly

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25. The Simon & Schuster book jacket for the original edition says the book “is the first detailed behind-the-scenes account” of the Court, written in “spellbinding” fashion that “reveals as never before the implications of power and influence” in the Court.
  26. Bernard Schwartz continued to contribute heavily to this trend, milking the papers of Justice Brennan and others for a steady stream of books. For works by Bernard Schwartz that continued this trend, see BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* (1990); BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* (1988); BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* (1996); BERNARD SCHWARTZ, *SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT* (1986); BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* (1988); BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE REHNQUIST COURT* (1996); BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* (1985). Other books that contributed to the genre were HOWARD BALL, *HUGO BLACK: COLD STEEL WARRIOR* (1996); JOAN BISKUPIC, *SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE* (2005); PHILIP J. COOPER, *BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT* (1995); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994); JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* (1994); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992) (relying on interviews with law clerks and Justices more than on access to Court papers); MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991* (1997).
  27. For examples of works that are analytical and that do not rely on inside papers and records, see MARK V. TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005); see also ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* (2012).
  28. EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998).
  29. A Supreme Court Term typically runs from the first Monday in October (set by federal statute) to late June. Terms are referred to by the year in which they begin, so the 1988–89 Court year in which Lazarus clerked is the October Term 1988. See 28 U.S.C. § 2 (2012).
  30. LAZARUS, *supra* note 28, at xi.

political and partisan terms, much as *The Brethren* had nearly twenty years earlier. Lazarus said he offered an examination of disputes that “tear at the fabric of the Court’s internal culture” and a “clear window into the unsettling interactions of Justices and law clerks as they write the law of the land.”<sup>31</sup> His account heavily emphasized the political divide and personal agendas in the Court and placed great weight on the role of the law clerks. Few works since *Closed Chambers* have taken as strong a view of the Court as an overtly divided political institution.

### III. THE BENEFITS AND DRAWBACKS OF RELYING ON COURT PAPERS

#### A. *The Benefits*

The most important lessons from works based on the Justices’ papers are twofold: first, the revelation of internal deliberations by and large shows the Court working as one might expect—engaged in serious, analytical deliberations over substantive legal issues; and second, in part because of the first point, the disclosures for the most part have not tarnished the Court’s reputation as some Justices and others feared would be the case. Books like *The Brethren* convey the impression that much of what goes on inside the Court is driven by political agendas. Politics no doubt play a role in some Supreme Court decisions. The papers of the Justices, however, show that there is usually much more than politics at work inside the Court and that within the Court substantive legal issues really do matter.

Consider Professor Simon’s extensive account of an important civil rights ruling in 1989.<sup>32</sup> In the case of *Patterson v. McLean Credit Union*, the Court held that an 1866 civil rights law prohibiting race discrimination in making contracts did not apply to racial harassment in the workplace.<sup>33</sup> Simon describes in infinite detail how, when the Court first considered the case in the spring of 1988, a new conservative majority<sup>34</sup> emerged to reconsider an earlier precedent<sup>35</sup> that held the 1866 law prohibited race discrimination in private contracts, not just racial bias by state and local governments.<sup>36</sup> The earlier ruling, from 1976, was considered a crucial tool for enforcement by civil rights groups, as Simon describes.<sup>37</sup> After the Court reargued *Patterson* in October 1988, internal Court papers show, somewhat surprisingly, that there was no strong support for overruling the 1976 precedent. Moreover, Justice

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31. *Id.* at 12.

32. JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 20–81 (1995).

33. 491 U.S. 164 (1989).

34. The new majority consisted of Chief Justice William Rehnquist and Associate Justices Byron White, Sandra Day O’Connor, Antonin Scalia, and Anthony Kennedy. See SIMON, *supra* note 32, at 20.

35. *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that section 1 of the Civil Rights Act of 1866, codified as 42 U.S.C. § 1981, prohibits race discrimination in the making and enforcement of private contracts, not just when state action is present).

36. SIMON, *supra* note 32, at 20, 28–31, 37–41.

37. *Id.* at 40.



