

1996

The Ratings Game: Factors That Influence Judicial Reputation

William G. Ross

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 Marq. L. Rev. 401 (1996).

Available at: <https://scholarship.law.marquette.edu/mulr/vol79/iss2/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

MARQUETTE LAW REVIEW

Volume 79

Winter 1996

Number 2

THE RATINGS GAME: FACTORS THAT INFLUENCE JUDICIAL REPUTATION

WILLIAM G. ROSS*

INTRODUCTION

The rating of United States Supreme Court justices is an increasingly favorite pastime among scholars, judges, journalists, students, and practicing attorneys. Once the domain of a few pundits who made personal lists of the all-time "greatest" justices,¹ surveys are becoming more formal and are embracing more participants. The most extensive

* Professor of Law, Cumberland School of Law of Samford University; A.B., Stanford, 1976; J.D., Harvard, 1979. The author was one of the scholars polled in the 1993 Blaustein-Mersky survey that is discussed in this Article. The author thanks Professor Roy M. Mersky of the University of Texas for advice and encouragement in connection with this Article and for his permission to publish the results of that survey as an appendix to this Article.

1. In 1928, Secretary of State Charles Evans Hughes, formerly an associate justice of the U.S. Supreme Court and later Chief Justice of the United States, made an informal list of the eight leading Supreme Court justices. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 58 (1928). In 1938, Harvard Law School Dean Roscoe Pound compiled a list of the ten greatest jurists in American history, only four of whom had served on the Supreme Court. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 30-31, n.2 (1938). In 1957, Justice Felix Frankfurter weighed in with his list of the sixteen greatest Supreme Court justices. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 783-84 (1957). The legal scholar John P. Frank presented a list of 23 justices in 1958. JOHN P. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* (1958). Wisconsin Chief Justice George R. Currie made a list of the top nine justices in 1964. George R. Currie, *A Judicial All-Star Nine*, 1964 WIS. L. REV. 3, 3-13. Sidney H. Asch compiled a list of the fifteen greatest justices in 1971, and New York University Law Professor Bernard Schwartz made a list of the top ten in 1979, SIDNEY H. ASCH, *THE SUPREME COURT AND ITS GREAT JUSTICES* (1971); Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 SO. ILL. U. L.J. 405, 405-06. Stuart S. Nagel in 1970 and James E. Hambleton in 1983 made lists based upon compilations of earlier lists. Stuart S. Nagel, *Characteristics of Supreme Court Greatness*, 56 A.B.A. J. 957-59; James E. Hambleton, *The All-Time All-Star All-Era Supreme Court*, 69 A.B.A. J. 462-64 (1983).

surveys were conducted in 1992 by Professors William D. Pederson and Norman W. Provizer and in 1993 by Professors Roy M. Mersky and the late Albert P. Blaustein.² Pederson and Provizer compiled four separate lists for academics, jurists, students, and lawyers, while Blaustein and Mersky prepared one list based on a poll of more than one hundred judges, scholars, and lawyers. The Blaustein-Mersky survey updated a similar survey that these scholars conducted in 1970. Although all of these lists have some predictable similarities, there are also some striking differences that offer significant insights into how the perception of what constitutes judicial greatness shifts with time and diverges according to who does the ranking.

Although the ranking of Supreme Court justices may sometimes seem like a parlor game, it is a useful exercise insofar as it offers a means of defining the qualities that Americans value in their Supreme Court justices. The identification of such qualities is of both retrospective and prospective use. Retrospectively, the evaluation of justices offers insights into legal history since distinctions among the relative significance of various judges provide a clearer perspective about which judicial decisions and philosophies have most profoundly influenced the Court and the country. In this manner, it assists the historian in her essential task of distinguishing between phenomena and ephemera. It also offers significant insights into historiography, since shifts in judicial reputation over the years reflect changing attitudes toward the work of the Court during various periods of history. Prospectively, the evaluation of justices helps us to discriminate among possible candidates for service on the Court and to predict how potential or new justices will behave while on the bench.³ An understanding of what makes judicial greatness is particularly important since the work of the Supreme Court is so subjective and has such a profound impact on the life of the nation.⁴

2. See WILLIAM D. PEDERSON & NORMAN W. PROVIZER, *GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASES 14-19* (1993); list compiled by Roy M. Mersky and Albert P. Blaustein (Attached to this Article as Appendix I). The scope of the two surveys is substantially different. Professors Pederson and Provizer asked members of their four groups of participants to list the ten greatest justices. Professors Mersky and Blaustein sought rankings of all of the 108 justices who had served on the Court. Professors Blaustein and Mersky conducted a similar survey in 1970. See Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1185 (1972); See also Appendix II.

