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Book Review: The Brethern, by Bob Woodward and Scott Armstrong

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BOOK REVIEW

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THE BRETHREN INSIDE THE SUPREME COURT. By Bob Woodward and Scott Armstrong. New York: Simon and Schuster, 1979.

Since the days of Chief Justice Marshall, the United States Supreme Court has occupied a unique role in our system of government. Deemed by our founding fathers to be a necessary check on abuses of the democratic process, the Court has traditionally been considered the final guardian of constitutional liberties. Manned by nine justices serving during good behavior,[1] the institution is designed to ensure isolation from political pressures. The Court regularly determines, for example, whether men shall live or die, schools shall be integrated, legislative districts redesigned, and corporate mergers prohibited. In essence, it seeks to provide some form of resolution to the myriad problems which work their way into our legal system. Given the import of this task and the effect which the decisions of the Court have upon all our lives, the basic secrecy under which the justices have historically operated is surprising. *The Brethren,* by Bob Woodward and Scott Armstrong, is the first piece of serious investigative reporting which seeks to pierce the Court's hidden deliberative processes.

The Brethren is an in-depth probe of the Court's 1969-1975 terms. Based on "interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court,"[2] the book presents a blow-by-blow account of the method by which the justices arrived at various controversial decisions of the last decade.

The Brethren would appear to be a work of considerable importance not only because of its subject matter, the first detailed examination of behind-the-scenes Supreme Court battles, but also because of its authors. Bob Woodward's previous books with Carl Bernstein, *All the President's Men* and *The Final Days,* have established his reputation for tough, incisive investigative reporting. Woodward, this time teaming with *Washington Post* reporter and

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[1] U.S. CONST. art. 3, § 1.

[2] B. WOODWARD & S. ARMSTRONG, THE BRETHREN 3 (1979) [hereinafter cited as THE BRETHREN].

former Watergate investigator Scott Armstrong, has accomplished a readable, well-written book setting forth the feuds, compromises, and personal quirks of the justices with remarkable detail.

Within the book's pages we are introduced to Chief Justice Burger, who is reportedly described by his colleagues as "abrasive," "asinine," and a "blustery braggart without substance or integrity." The obstinacy of William O. Douglas, especially in the latter days of his tenure, is aptly illustrated. The indecision of Harry Blackmun, the aggressive personality of Byron White, the humor of Thurgood Marshall, and the bitterness of William Brennan are examples of the personal portraits which the book creates of the men who occupy our highest court.

The book also documents in vivid detail the claimed tendency of Chief Justice Burger to switch votes, withhold votes, and tamper with opinion assignment procedures in order to obtain what he considers to be a more personally acceptable majority opinion. According to *The Brethren,* the other members of the Court counter such acts by forcing their own language into Burger's opinions under threat of dissent. Indeed, such maneuvering is probably the only rational explanation for the confusing and disjointed opinions authored by the Chief Justice in *Reed* v. *Reed,*[3] *Swann* v. *Charlotte-Mecklenburg Board of Education*[4] and *United States* v. *Nixon.*[5]

Woodward and Armstrong do several things quite well. Perhaps the foremost attribute of the book is its intimacy. The reader is introduced to the unofficial ideological positions of the justices as well as the power plays which ultimately resulted in such landmark decisions as *Roe* v. *Wade*[6] (abortion), *Swann* v. *Charlotte-Mecklenburg Board of Education*[7] (busing), *Furman* v. *Georgia*[8] (death penalty), *Frontiero* v. *Richardson*[9] (sex discrimination), and *United States* v. *Nixon*[10] (Watergate tapes). The authors disclose that Muhammad Ali came much closer to imprisonment than either he or readers of the Court's opinion might have imag-

[3] 404 U.S. 71 (1971).
[4] 402 U.S. 1 (1971).
[5] 418 U.S. 683 (1974).
[6] 410 U.S. 113 (1973).
[7] 402 U.S. 1 (1971).
[8] 408 U.S. 238 (1972).
[9] 411 U.S. 677 (1973).
[10] 418 U.S. 683 (1974).

ined previously.[11] Accounts are given of the sometimes moving, sometimes pathetic exchanges occurring in the last months of the careers of Justices Black, Harlan and Douglas as each endeavored to perform judicial duties despite physical infirmities. Such passages provide the reader with an unexpected glimpse into the personal lives of the justices.