Brennan initially had a narrow, 5-4 Court majority to hold that the racial harassment violated the 1866 law. Brennan's fifth vote was Justice Anthony M. Kennedy, a newcomer when the Court first considered the case in February 1988.<sup>38</sup>

Although the vote to preserve the earlier precedent remained solid, Simon describes how Kennedy wavered and, despite Brennan's extensive efforts to persuade him, eventually switched his vote to create a majority against applying the 1866 law to racial harassment on the job.<sup>39</sup> Kennedy's reasoning, along with the Court majority, was that racial harassment in the workplace once an employee was already on the job was not racial bias in the making of an employment contract.<sup>40</sup> As Simon describes it, Brennan relied on the legislative history of the 1866 law to say that the presence of racial harassment in the workplace could suggest the lack of good faith in the making of a contract that is free of racial bias.<sup>41</sup> Kennedy acknowledged that there was some merit to Brennan's reading of the legislative history, according to Simon.<sup>42</sup> But Kennedy explained that as a matter of principle he was not willing to use legislative history to substantially broaden the reach of a statute beyond the language that Congress wrote, and he believed that Brennan's opinion did just that.<sup>43</sup> So Brennan and Kennedy differed fundamentally over how to use legislative history generally and over how to read the statute in this case.

Simon's account, a virtual play-by-play of how the case unfolded behind the scenes, demonstrates the Court's focus on substantive legal issues. To be sure, the narrative also examines an especially tense and divisive moment late in the case when Brennan and then Kennedy first escalated and then toned down their written criticism of one another's draft written opinions.<sup>44</sup> In the hands of another writer, the incident might have been hyped as reflecting a deep-seated personal rift between the newcomer Kennedy and the close-to-retirement Brennan.<sup>45</sup> But Simon's account shows that, politics aside, at least some of the exchange between Kennedy and Brennan, with Justice Stevens trying to mediate between them, reflected concern for the image of the Court that might be harmed by publication of harsh criticism among the Justices. Again, this description of a potentially volatile, previously secret internal dispute did not tarnish the reputation of the Court and instead gave a realistic picture of the negotiations and interactions that take place.

In some circles, the *Patterson* decision was viewed through a political lens, showing that the Rehnquist Court would be a more conservative institution than its

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38. *Id.* at 30, 48–49.

39. *Id.* at 54–61.

40. *Id.* at 57.

41. *Id.* at 60.

42. *Id.* at 57.

43. *Id.*

44. *See id.* at 64, 71–79.

45. Kennedy took his seat on the Court on February 18, 1988. Brennan retired on July 20, 1990.

predecessors.<sup>46</sup> But of far greater significance, Simon's account shows the Court wrangling over the meaning of the language of the 1866 law, struggling to determine what Congress intended more than one hundred years earlier, and trying to determine whether state contract law definitions had any relevance.<sup>47</sup> Rather than compromise the reputation of the Court or depict the Justices as overly political, the account shows the Court worrying about the substance of the law—pretty much what you want the Justices to be doing.

There is another valuable lesson to be learned about how the Court operates from works that rely on the papers of the Justices. Many such accounts demonstrate clearly that most of the Court's serious, substantive work is done in writing, not in conversation. Perhaps because of writing style, perhaps for other reasons, some earlier works, like *The Brethren*, leave the impression that much of the Court's business is carried out in personal conversations among the Justices.<sup>48</sup> In numerous places in *The Brethren*, reactions by one Justice to the draft opinion of another are recounted as if they were verbal comments, rather than written internal memos.<sup>49</sup> Some more recent works emphasize these personal interactions as an integral part of the decisionmaking among Justices, even when the contacts may actually be superfluous.

For example, in her well-received 2007 study of liberal-conservative struggles within the Court,<sup>50</sup> network reporter Jan Crawford<sup>51</sup> described a 1992 encounter in which Justice Kennedy changed his mind about the constitutionality of a graduation prayer while writing a majority opinion and changed the outcome of the case, thereby striking down the prayer.<sup>52</sup> The book says,

Kennedy left his chambers and walked down . . . to see Rehnquist. Apologetic and embarrassed, Kennedy delivered the news. In writing the opinion for the majority to allow the prayer, Kennedy had changed his mind about the result. He'd written a decision ruling instead that the prayer was unconstitutional . . .

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46. SIMON, *supra* note 32, at 79–80.

47. *Id.* at 54–81.