3. HENRY ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 11 (2d ed. 1985).

4. As Professor Fairman observed, the Justices always are "at work on the all-embracing question, 'What sort of country is America to be—what shall be the characteristics of its

The evaluation of Supreme Court justices is obviously far from an exact science. Everyone who participates in surveys on judicial greatness or has an opinion about the respective merits of justices applies somewhat different criteria in evaluating the justices, and any opinion or ranking is inherently subjective.⁵ As we shall see, the reputations of some justices have fluctuated widely, varying according to the temper of the times and the predilections of the persons who have conducted the surveys. But while there is no precise or objective means of evaluating justices, the rankings of justices have had certain consistencies. Literally every published survey has ranked John Marshall as the "greatest" justice, and other justices, particularly Oliver Wendell Holmes Jr. and Louis D. Brandeis, have generally fared well.

Despite differing results in various surveys, however, there are certain factors which are likely to influence any judicial reputation. The participants in the 1993 Pederson-Provizer survey listed the following factors: leadership on the Court, writing ability, judicial restraint, judicial activism, enhancement of the Court's power, protection of individual rights, length of service, impact on the law, impact on society, intellectual and legal ability, protection of societal rights, dissent behavior, and personal attributes.⁶ Similar factors are likely to have been considered in other surveys and in other evaluations of the justices.⁷

economy, what shall be the qualities of the people's liberty, where within this federal system shall various responsibilities be exercised?" On these, the ultimate problems, the Constitution speaks with Delphic reticence; it is actually the Justices that pronounce the responses. No other country gives so much authority to its supreme judiciary. That is why we hear so much popular discussion of the personalities on our Supreme Court. That is why it seems worth while . . . to seek in the Court's history an answer to the question, "What makes a great Justice?" Charles Fairman, *What Makes A Great Justice? Mr. Justice Bradley and the Supreme Court, 1870-1892*, 30 B.U. L. REV. 68 (1950). Not everyone would agree with this assessment, however. Professor Ariens recently argued that "[t]he romantic notion of the Great Judge . . . is dangerously misleading" because the Court's decisions are not important since their effect depends so heavily upon those who must implement the decisions and the obedience of the citizenry. According to Ariens, "any symbolic guidance on Great Judges for legal and moral guidance means that less is required of us as members of a community." Michael S. Ariens, *Constitutional Law and the Myth of the Great Judge*, 25 ST. MARY'S L.J. 303, 312-13 (1993).

5. As Felix Frankfurter observed, "[g]reatness in the law is not a standardized quality, nor are the elements that combine to attain it." Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 784 (1957).

6. PEDERSON & PROVIZER, *supra* note 2, at 19.

7. Professor Abraham recently listed the following factors, in no particular order of importance: "(1) Demonstrated judicial temperament; (2) professional expertise and competence, including analytical powers; (3) absolute personal moral and professional integrity; (4) an able, agile, lucid mind; (5) appropriate professional educational background or training; (6) the ability to communicate clearly, both orally and in writing, and especially

Some of these factors obviously influence some critics more than others, and some factors—activism and restraint, for example—may be mutually contradictory. Moreover, these factors are more useful in framing a theoretical model of an ideal justice rather than identifying the factors that actually mold judicial reputation in practice. This Article will consider the impact of factors that seem most likely to have influenced the rankings of justices. The influence of these factors can be discerned from determining how various justices have fared in the surveys and in other studies of the justices and constitutional history.

IMPACT ON LEGAL DEVELOPMENT: THE VISION FACTOR

The most fair and rational factor—and perhaps the most important element—that influences judicial reputation is the extent to which a justice helps to forge the law. Since Supreme Court justices, unlike most other judges, are not required to follow the precedents of higher courts and regularly decide difficult cases about the law, Supreme Court justices obviously have a greater opportunity than do other judges to influence the development of the law. Justices leave their mark not only upon future generations of judges, but also upon future generations of all Americans since their decisions so profoundly affect social, political, and economic issues that touch everyone.

The greatest of judicial decisions—and the judges that authored them—should be measured more by their long-term influence than by their actual durability. Accordingly, Richard A. Posner aptly contends that a judge's reputation should be measured not so much in terms of "the 'rightness' of his decisions as judged by the test of time" since "[m]ost judicial decisions, even of the agreed-to-be-the-greatest judges

the latter—in other words, craftsmanship and technique; (7) resolute fair-mindedness and impartiality; (8) a solid understanding of the proper judicial role of judges under our written Constitution; (9) diligence and industry; (10) on-Court leadership ability." Henry J. Abraham, Preface to PEDERSON & PROVIZER, *supra* note 2, at xvii-xviii. Professors Blaustein and Mersky reported that the experts that they consulted for their 1970 survey "found that success on the Supreme Court was the result of several qualities in combination: scholarship; legal learning and analytical powers; craftsmanship and technique; wide general knowledge and learning; character, moral integrity and impartiality; diligence and industry; the ability to express oneself with clarity, logic and compelling force; openness to change; courage to take unpopular positions; dedication to the Court as an institution and to the office of Supreme Court justice; ability to carry a proportionate share of the Court's responsibility in opinion writing; and finally, the quality of statesmanship." ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* 50-51 (1978).