The Brethren is most convincing, and perhaps most accurate, in its description of the dramatic shift of power and philosophy which has taken place on the Court since the resignation of Earl Warren. In the course of the years analyzed, consistent liberal majorities gradually gave way to more moderate or conservative judicial approaches. The realignment of the Court resulting from the forced resignation of Abe Fortas, the deaths of the highly esteemed John Harlan and Hugo Black, and the resignation of the Court's great libertarian, William O. Douglas, provides a central theme to Woodward and Armstrong's analysis. Nixon appointees Warren Burger, Harry Blackmun, Lewis Powell and William Rehnquist, as well as Gerald Ford's designee John Paul Stevens, manage to deflect the direction of the highest tribunal away from the activist postures which characterized the Warren years. As the book documents, however, the result is not a knee-jerk conservative Court dominated by the Chief Justice. Rather, a strong centrist core composed of Justices Stewart, Powell, White and Stevens increasingly controls the outcome of cases. Remaining liberals Brennan and Marshall appear to be left isolated and embittered, no longer exercising substantial influence over their colleagues. Brennan is said to refer to the Chief Justice as "dummy" and wield an "acid pen" in dissent. Marshall is described as having given up the fight. " 'I'm going fishing,' he tells his clerks. 'You kids fight the battles. What difference does it make? Why fight when you can just dissent?' "[12]

Despite several strong points, however, *The Brethren* suffers from serious deficiencies. Not only is the authors' methodology somewhat troubling, but, as will be discussed below, the primary emphasis of the work is misdirected. Further, the book evinces precious little understanding of the important and complex nature of the institution with which it deals. Accordingly, the book, which

[11] THE BRETHREN, *supra* note 2, at 136-49. *See* Clay v. United States, 403 U.S. 698 (1971).

[12] THE BRETHREN, *supra* note 2, at 197.

was eagerly anticipated in both legal and journalistic circles, ultimately is disappointing.

I

Before considering the thrust and likely impact of the book, it is appropriate to say a word about the overall methodology employed by the authors. Unlike the other branches of government, the Supreme Court is required to formally explain the legal rationale and logical basis for its decisions. The task of an investigative report such as *The Brethren* is thus to go behind the justices' written opinions and explore the inarticulated pressures, compromises, and theories which work their way into the Court's decision-making process. The internal conferences at which the justices heatedly debate the outcome of particular cases are, of course, off the record and removed from public scrutiny. *The Brethren,* therefore, must rely on a hand-me-down type of approach whereby sources relate, generally second or third hand, what went on behind the closed doors. Unless the Supreme Court decides to open these internal proceedings to public scrutiny, such an approach seems an unavoidable evil. In dealing with these multiple hearsay declarations from former law clerks and "several justices," however, Woodward and Armstrong appear to give insufficient consideration to the likely biases of their sources.

Consider, for example, the primary victim of the book, Chief Justice Burger. The text is replete with colorful diatribes about the incompetence and general undesirability of Warren Burger. It should be understood, however, that the primary bases for such conclusions are extensive conversations with former law clerks who are, as the authors readily admit in other contexts, generally much more liberal than the Chief Justice. It can further be assumed that most of the law clerks of this period were quite unhappy to witness, much less participate in, the undoing of much of the work of the Warren Court. Accordingly, the tendency to view the Chief Justice in a poor light would be strong. Any contributions by "embittered" justices unhappy with the direction of the Burger Court would likely be subject to similar tendencies of exaggeration.