48. WOODWARD & ARMSTRONG, *supra* note 15.

49. For example, in describing the Court's work on a death penalty case in the early 1970s, THE BRETHREN observes, "Stewart agreed with Brennan that White was unpredictable." *Id.* at 216. This is one of a number of places that give the reader the sense of Justices Brennan and Stewart sitting in one of their offices discussing Justice White, rather than indicating that it is a conclusion based on the authors' reporting. See also the discussion of two cases about unanimous jury verdicts in 1972, where the book says, "Burger tried to get Powell to switch." *Id.* at 222. Was this a one-on-one conversation between Chief Justice Burger and Justice Powell, as the narrative seems to imply? Or might it have been in a written memo from Burger to Powell? The book provides no answer.

50. JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

51. At the time *Supreme Conflict* was published, Crawford used the name Jan Crawford Greenburg. She now publishes using the name Jan Crawford.

52. GREENBURG, *supra* note 50, at 139–40, 145–50 (discussing *Lee v. Weisman*, 505 U.S. 577 (1992)).

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There was nothing Rehnquist could do . . . so he advised him to go ahead and circulate his draft opinion.<sup>53</sup>

To be sure, the story is well told, and the book in some other places makes use of Justices' papers. But this story of a conversation between Kennedy and Rehnquist actually contributes little to understanding the Court. Kennedy did not need to notify Rehnquist in person—a memo would have sufficed—and the fact that they met face to face has no real significance for how the case came out or how the legal arguments unfolded. Nothing really happened in that face-to-face meeting; all developments of importance in the case took place in writing.

It is virtually impossible to come away from time spent researching in collections of Justices' papers without acquiring a fascination for reconstructing the paper trail of a case—that is, assembling in chronological order the exchanges of memos and draft opinions that make up a case file. The fascination is to try to track what happened in the case—when did Justices express their views and what impact did those expressions have on initial and subsequent draft opinions and on the final product? Getting caught up in that web of chronological reconstruction and intrigue also leads inevitably to the conclusion that it is the written exchanges that matter most to the Court.<sup>54</sup> That is not to say that one-on-one discussions do not happen and do not play an important role. Personal conversations outside the Justices' conference room do take place and may sometimes play a crucial role. The point is simply that important, game-changing conversations are rarer than the image of the Court that is conveyed in some books like *The Brethren*.

The written files of Justices also convey another important message—that the Justices remain cordial and collegial even when there are sharp differences of opinion. The impression that comes through in Justices' papers has two parts to it. First, the Justices are not saints and do show frustrations with one another, sometimes in scribbled notes on draft opinions, sometimes in memos to law clerks, and sometimes even in memos to other Justices. But second, those expressions of frustration and disagreement are rarely personal, and the Justices, more than many leaders in Washington, understand that all nine of them have to sit at the same conference table together again the next day.

Like other mortals, they have reactions, feel frustrations, and become vested in their work product and in the outcomes of cases. It is enlightening to see some of those feelings and frustrations expressed in comments in the margins of draft opinions. Indeed it is instructive to see the Justices vent their disagreements and

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53. *Id.* at 149.

54. Justice Brennan emphasized this point in interviews with the author. Referring to making changes and working with his colleagues, Brennan said, "And to the extent I modify my initial effort, I do it, as you know, constantly and prefer to do it by exchanges, written exchanges, between me and any of my colleagues who want to do that sort of thing, and all of them do . . . . And to the extent that I've been successful in so-called massing a court in that way, that's because I've been perfectly willing to negotiate revisions, changes, deletions, additions that are not inconsistent, as I see it, with my own view of the proper result in the case." Interview with William J. Brennan, Jr., Assoc. Justice U.S. Supreme Court, in Wash., D.C. (Apr. 15, 1987).

frustrations, more often than not within the confines of their own chambers, and then return to work with their colleagues.