... usually are superseded and in that sense eventually proved 'wrong.'"⁸ Judge Posner contends that "the test of greatness for the substance of judicial decisions, therefore, should be, as in the case of science, the contribution that the decisions make to the development of legal rules and principles rather than whether the decision is a 'classic' having the permanence and perfection of a work of art."⁹ Posner believes that the extent to which a judge is cited by other judges is a valid index of his influence and therefore, of his greatness.¹⁰

The greatest justices have developed legal principles that have endured the test of time even though—or perhaps because—future generations have refined and adapted those principles to their changing needs. The highly rated Holmes, Brandeis, and Stone, for example, are revered as pioneers of civil liberties even though many of the principles that they enunciated are no longer "good law." In addition to encouraging judicial activism in the area of civil liberties, the same trio of justices were instrumental in the development of legal doctrines that eventually helped to persuade the Supreme Court to abandon its careful scrutiny of economic legislation.¹¹

John Marshall's consistent ranking of first in surveys on judicial greatness clearly reflect his monumental decisions expanding the power of the Supreme Court and the federal government and fostering economic development. The high ratings that Joseph Story receives likewise reflect Story's significant contributions to the strengthening of the federal government and the nation's economy. And, of course, Earl Warren's high rankings reflects his major role in so many decisions in which the Supreme Court expanded civil liberties in the areas of race, religion, freedom of expression, voting, and criminal justice.

IDEOLOGY: THE POLITICAL CORRECTNESS FACTOR

Since the work of the Court is inextricably related to politics, the political predilections of the persons who evaluate the justices inevitably influence their rankings. Moreover, since the decisions of the justices so profoundly affect the political life of the nation, the political orientation

8. Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L. J. 511, 523 (1994).

9. *Id.*

10. *Id.* at 534-35; RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 80-91 (1990). Posner acknowledges that this is not "the only method" of evaluating judicial greatness and that it "has no pretension to infallibility." Posner, *supra* note 8, at 534.

11. See, e.g. G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 578-85 (1995).

of justices is a legitimate criterion for evaluating judicial greatness. If, for example, an evaluator believes that significant economic inequalities exist in American society and that the Constitution provides a means for mitigating such inequalities, the evaluator may fairly boost the ranking of a justice who has found creative ways to use the Constitution to remedy such inequalities, even if his or her views have not been accepted by the Court.¹²

Since most leading scholars favor judicial deference to the legislative branch of government in economic matters and judicial activism in cases involving personal liberties, it is not surprising that so-called "liberal" justices are more highly ranked than what might be called "conservative" justices. Since 1937, when the Court has used its power primarily for the protection of personal rather than economic liberties, liberals have tended to favor a strong Court and also have traditionally favored the assertion of federal power at the expense of the states. The Pederson-Provizer list of the top ten justices reads like an honor roll of liberal heroes: John Marshall, who laid the foundations for a powerful Court and federal government; Holmes and Brandeis, who railed against substantive economic due process and wrote eloquent dissents in favor of free speech; and Warren, Brennan, Black, and Douglas, who expanded the scope of civil liberties and espoused judicial activism on behalf of embattled minorities. Similarly, the 1970 and 1993 Blaustein-Mersky lists place civil libertarians and judicial activists (in non-economic cases) at the top of the lists and tend to assign to the bottom those justices who opposed economic regulatory legislation and civil libertarianism. For example, three of the so-called "Four Horsemen of the Apocalypse" who opposed New Deal legislation—Butler, McReynolds, and Van Devanter—are listed as "Failures" in both studies. This ranking almost certainly reflects the political predilections of the participants in the survey since all of these justices served for long tenures and were highly influential.¹³ The "failure" ratings of Harold

12. As one study of such rankings has argued, "[t]he problem is not that political bias improperly distorted the evaluations, but that political bias inevitably and properly affects evaluations of justices. . . . We need to remind ourselves that justices are not merely opinion-writers; they also vote." David P. Bryden & E. Christine Flaherty, *The "Human Resumes" of Great Supreme Court Justices*, 75 MINN. L. REV. 635, 662 (1991).

13. Professor Langran has observed that "Justice Butler's rating as a failure was based entirely upon his conservative approach to cases before the Court. Perhaps he was insensitive to matters of civil liberties, but one wonders if that alone should be enough to brand him as a failure as a justice." Robert W. Langran, *Why Are Some Supreme Court Justices Rated as "Failures"?*, in YEARBOOK SUPREME COURT HISTORICAL SOCIETY 11 (1985). Similarly, Langran concludes that "Van Devanter should not have been rated a failure" but that the

H. Burton, Fred M. Vinson, and Sherman Minton in the 1970 Blaustein-Mersky survey and the undistinguished rankings of those same justices in the 1993 update also may reflect distaste for their conservatism on social questions.¹⁴ Likewise, the low ranking of Warren E. Burger, who placed eighty-sixth in the 1993 Blaustein-Mersky survey despite his obvious influence and relatively long tenure, may reflect distaste for Burger's political predilections as much as frustration over the perception that he failed to offer effective leadership as chief justice. Finally, it is difficult to use any measure other than politics to account for the very low ranking of Clarence Thomas, who placed third from the bottom in the 1993 Blaustein-Mersky survey, even though his service of less than two years on the Court provided little basis for any ranking.