Another recurrent theme of *The Brethren* is the inability of various justices to author acceptable opinions without the guidance of their law clerks. We are told that Mr. Justice Marshall not only failed to have a significant hand in his powerful dissent in *San*

Antonio Independent School District v. *Rodriguez,*[13] but also probably misunderstood the position he was taking.[14] Likewise, the authors reveal that a clerk for Justice Blackmun, after being shown a "crudely written and poorly organized" draft authored by his boss, took it upon himself to accomplish the "laborious" task of rehabilitating the opinion in *Roe* v. *Wade.*[15] The long and short of such examples is the brilliance of the clerks and the dullness of the justices. It may, of course, be true that the clerks often possess greater legal ability than their employers. Surely, however, the self-serving nature of such remarks is apparent. What could be more comforting to a clerk than the knowledge that he is running the Supreme Court?

It is surprising that crack investigative reporters such as Woodward and Armstrong appear to accept the declarations of their sources as gospel. A more objective study would likely have entertained a higher degree of skepticism and, perhaps, taken pains to explain the potential for bias to the reader.

II

Much more disconcerting than such problems of bias, however, is the book's ultimate direction. In an unfortunate attempt to present startling revelations concerning the private lives of the justices, Woodward and Armstrong dedicate large portions of the book to irrelevant trivialities. At the same time, the authors appear to gloss over problems of major significance to the Court as an institution.

We are given, for example, an extended discussion of Byron White's propensity to cheat on the basketball court.[16] Similarly, much is made of the "unpleasant odor" which filled the conference room as the result of the "incontinence" of Justice Douglas after his stroke.[17] We are informed that Justice Brennan failed to realize that a National Lampoon cartoon portrayed him as a "flasher" rather than a protector of school children.[18] It appears that the

[13] 411 U.S. 1 (1973).
[14] THE BRETHREN, *supra* note 2, at 258-59.
[15] 410 U.S. 113 (1973). *See* THE BRETHREN, *supra* note 2, at 183-84.
[16] THE BRETHREN, *supra* note 2, at 185.
[17] *Id.* at 391-92.
[18] *Id.* at 279-80.

Chief Justice makes scheduling mistakes which "any dumb ass" could avoid.[19]

While much of *The Brethren* is dedicated to such inanities, more serious concerns often go substantially unexplored. Disturbing indications of a Nixon-Burger connection with regard to both the school busing cases and the Watergate tapes case appear but are left undeveloped.[20] It must also be supposed that the authors saw little import to claims that the Chief Justice is not above misrepresenting the facts of a case or straining to decide issues not presented by a case in order to overrule Warren Court precedent.[21] Perhaps a more direct example of such misplaced priorities is the fact that the authors consider Justice Rehnquist's winning personality more deserving of attention than his claimed tendency to employ "an unusual twist of logic" or apply "seemingly inappropriate citations" in hopes of overruling substantial areas of case law without expressly saying so.[22] Potential abuses of the judicial process would seem to merit more serious consideration than the personality quirks of individual justices in any serious study of the Court.

Too often *The Brethren* reflects a sort of intellectual color-blindness — emphasizing the trivial and skirting the crucial. At times, Woodward and Armstrong seem unsure of whether they are writing for Simon and Schuster or for Rona Barrett. In reality, however, there is precious little to shock our sentiments in *The Brethren.* Internal jockeying by the justices and compromises achieved in order to obtain a majority are as old as the institution itself. The confusing flip-flopping of the Chief Justice is readily apparent to any reader of the Court's opinions. No criminal activities are revealed or even hinted. Lobbying by outsiders is demonstrated to be futile. Power plays by individual justices are regularly thwarted by the Court as a whole, and poorly reasoned opinions by one justice are often hammered into acceptability by the others.