Consider the example of Justice Brennan and Justice Lewis F. Powell, Jr. The two developed a strong professional relationship that became a critical facet of the Court under Chief Justice Warren E. Burger.<sup>55</sup> Brennan owed much of his legendary influence to Powell's willingness to work with him to reach a majority consensus on many important issues, and the two worked well together.<sup>56</sup>

But when Brennan in 1982 found himself in a tussle with Justice Sandra Day O'Connor over habeas corpus,<sup>57</sup> Powell was on the other side, giving O'Connor a 7–2 victory. When Powell got his first glimpse of the dissenting opinion that Brennan circulated to all of his colleagues, Powell wrote on his own copy, “No one is kinder or more generous than WJB until he takes up his pen in dissent.”<sup>58</sup> When Brennan labeled O'Connor's opinion an example of “judicial activism,”<sup>59</sup> a somewhat incredulous Powell scrawled on his copy, “Who's calling who what?”<sup>60</sup>

But while the comments, frustrations, and observations come through in the papers of Justices, so too does the collegiality that is a way of life at the Court. The collegiality is well illustrated in the same Court Term by a letter from the newcomer O'Connor to Brennan at the end of the Term.<sup>61</sup> Although the two Justices fought hard over habeas corpus and other issues, she wrote Brennan “to express my appreciation for your kindness during my first Term on the Court.”<sup>62</sup>

These examples together paint a realistic picture of the dynamic of nine powerful individuals struggling with difficult issues and sometimes with each other while maintaining a high degree of professional collegiality for the sake of their working relationships. This picture of the Court is an important contribution from study of Court papers. And the picture is all too often obscured as many recent works focus on conflict and personality within the Court. In his best-selling book, *The Nine*,<sup>63</sup> Jeffrey Toobin refers to Chief Justice John Roberts, Jr. at one point as a “warrior.”<sup>64</sup> Elsewhere Toobin asserts, “still, when it comes to the incendiary political issues that end up in the Supreme Court, what matters is not the quality of the arguments but

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55. Chief Justice Warren Burger was the presiding Justice on the Court from 1969 to 1986. Justice Lewis Powell was appointed to the Court in 1972 and served until 1987. Powell was frequently the swing vote on the Burger Court, determining whether the liberal or conservative bloc would prevail. See STERN & WERMIEL, *supra* note 22, at 360–67, 496–97.

56. *See id.* at 476.

57. *See Engle v. Isaac*, 456 U.S. 107 (1982); *see also* STERN & WERMIEL, *supra* note 22, at 478.

58. STERN & WERMIEL, *supra* note 22, at 479.

59. *Engle*, 456 U.S. at 137 (Brennan, J., dissenting); STERN & WERMIEL, *supra* note 22, at 479.

60. STERN & WERMIEL, *supra* note 22, at 479.

61. Justice O'Connor was sworn in and took her seat on the Court on September 24, 1981.

62. STERN & WERMIEL, *supra* note 22, at 480 (citing a letter from O'Connor to Brennan on June 28, 1982).

63. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007).

64. *Id.* at 335.

the identity of the justices.”<sup>65</sup> Toobin explained that he was talking about the individual judicial philosophies of the Justices,<sup>66</sup> but his book clearly underscores the importance of personal interactions and chemistry among the Justices. Toobin describes Justice Stephen G. Breyer reading a dissenting opinion from the bench in which Breyer takes an apparent dig at Chief Justice Roberts and Justice Samuel A. Alito, Jr. in an important 2007 case limiting the use of race in public school student placements.<sup>67</sup> “At this direct slap, Alito roused himself and stared across the bench at Breyer. Roberts didn’t change expression, but the muscles in his jaw twitched,” Toobin wrote.<sup>68</sup> The description makes for good drama and adds personal involvement to the narrative of what might otherwise be dry accounts of cases. But does the drama really capture a personal tension that is important to the functioning of the Court? No doubt any group of nine individuals who spend as much time together deciding important issues will experience moments of frustration. The papers of the Justices suggest that they work hard to achieve a high degree of cordiality that, in terms of the inner workings of the Court, supersedes moments of tension or frustration that can be easily captured.

Nowhere is the emphasis on personal conflict more apparent than in the aftermath of the Supreme Court’s decision upholding the individual mandate of the Patient Protection and Affordable Care Act.<sup>69</sup> Reaction to and analysis of the decision focused on the impact of the law and of the Court’s limitations on the power of Congress. But the commentary and reporting also put the spotlight on personal tension within the Court’s conservative wing, highlighting an alleged conflict between Chief Justice Roberts and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito over Roberts’s decision to vote to uphold the law.<sup>70</sup> Friction no doubt did exist in such a high-stakes case, but if the lessons from examination of past cases in Justices’ papers hold true, it is unlikely that the personal conflict played the major role in deciding the case, or even that the conflict lasted beyond the immediate end of the Court Term.