The possible influence of political considerations are demonstrated in the disparities between the lists of scholars and attorneys. Lawyers, who may be presumed to be more conservative than academics, ranked Taney, Story, and Rehnquist among the top ten justices in the Pederson-Provizer survey. These justices were not among the top ten justices in their survey of scholars. Scholars in that survey, however, placed Brennan among the top ten even though he was not among the top ten ranked by attorneys. Another intriguing contrast between the lists is that attorneys picked the relatively "conservative" Harlan II as one of the top ten justices, while scholars selected the "liberal" Harlan I. And Frankfurter, who ranked fifth among lawyers, placed ninth among scholars. It is difficult to conclude that the markedly more "conservative" tilt of the attorneys' survey does not reflect differences in the political outlook of the respondents.¹⁵

The 1993 Blaustein-Mersky list lends additional support to this conclusion. In that survey, which included lawyers, judges, and academicians, Story ranked fourth but Taney placed twenty-ninth and Rehnquist forty-eighth. Harlan I outranked Harlan II, Brennan ranked seventh, and Frankfurter placed fourteenth.

"Political correctness," however, does not assure a high ranking, and "incorrectness" does not necessarily assure a low ranking. Although Thurgood Marshall is widely and properly revered for his unique pre-

verdict on McReynolds "might be proper if considering this ultra-conservativeness with his inability to blend in with the other justices in a body which is supposed to be collegial . . . was the cause of his being rated a failure." *Id.* at 9, 10.

14. *Id.* at 11-14.

15. In the 1993 Blaustein-Mersky survey, which surveyed a range of academicians, judges, and attorneys, Story placed fourth, but Taney ranked twenty-ninth and Rehnquist forty-eighth.

Court career and his unflagging devotion to liberal ideals while on the Court, he was placed at the bottom of the "average" category in the 1970 Blaustein-Mersky survey, rose no higher than seventeenth in their 1993 survey, and did not join his liberal brethren in the Pederson-Provizer top-ten lists of scholars, judges, and attorneys.¹⁶

Conversely, Stephen J. Field appeared among the "near greats" in the 1970 and 1993 Blaustein-Mersky surveys¹⁷ and was rated tenth in a 1958 list compiled by John P. Frank, who surely would differ with Field on many key issues. Since few respondents to the Blaustein and Mersky surveys were likely to have been sympathetic to the judicial views of this architect of substantive economic due process, Fields's relatively high ranking is a tribute to his pervasive influence and his powers of intellect.¹⁸ Similarly, Joseph P. Bradley received high rankings in the 1970 and 1993 Blaustein-Mersky surveys (seventeenth and twenty-first, respectively) even though he also espoused what most scholars today would regard as an unduly narrow view of the constitutional scope of governmental regulation; although he was sometimes more amenable to such regulation than were some of his colleagues on the Court.

Frankfurter's ranking as fourteenth in the 1993 Blaustein-Mersky survey further demonstrates that a justice who espouses "conservative" views on the Court is not necessarily barred from the higher echelons. This ranking, however, is not so high as we might expect for a justice who served so long and expressed his views so brilliantly and forcefully. One suspects that Frankfurter might have joined the pantheon of the "great" justices if he had more frequently supported the great civil libertarian decisions of his day and that he might have fallen further if he had not so frequently voted in favor of such decisions and had not been so closely identified with liberal causes during his pre-Court career. Conversely, Frankfurter's rating may be helped by a trend among

16. Thurgood Marshall ranked ninth in the Pederson-Provizer survey of students. PEDERSON & PROVIZER, *supra* note 2. In the 1993 Blaustein-Mersky survey, Marshall ranked seventeenth, a great improvement from their 1970 survey but still far below his liberal brethren. Blaustein & Mersky, *supra* note 2.

17. Field ranked sixteenth in both surveys. Blaustein & Mersky, *supra* note 2.

18. As Professor Atkinson has observed, "[m]ost would agree that Stephen J. Field, by virtue of the tenacity and force with which he held to his conclusions and pressed his point of view for 34 years, is entitled to a place of preeminence in Supreme Court history. Not only did he participate in hundreds of major decisions, but he elaborated his views in the detail permitted only by long service. The duration of his tenure as well as his strength of mind made him influential." David N. Atkinson, *Minor Supreme Court Justices: Their Characteristics and Importance*, 3 FLA. ST. U. L. REV. 348, 349 (1975).

academics and judges to admire judicial restraint, although Frankfurter fell from eleventh in the 1970 survey.

The primary hero of the judicial restraint renaissance, however, is not Frankfurter but rather Harlan II, who has been the subject of much admiring attention during recent years on the Court and in academia.¹⁹ The emergence of what one commentator has called a "cult of Harlan"²⁰ may explain why Harlan's ranking vaulted from twenty-fifth to tenth between 1970 and 1993 in the Blaustein-Mersky survey. Harlan's newfound popularity, however, is based at least in part upon respect for his intellectual and professional integrity rather than agreement with his specific opinions, many of which may conflict with the views of his acolytes.