III

Certainly one of the primary undercurrents of *The Brethren* is the basic subjectivity of Supreme Court decisionmaking. Wood-

[19] *Id.* at 64.
[20] *Id.* at 55-56, 294, 316.
[21] *Id.* at 284, 373-75.
[22] *Id.* at 383-84.

ward and Armstrong repeatedly portray the justices as a group of individuals deciding questions of ultimate societal import on the basis of their personal whims. The authors would have us believe that Harry Blackmun cast his vote in favor of the right of a woman to choose abortion in hopes of pleasing his progressive wife and daughters.[23] Justice Stewart's vote in a boundary dispute is described as follows:

> In one case, Ohio and Kentucky, divided by the Ohio River, could not agree on their common boundary. An 1820 Supreme Court case put the river in Kentucky and therefore was precedent. But Stewart, who came from Ohio, told his clerks that he had another reason for voting against his home state. 'My father always told me at the breakfast table that the Ohio River was in Kentucky.'[24]

Justice Black is claimed to have taken a stance against extensive school busing because a long-employed, black Supreme Court messenger and friend of the justice "doesn't like busing."[25] Even worse, the authors report that Justice Black's vote in *Evans* v. *Abney*,[26] a landmark discrimination case dealing with a state court's interpretation of testamentary intent, was based upon his desire to prevent "interference with his wish to have his Court papers destroyed when he died."[27]

The first and most obvious criticism of these claimed instances of outrageous subjectivity is that they are simply ridiculous. The issue is not whether such statements might have been made in an off-handed fashion by a particular justice. The question is whether it is reasonable to assume that the justices made their decisions based on such sentiments. No serious student of the Court could accept the authors' claims at face-value. Yet much of the general audience for which the book is aimed will probably be willing to believe that decisions of the United States Supreme Court are based on what the justices hear at the breakfast table.

Consider, for example, the alleged statements of Justice Black. The long career of Hugo Black evidenced a greater concern for literal applications of the Constitution and the protection of

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[23] *Id.* at 183.
[24] *Id.* at 270.
[25] *Id.* at 98.
[26] 396 U.S. 435 (1970).
[27] THE BRETHREN, *supra* note 2, at 60.

state sovereignty then perhaps any other aspect of his constitutional analyses.[28] Off-handed statements which imply that Justice Black decided *Evans* v. *Abney* out of self-interest as opposed to his strong interest in federalism are not only silly, but reach the height of irresponsibility. Yet *The Brethren*'s implicit message that Supreme Court decisions represent the individual whims of nine justices may have wider and perhaps harsher implications than its authors comprehend.

Our federal constitution is not a code-like document filled with specific directives and prohibitions designed to apply to all factual situations which may arise. Rather, as Chief Justice Marshall indicated in *McCulloch* v. *Maryland,*[29] the Constitution is a document of enduring principles which requires an independent judiciary to interpret it and apply it throughout changing historical periods. Accordingly, if we are to have any meaningful constitutional protections, the justices of the Supreme Court must breathe life into the provisions of the document through their own interpretations of its contents in light of past decisions and the present needs of society. Indeed, contrary to the implicit position of Woodward and Armstrong, some degree of subjective review is inherent in constitutional analysis. No less a judicial conservative than the late Alexander Bickel recognized the necessity of judicially determined constitutional principles as follows:

> There is a body of opinion and there has been, throughout our history — which holds that the Court can well apply obvious principles, plainly acceptable to a generality of the population, because they are plainly stated in the Constitution . . . or because they are almost universally shared; but the Court should not manufacture principle. However, although the Constitution plainly contains a number of admonitions, it states very few plain principles; and few are universally accepted . . . . Unable to cabin the Court's interventions by rule, we have been generally content with the exercise of authority not so cabined. We do not confine the judges, we caution them. That, after all, is the legacy of Felix Frankfurter's career.[30]

Indeed, the necessity of active judicial interpretation presents the most troubling dilemma of modern constitutional analysis.

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[28] *See* Younger v. Harris, 401 U.S. 37 (1971); Oregon v. Mitchell, 400 U.S. 112 (1970); *In re* Winship, 397 U.S. 358, 377 (1970) (dissenting opinion).

[29] 17 U.S. (4 Wheat.) 316 (1819).

[30] A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 177 (1978).

The Court must find a way to read sufficient content into the vague due process and equal protection guarantees so that fundamental liberties are assured to all. Yet, limits on the scope of judicial review must be adequate to prevent the Court from exercising the powers of a super-legislature.