Still another value gleaned from the Justices’ papers may be an awareness of when a legal doctrine is on shaky ground and could be ripe for reconsideration or revision. This is not to say that a precedent should be disrespected or, worse, disregarded simply because there is evidence of internal discomfort among the Justices. A precedent remains just that, unless and until it is overruled or distinguished.

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65. *Id.* at 339.

66. *Id.*

67. *Id.* at 334–36 (discussing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007)).

68. *Id.* at 336.

69. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (upholding 26 U.S.C. § 5000A).

70. *See* Jan Crawford, *Discord at Supreme Court is Deep, and Personal*, CBSNEWS.COM (July 8, 2012), [http://www.cbsnews.com/8301-3460\\_162-57468202/discord-at-supreme-court-is-deep-and-personal/?tag=exclsv](http://www.cbsnews.com/8301-3460_162-57468202/discord-at-supreme-court-is-deep-and-personal/?tag=exclsv) (reporting that frustration among conservative Justices over the apparent change of heart by Roberts will affect relationships at the Court for some time to come).

A five-to-four decision accompanied by a strong dissent is still a decision of the Court, entitled to respect.

Yet there is nothing wrong with advocates knowing that an attack on a legal doctrine established by the Court may get a more favorable reception because there is disagreement among the Justices. Or conversely, knowing that support is weak for a doctrine may help advocates figure out arguments to shore up a line of reasoning. To date, there is little evidence that Supreme Court advocates are making these calculations based on internal documents rather than on published majority and separate concurring or dissenting opinions.

But there are examples of doctrines shown to face growing doubts and uncertainty within the Court. For example, the papers of several Justices reveal how quickly concerns developed about the application of the First Amendment to protect the news media from libel lawsuits by public officials and public figures. The ink on the decision in *New York Times v. Sullivan* was scarcely dry before some Justices began to see pitfalls in the doctrine.<sup>71</sup> The existence of doubts about the direction of libel law is not a secret; it is reflected in the dissenting and concurring opinions of Justices in cases spanning the 1960s through the 1980s.<sup>72</sup> The extent of those doubts—and the efforts to save *Sullivan* by its author, Justice Brennan—was not known outside the Court. A deeper understanding of the Court's doctrine, and of the concerns over its scope, might inform future litigation on the subject.

The same point may be true of other important and controversial Court decisions and doctrines. Lawyers litigating cases over affirmative action in higher education might benefit from examining and understanding the internal deliberations of the Court in earlier cases.<sup>73</sup> The arguments in future abortion litigation might be enhanced by examination of the internal deliberations over the meaning of the “undue burden” standard established in earlier cases,<sup>74</sup> especially since there appears to be some disagreement within the Court about what the standard means and how

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71. 376 U.S. 254, 279 (1964) (holding that public figures may recover damages for libel from news media defendants only upon a showing of actual malice, meaning knowing falsity or reckless disregard for the truth). For a discussion of these issues, see Lee Levine & Stephen Wermiel, *The Making of Modern Libel Law: A Glimpse Behind the Scenes*, 29 COMM'N LAWYER 1 (June 2012) (describing the internal struggles within the Court over the scope of First Amendment application to libel law).

72. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 369 (1974) (White, J., dissenting); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765 (1985) (White, J., concurring in the judgment); *id.* at 763 (Burger, C.J., concurring in the judgment).

73. In the Court's most recent decision upholding affirmative action in higher education, *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Justices expended considerable time and effort debating the meaning and intent of an earlier ruling, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in which the Court was deeply divided.

74. The Court, by plurality decision, held that abortion regulations are unconstitutional if they impose an “undue burden” on a woman's right to decide whether to terminate her pregnancy, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992), revising the earlier standard from *Roe v. Wade*, 410 U.S. 113 (1973). But in *Stenberg v. Carhart*, 530 U.S. 914, 957 (2000), Justice Kennedy, who had joined the plurality that created the undue burden standard, dissented and disagreed with Justices Sandra Day O'Connor and David Souter over the meaning of undue burden.

it should be applied.<sup>75</sup> Examining the earlier deliberations may not provide clear answers for future cases, but there may be useful insights in some cases from the papers of the Justices.