Further evidence that political predilections are not dispositive in the ratings is provided by the relative rankings of Lewis F. Powell and Harry Blackmun. Although the moderate Powell served for only fifteen years, he ranked twenty-second in the 1993 Blaustein-Mersky survey while the more liberal Blackmun, who had served for twenty-three years, ranked only twenty-fourth.

Moreover, there are reasons other than ideology to explain the rankings of most justices. As we shall see below, most of the "great" justices were characterized by long tenure, leadership, literary skills, influence, and other factors that cannot be explained by ideology. Literally all of the top twenty justices in the 1993 Blaustein-Mersky survey had most if not all of these attributes. Most of the low ranked justices lacked some or most of these qualities. Only a handful of justices in the bottom fifty of the 1993 Blaustein-Mersky survey—notably Burger, Henry B. Brown, Burton, William R. Day, Vinson, Van Devanter, Butler, and McReynolds—served long and influentially enough that they could remotely merit placement among the upper half of the justices. Although it is unlikely that more conservative evaluators would place these few justices among the top twenty, more conservative evaluators might rescue them from the lower half.

Perhaps the principal common ideological denominator in judicial rankings is what Professors Blaustein and Mersky have called judicial "statesmanship," which they define as "an understanding of the nature

19. See *Centennial Conference in Honor of Justice John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 1-286 (1991); TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992); Jeffrey Rosen, *Poetic Justice*, NEW REPUBLIC, Mar. 8, 1993, at 26-27.

20. Rosen, *supra* note 19, at 26.

of the American governmental system as a continuing experiment in democracy and an understanding of the special role of the Court in conducting that experiment."²¹ In applying this subtle concept, one could argue that all of the highly ranked justices had a keen appreciation of the historical role of the Court as a guardian of personal and property rights and a sophisticated vision of the Court's relationship to the President, Congress, the state governments, and public opinion. Different justices interpreted this role in different manners at different times—Marshall and Warren, for example, expounded judicial activism while Holmes and Frankfurter advocated judicial restraint—but all "great" justices shared a common comprehension of the Court's delicate but important position in American life. Many and perhaps most of the judges who are not ranked as great may also have shared this understanding, but they were less successful in articulating it or did not serve long enough to clearly mark the Court with their own peculiar version of this vision.

The concept of "statesmanship," however, is not free from ideological content, since some of the poorly ranked judges also adhered to a distinct vision of the role of the Court in American society. The Four Horsemen, for example, all embraced a clearly defined and coherent philosophy. Those who evaluate the justices have concluded that these justices were flawed in their vision since many of their decisions impeded economic reform that has stood the test of time and thwarted the development of civil liberties that are now generally accepted as fundamental. Moreover, the Court's powers almost surely would have been curtailed if the views of these justices had continued to prevail. Although the rejection of constitutional values that are generally accepted today and the jeopardizing of the Court's powers would seem to justify the determination that these justices lacked "statesmanship," this conclusion is not without ideological content since one who agreed with the content of their decisions might argue that they were statesman-like for courageously defending correct constitutional doctrines in the face of formidable public and political opposition.

As notions of what constitutes "statesmanship" shifts with the ideological trends, the rankings of justices are bound to change. Even the most revered justices are not immune to corresponding declines in their reputations. Mark V. Tushnet recently pointed out, "if there is a phenomena of decanonization and the process is tied to backing the

21. BLAUSTEIN & MERSKY, *supra* note 7, at 51.

wrong horse, we may soon see interesting things happening with respect to the reputations of Brandeis and Holmes, who may turn out now to have backed the wrong horse."²²

LONGEVITY OF TENURE: THE GERIATRIC FACTOR

The most striking common denominator among highly ranked justices on the lists is longevity of service. The Pederson-Provizer list includes five of the seven justices who have served for more than thirty years. Only Field and Story are absent. Similarly, the top ten justices in Blaustein and Mersky's 1970 survey included six of the fourteen justices who had served for longer than 28 years and their top ten in 1993 included six of the fifteen who had served that long.²³ The link between longevity of service and reputation is not accidental. The greatness of most justices would be considerably diminished if their tenure had been cut in half.

For example, if John Marshall had served for 17 years rather than 34, he would not have decided *McCulloch v. Maryland*,²⁴ *Dartmouth College v. Woodward*,²⁵ or *Gibbons v. Ogden*.²⁶ Although he still might be ranked as "great" for enhancing the power of the federal government and the Supreme Court, he would not be remembered for providing a firm legal foundation for expanding capitalism. Similarly, if Earl Warren had served for eight years rather than sixteen, he would not have participated in the landmark decisions concerning re-apportionment, criminal procedure, and the freedom of speech, religion, and press that marked the second half of his tenure. Although his contributions to the civil rights decisions of the 1950s would assure him an honored position in history, it is unlikely that he would appear on any list of the top ten justices. Likewise, if Holmes had served only half of his 29 years, he would not have participated in any of the free speech decisions that form a major part of his reputation.

It is significant that Brennan's ranking rose from twenty-sixth in the 1970 Blaustein-Mersky survey, when Brennan had served only fourteen

22. *Transcript Biographies of Titans: Holmes, Brandeis, and Other Obsessions*, 70 N.Y.U. L. REV. 677, 693 (1995).