Woodward and Armstrong, however, fundamentally misunderstand this crucial role of the Court. They seek to shock us with the knowledge that not all constitutional decisions represent precise applications of pre-ordained rules which are etched somewhere in stone. Since they are not, the implication is that the Court has stepped outside its constitutionally mandated function. The Supreme Court, of course, does sometimes overstep its bounds. But the Court does not overreach merely because a particular decision is not based on the explicit and unambiguous language of the Bill of Rights.

Consider, for example, the landmark case of *Griswold* v. *Connecticut*.[31] There the Court struck down a state law which prohibited the use of contraceptives by married persons. No literal provision of the Constitution would seem to prohibit such an anti-contraceptive statute. Yet, the justices held that a right to privacy, which includes the right of married couples to decide whether or not to use birth control devices, is implicit in the Bill of Rights taken as a whole.[32]

Does *Griswold* represent an abuse of the Court's power since the decision was not based on a specific provision of the Bill of Rights? On the contrary, in *Griswold* the Supreme Court properly fulfilled its unique role in our system of government by offering protection to a fundamental liberty in danger of infringement under the democratic process. Would Woodward and Armstrong be content with a Court which examined the facts in *Griswold,* found no explicit right to privacy listed in the Constitution, and, therefore, sustained the statute? If the right of the authors to protect the sources consulted in the writing of *The Brethren* were to be litigated, would they be content with a rigid and literal reading of First Amendment.

The Brethren touches indirectly, yet often destructively, on one of the most complex problems faced by the Supreme Court as

[31] 381 U.S. 479 (1965).

[32] *Id.* at 484.

an institution. Woodward and Armstrong, however, see only one side of the equation. The authors understand and attempt to make significant the problematic nature of subjective decisionmaking. It never occurs to them, however, that a purely objective and literal interpretation of the Constitution would leave it, essentially, a dead letter. Accordingly, the authors' criticisms of the Court flounder and merit little consideration.

Further, it is obvious that the Supreme Court occupies a complex and delicate posture in our system of government. Unlike the legislative and executive branches, the Court is armed with neither the power of the purse nor the sword. Rather, the Court's traditionally respected role as the country's final legal arbiter as well as the logical and moral force of its decisions must serve as the judiciary's basis of enforcement. *The Brethren* centers not on the moral or legal basis of particular decisions, but on behind-the-scenes exposés of the personalities of the members of the highest court. It is unfortunate that a critical examination of the Court which will likely reach a mass audience is not supported by an understanding of the role which the institution seeks to play in our society. It is certainly not true that those problems can only be addressed by lawyers. It might be preferable, however, if critics of the Court spend at least a little time studying the sensitive issues faced by the justices and the legal context in which their decisions are reached.

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Analysis of the decisionmaking process of the Supreme Court is not only an appropriate aim, it is an essential task in a free society. In the words of the Chief Justice: ". . . no public institution, or the people operating it, can be above public debate."[33] *The Brethren,* therefore, is a disappointing book not because it seeks to investigate the Court, but because it accomplishes its task so poorly. The way in which the justices wield their power is a great concern for modern society. Any serious examination of the Court should consider the actions of the justices in light of the complex issues they face and in the context of the proper role of the judiciary in our constitutional system. Certainly, the political philosophies, analytical abilities, and personal predilections of the individual justices play a strong part in analyzing whether the United

[33] THE BRETHREN, *supra* note 2, at 5.

States Supreme Court is doing its job. Whether Warren Burger is pompous and self-centered or whether Whizzer White is sometimes over-anxious under the basket, however, provides little assistance.

Woodward and Armstrong were either unaware of the kinds of circumstances which threaten to compromise the Court, or unable to find substantial material to attack the institution's credibility. As a result, the authors turned to a heavy emphasis on the revelation of irrelevant tidbits about the personal lives of the justices. Personal tidbits, however, appear to be the things from which best-sellers are made. This misdirection is unfortunate, however, because a responsible work on the operation of the Court is needed. Woodward and Armstrong are simply not the authors to do it.