*B. The Drawbacks*

Analysis of the work of the Supreme Court through the papers of the Justices may have some drawbacks as well—or at least points of debate and controversy.

Foremost among the controversies is the use of the conference notes of Justices. To understand the controversy, it is important to understand what conference notes are. The nine Justices meet in private, with no one else present in the room, to both determine which cases they will hear and eventually decide and to vote and, at least initially, decide cases just heard by the Court. A Justice typically takes notes on the comments made at conference by the other Justices. The main purpose of the notes appears to be for that Justice's later reference; when a Justice is subsequently writing an opinion in a case, the Justice and law clerks may refer to the notes to determine the basis on which the Court agreed to decide the case.

The conference notes of Justices pose a number of challenges as research sources. To some scholars, using conference notes represents the brass ring because the conference itself is the ultimate inner sanctum. "The secrecy of the conference is, indeed, one of the great continuing Court traditions," wrote Bernard Schwartz for his study of the Warren Court.<sup>76</sup>

So what is the problem? Schwartz used the shorthand, scribbled notes of the Justices to transform accounts of the conferences into verbatim conversations. This was a surprising undertaking and a dubious process for a respected and prodigious legal scholar of Schwartz's caliber.<sup>77</sup> *Super Chief* is filled with conference statements and conversations in quotation marks as if to suggest that these are the precise words spoken by the Justices in the inner sanctum. But of course, even if the Justices knew shorthand, and there is no evidence that any of them did, the scrawled notes are just that—notes. They were not written as verbatim quotes or as anything more than an effort to capture the essential core of a colleague's view. In fairness, Schwartz acknowledged that he was reconstituting statements from notes.<sup>78</sup> "I have tried to reconstruct the conferences in most of the cases discussed," he wrote.<sup>79</sup>

There is undoubtedly value in learning what the Justices said when discussing some cases. But does the value outweigh the titillation? Is the value sufficiently great to take the step of recreating conversations that undoubtedly never actually took place in the precise form in which they were reported?

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75. Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *Stenberg v. Carhart*, 530 U.S. 914 (2000), with *Gonzales v. Carhart*, 550 U.S. 124 (2007).

76. SCHWARTZ, *supra* note 21, at xi.

77. Schwartz, who died in 1997, was a law professor at New York University School of Law for forty-five years before spending his final years teaching at the University of Tulsa College of Law.

78. SCHWARTZ, *supra* note 21, at xi.

79. *Id.*

Schwartz is not alone. Perhaps spurred in part by *Super Chief*, author Del Dickson<sup>80</sup> published a lengthy volume in 2001 that was not part of a biography or a Supreme Court history. Its sole purpose was to recreate the conference discussions of the Justices in 300 major cases.<sup>81</sup> Dickson explained, “Instead of simply publishing the Justices’ notes verbatim, they were carefully edited in the spirit of what they are—abbreviated versions of what was actually said in conference.”<sup>82</sup> He wrote, “sentence fragments have been completed and abbreviations made whole, so that the notes read more as they were originally spoken in conference.”<sup>83</sup>

Let’s consider the credibility of this notion for a moment. First, recall that the notes in question are not those of the speaker, but rather of one or more among eight listeners. Second, the very assumption on which these reconstructions of conference discussions are based is unproven. In what rulebook is it spelled out that the Justice’s notes are attempts at shorthand accounts of verbatim statements, rather than attempts to capture the essence of the speaker’s ideas? Third, even if the Justices as note-takers did a reasonably careful job of recording what others said, does the reconstruction of the conversations take into account the possibility, perhaps even probability, that the notes are filtered through the note-taking Justice’s own perspective on the case?<sup>84</sup>

The main focus of Justice Black’s papers-burning admonition to his son was Black’s conference notes.<sup>85</sup> This was because Black feared that the candor of discussion would be compromised if the confidentiality of the conference room were breached. But Black was also concerned over the very substantial problem that any verbal statement or written document may be taken out of the context in which it was originally intended by the speaker or author. So yet another problem in the reconstruction of conference notes is that even the most accurate composite of notes taken by other Justices may lack the context of what the speaker intended when discussing a case. Reconstructed conversations at the conferences can at best only guess at the context, tone, and intent of the Justice who was the speaker.