23. BLAUSTEIN & MERSKY, *supra* note 7, at 37; BLAUSTEIN & MERSKY, *supra* note 2. Both lists included Marshall (34 years); Holmes (29 years); Story (34 years); Black (33 years as of 1970 and 34 as of 1993); and John Marshall Harlan I (34 years). The 1970 list included Taney (28 years) and the 1993 list included Brennan (33 years).

24. 17 U.S. (4 Wheat.) 316 (1819).

25. 17 U.S. (4 Wheat.) 518 (1819).

26. 22 U.S. (9 Wheat.) 1 (1824).

years, to fifth in the 1993 Pederson-Provizer survey and seventh in the 1993 Blaustein-Mersky survey, when Brennan had retired after thirty-four years. Brennan's devotion to civil liberties, his intellectual powers, and his influence on his brethren already were apparent by 1970 and he already had participated in and written many landmark decisions by then. During the following two decades, however, Brennan had the opportunity to participate in many more significant decisions. Perhaps more importantly, however, Brennan during those years exercised a quiet but arguably profound influence on his more conservative colleagues and, when this influence failed to produce a majority, he wrote dissents that powerfully articulated the liberal position.

Longevity of service also may account for the substantial rise in the rankings of Justices Thurgood Marshall, Potter Stewart, and Byron R. White between 1970 and 1993 in the Blaustein-Mersky survey. Marshall rose from eighty-second to seventeenth as his number of years of service increased from three to twenty-four. Stewart, whose years of service increased from twelve to twenty-three, rose from seventy-ninth to twenty-eighth in the rankings. White rose from eightieth to forty-first as his years of service increased from eight to thirty-one. Like Brennan, Marshall gained respect for his dissents in so many cases during the Burger-Rehnquist eras while Stewart and White may have been recognized as pivotal figures in many of the closely divided decisions of this period.

The only "great" justice whose tenure was short is Cardozo, and he is the exception that proves the rule. Although scholars agree that Cardozo made major contributions during his mere six years on the Court, Cardozo's high ranking surely is influenced by his brilliant reputation during his eighteen years on the New York Court of Appeals. Cardozo is the only justice who would rank among the nation's "great" judges even if he had not served on the Court. Without his service on the New York court, however, it is unlikely that Cardozo would be widely viewed as a "great" justice.

Conversely, the only long-serving justices with low rankings are Van Devanter and McReynolds, both of whom served for 27 years. The reputations of both justices, as we have seen, are marred by their hostility toward economic regulation. Indeed, shorter tenures might have spared them from the "failure" ranking since so much of their notoriety is the result of their opposition to New Deal legislation near the end of their years on the Court.

A long tenure also seems to boost the rankings of otherwise mediocre justices. Thomas Todd, for example, was frequently absent

from the Court and did so little to influence the great decisions of the Marshall Court (for which he generally voted) that Frank H. Easterbrook has wryly called him "the most insignificant justice."²⁷ His ranking among the higher echelons of the "average" category in the 1970 Blaustein-Mersky survey and his only slightly lower showing in their 1993 survey may reflect the fact that he served for a lengthy period (nineteen years) during stirring times. Similarly, the relatively long tenure of John McKinley may explain why this justice, who made few contributions during his fifteen years on the Court, placed near the top of the "average" category in the 1970 Blaustein-Mersky survey and clung to an average rating in the 1993 update.

Short tenure naturally tends to depress rankings. It is perhaps no accident that the talented James Byrnes, who served for only one year, is ranked fifth from the bottom in the 1970 and 1993 Blaustein-Mersky surveys, and perhaps it was unfair to rank him at all. It is likely that other bright and able persons, particularly Fortas, Goldberg, Jackson, and Wiley B. Rutledge, would have received higher rankings—perhaps even as "greats"—if their tenures had not been cut short.²⁸

Longevity of tenure is virtually a prerequisite for judicial greatness insofar as the work of a judge is plodding and incremental. Although justices may be remembered for bold opinions and occasional dashes of genius, sudden innovations are contrary to the spirit of the judicial process. Landmark decisions are nearly always merely the culmination of slow changes that already occurred on both the Supreme Court and lower courts. The classic example is *Brown v. Board of Education*,²⁹ which was a *coup de grace* rather than a bolt from the blue. A great justice is not one who hands down a few revolutionary decisions and then departs from the scene, but rather one who participates over a long period of time in legal developments that eventually culminate in major changes in the law. Similarly, the reputations of most justices are based upon a lengthy series of decisions rather than a few dramatic decisions that are handed down during a brief period.

For example, the "great" Black and Douglas are remembered more because of their commitment to civil liberties in countless cases

27. Frank H. Easterbrook, *The Most Insignificant Justice*, 50 U. CHI. L. REV. 481, 496 (1983).

28. In the 1993 Blaustein and Mersky survey, Fortas ranked sixty-fourth, Goldberg placed fiftieth, Jackson was fifteenth, and Rutledge ranked thirty-fifth. Blaustein & Mersky, *supra* note 2.

29. 347 U.S. 483 (1954).

stretching over a third of a century than because of anything they said or did in any particular case. Even when a justice's reputation is based in large part on a famous vote or an epigrammatic observation, an examination of the justice's entire record is likely to reveal a substantial commitment to the ideals expressed in such vote or opinion. Although Harlan I's reputation is based in large measure upon his dissent in *Plessy v. Ferguson*,³⁰ that dissent was merely the most notable example of Harlan's steadfast devotion to the rights of African Americans during his 34 year tenure on the Court, a commitment that was evident in many lesser known or almost forgotten decisions.

INTELLECTUAL ABILITY: THE EGGHEAD FACTOR

Intellectual vigor is virtually a pre-requisite for judicial greatness. Virtually all of the justices have been highly intelligent and learned persons. Even most of the lesser justices, in contrast to most middling politicians, have enjoyed a surprisingly wide-ranging life of the mind and too often have been unfairly dismissed as intellectual philistines. Relatively few justices, however, have been systematic scholars of the law or have made significant and original contributions to legal thought, and a disproportionate share of these justices rank among the "greats." Three of the top fourteen justices on the 1970 and 1993 Blaustein-Mersky lists—Story, Holmes, and Cardozo—made original contributions to legal thought before serving on the Court. Two others, Frankfurter and Stone, were longtime law school professors and at least two more—Brandeis and Black—were serious legal thinkers. Another highly ranked justice, Douglas, taught at Yale and Columbia and pursued a wide range of intellectual activities. The erudition of Bradley may account for the relatively high ranking of this relatively obscure justice in the 1970 and 1993 Blaustein-Mersky surveys. Similarly, virtually all of the judges on Roscoe Pound's 1938 list of the ten greatest American judges were intellectuals,³¹ as were most of the ten judges that Bernard Schwartz ranked as the greatest in 1979.³²

In contrast, the lower echelons of the survey are studded with justices who were brilliant lawyers in their day but were not known for their interest in timeless ideas and who made no original contributions to legal thought even though they may have had a taste or even a talent

30. 163 U.S. 537 (1896).

31. POUND, *supra* note 1, at 4, 30-31.

32. Schwartz, *supra* note 1, at 405-06.

for philosophy, literature, or music. Fortas and Van Devanter are examples. Of course, many other lower ranked justices are notable more for political pluck or luck than for any legal talents, much less intellectual interests. Minton and Whittaker, who ranked as the worst "failures" in the 1970 Blaustein-Mersky survey, would be examples. Even though most of the less than "great" justices were highly learned persons, none made any notable contributions to legal thought. Moreover, only a handful—Jackson and Wiley B. Rutledge are the most notable exceptions—were even marginally engaged in the intellectual life of their generation.

Intellectuality helps to make a "great" justice inasmuch as we have seen that the greatest justices have been deeply concerned with the fundamental questions of human liberty and have contributed to the growth of legal thought. Great lawyers often do not make great justices because they are so trained in the ability to manipulate technicalities, so wedded to precedent, and so accustomed to accommodating themselves to the needs of clients that they are unable to achieve the intellectual creativity and catholicity that is an essential ingredient in judicial greatness. As Professor Atkinson has pointed out, a great justice "must be able to deal with constitutional issues with imagination and with a sense of their current importance to the public. There must be an awareness, partly intuitive, partly a product of education, of the larger values sometimes only implicitly suggested in litigation."³³

This is why Learned Hand believed that a judge who decided constitutional questions should "have at least a bowing acquaintance" with the great classics of Western philosophy and literature and that only a liberal education would enable Americans "to meet and master the high-power salesman of political patent medicines."³⁴ The profound erudition of men such as Story, Holmes, Brandeis, Black, and Frankfurter helped to make them great justices inasmuch as it imbued them with a vision that transcended the political fashions and fevers of the moment. It is no accident that Holmes, who is ranked as the second greatest justice in both the Pederson-Provizer survey and the 1993 Blaustein-Mersky survey, had a dazzlingly cultivated mind that is revealed in his correspondence with such intellectuals as Harold Laski, Lewis Einstein, and Frederick Pollock.³⁵ Justice Black recognized the

33. Atkinson, *supra* note 18, at 352.

34. Learned Hand, *Sources of Tolerance*, 79 U. CHI. L. REV. 12 (1930).

35. See HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 (Mark D. Howe, ed., 1941); HOLMES-LASKI

importance of erudition when he established a vigorous lifelong regimen of study of the great works of Western civilization after he became a Justice.³⁶ Such breadth of intellect is particularly likely to produce judicial greatness when it is joined with a technical proficiency that informs rather than stifles creativity.³⁷

Intellectuality, however, may hinder the type of boldness that is the hallmark of several of the very greatest justices. While the greatest justices have been disproportionately intellectual, two of the three most esteemed justices on the Pederson-Provizer list—John Marshall and Earl Warren—were not particularly intellectual. Both were more men of action than men of letters, and both acted boldly and shrewdly to expand the power of the federal government and the Court. While more intellectual than Marshall or Warren, Brandeis also belongs in the category of justices who were more public men than scholars. In all three instances, a relative lack of intellectuality may have contributed to a “great” reputation insofar as these justices often were willing to disregard legal doctrine in reaching decisions that had far-reaching political implications. More scholarly justices might have had difficulty justifying the results of decisions that departed from established precedent and that sometimes were arguably more the results of political predilections than legal reasoning. It is perhaps no accident that Frankfurter, the most “intellectual” member of the Warren Court, often dissented from the more creative products of Warren Court jurisprudence. Another highly ranked intellectual-justice, Holmes, made his reputation primarily as an apostle of judicial restraint. Although many present-day scholars share their reservations about judicial activism, scholars, like non-scholars, ranked Marshall first and Warren third in the Pederson-Provizer survey.