The problem of context is not limited to conference notes. There is a risk that any document prepared by one Justice and then considered by another Justice or by a researcher may be seen in a context other than the one intended by the author. The problem is all the more acute because a typical case file in one Justice’s papers will include the work product of other Justices in the form of memos and draft opinions.

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80. Del Dickson, J.D., Ph.D., is a well-regarded political science professor at the University of San Diego.

81. *THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* (Del Dickson ed., 2001).

82. *Id.* at xix.

83. *Id.*

84. For example, there are places in the conference notes of Justice Brennan where the notation next to Justice Thurgood Marshall simply says, “Agreed with me.” That is clearly not a verbatim account of what Marshall said in those instances; at the very least, Marshall probably said, “I agree with my brother Brennan,” or something along those lines. But it is equally plausible that Marshall said a bit more and Brennan filtered it as, “Agreed with me.”

85. For a discussion of Black’s concerns see *supra* text accompanying note 8.



Justice Brennan recalled<sup>86</sup> looking at a copy of the Mason biography of Justice Stone<sup>87</sup> in Justice Black's home study and witnessing Black launch into a tirade against the book. Black was affronted because Mason took memos written by Black and described them through Stone's eyes—out of the context in which Black intended them.

It is incumbent on researchers and writers who use internal Court papers to try to overcome the problem of lack of context when recounting exchanges among Justices. Users of conference notes face a virtually insurmountable challenge in trying to present accounts that are accurate both as to what was said and as to the context.

#### IV. CONCLUSION

There was a time when Justices and some Court practitioners argued that the Supreme Court would be harmed, perhaps irreparably, by research incursions into the internal papers of Justices. When the papers of Justice Thurgood Marshall were released upon his death in 1993, only two years after he retired so that internal details of two-year-old decisions were revealed, then-Chief Justice William H. Rehnquist wrote to the Librarian of Congress to protest.<sup>88</sup> Speaking for a majority of the Court, Rehnquist wrote that he was “surprised and disappointed” at the release of Marshall's papers so soon after his death.<sup>89</sup> The letter warned the Library of Congress that Justices might look elsewhere for library repositories for their papers.

But the release of the Marshall papers, as well as those of Justices William J. Brennan, Jr., Harry Blackmun, Byron R. White, Lewis Powell, and others have done no harm to the Court's reputation, although the public popularity of the institution ranks low in recent polls.<sup>90</sup> If anything, the use of the papers to explain the Court and its decisions shows the institution hard at work, debating and negotiating over

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86. Interview with William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Wash., D.C. (Oct. 24, 1986) (“But, one day at Hugo Black's, my wife, Marge, and I were at Hugo Black's for dinner one night. And I happened to see Alpheus Mason's biography of Stone. And I just picked it up and said, gee, this guy, Mason, has certainly done a hell of a good job, because he'd done Brandeis, you know, and Stone. And he did one hell of a good job. And Hugo went through the roof. He said, and then he told me this story, that there were—there are in that biography many quotes from memoranda that Stone's wife had turned over to Mason as part of Stone's papers. And they were memoranda about various cases and what had happened, just along the lines of mine and who did what and why, and so forth. And Hugo Black said that they were all a bunch of goddamned lies. Just a bunch of goddamned lies. Nothing like that ever happened in that case. This is what happened, and so forth . . . Well Hugo said finally, 'I'm going to take care of that. By God, I've got memoranda of various things. I'm going to order all my papers destroyed . . .’”).

87. MASON, *supra* note 6.

88. Letter from William H. Rehnquist, Chief Justice, U.S. Supreme Court to James H. Billington, Librarian of Congress (May 25, 1993) (on file with the author).

89. *Id.*

90. See *Supreme Court Ratings Down in Pew Poll*, ASSOCIATED PRESS (May 1, 2012, 3:46 PM), available at <http://www.wtop.com/?nid=319&sid=2848827> (“The Pew Research Center says 52 percent of Americans have a favorable opinion of the court, the lowest rating since the group started asking Americans their view of the high court in 1987.”).

important legal doctrine and struggling to agree on substantive results. The works of Professor James Simon provide strong support for this conclusion.

With a few exceptions discussed above, the story of using the papers of Supreme Court Justices is a success story—for researchers, for students of the Court, and for the credibility of the Justices.