Intellectuality may also contribute to the reputation of justices to the extent that intellectuals and academicians write most judicial biographies and are disproportionately represented among participants in the

LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI (Mark D. Howe, ed., 1953); HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903-1935 (James B. Peabody ed., 1964).

36. See DANIEL J. MEADOR, MR. JUSTICE BLACK AND HIS BOOKS (1974).

37. As Justice Frankfurter once observed, Holmes, Hughes, Brandeis, and Cardozo all “had the largeness of view so essential for adjudicating the great issues before the Court. But is it just a coincidence that all four were to a superlative degree technically equipped lawyers? They built on that equipment for the larger tasks of the Court; they were not confined by it. Again, is it mere coincidence that all four were widely read and deeply cultivated men whose reading and cultivation gave breadth and depth to their understanding of legal problems and infused their opinions?” Frankfurter, *supra* note 1, at 794-95.

rankings of justices. As one study of judicial reputation wryly observed, "[i]t should come as no surprise that the kind of justice whose performance pleases professors turns out to have a background, on average, which bears an uncanny resemblance to that of many of the best professors."³⁸ Such a bias, however, is not immediately apparent in the Pederson-Provizer survey, in which "intellectual" judges, including former academicians, fare at least as well among lawyers as among scholars. Holmes, Brandeis, Douglas, Frankfurter, and Cardozo appear on both lists, but the lawyers give higher rankings to all of these justices except Holmes (who places second on both lists), and also include Rehnquist and Joseph Story, the erudite legal commentator and savior of the Harvard Law School. Although one might expect the student list to reflect the views of the scholars or favor the intellectual judges whose opinions are emphasized in law schools, the student top ten list included only one bona fide intellectual—Holmes—and one quasi-intellectual, Rehnquist.

Although scholars tend to reward intellectuality in justices, their definition of intellectuality may be rather narrow since it is based largely upon a justice's contribution to the great public issues of his day. Although most of the justices who have made major contributions to such issues also have had the interest and ability to carry their load of the Court's more mundane work, it is unlikely that technical ability alone would enable one to achieve judicial greatness. Intellectual ability on narrow issues may help to raise a justice's rankings marginally, although it will do little to save the reputation of a justice whose ideology is regarded as offensive. For example, Van Devanter was an able judicial technician who made important contributions in areas such as natural resources law in which his impatient colleagues deferred to his daedal craftsmanship. Neither technique nor contribution, however, rescued this advocate of economic due process from the "Failure" categories in the 1970 and 1993 Blaustein-Mersky surveys.

PRE-COURT AND POST-COURT CAREERS: THE CELEBRITY FACTOR

The greatest justices have had disproportionately distinguished careers before they became members of the Court. John Marshall served as secretary of state, as did Hughes between his two periods of service on the Court. Hughes and Warren had been innovative governors of leading states. Stone was U.S. attorney general and

38. Bryden & Flaherty, *supra* note 12, at 656.

Columbia Law dean. Holmes had authored a seminal study of law and served for two decades on the highest court of an important state. Brandeis had earned a place in history as an effective advocate of progressive causes. Frankfurter had won renown as a Harvard Law professor and Washington insider. Prior to their becoming chief justices, Hughes came within a whisker of election to the presidency, and Warren was narrowly defeated for vice president. In contrast, the lower echelons are replete with justices whose pre-Court careers would not merit a footnote in any broad history of the nation—mediocre senators, undistinguished lower court judges, forgettable attorneys general, and wealthy corporate attorneys. Taft, Salmon P. Chase, and Thurgood Marshall are the only figures of non-judicial historical importance who occupy these lower ranks.³⁹

With the exception of Cardozo and possibly Hughes, however, it is unlikely that the pre-Court careers of the “great” justices influenced their rankings. Warren, for example, would almost surely be just as highly esteemed even if he had not been a nationally prominent politician before his elevation to the Court, and his brilliant pre-Court career had little lasting national historical importance. Even Holmes and Frankfurter would be unknown except to a few legal scholars and historians, although Holmes’s scholarship would have earned him lasting renown in intellectual history⁴⁰ and Frankfurter’s journalistic and political activities would have secured him a permanent niche in the history of the Progressive movement and the New Deal. Similarly, evaluators do not appear to have allowed their presumed esteem for Thurgood Marshall’s pre-Court career to affect their evaluation of his performance on the Court. In some instances, however, ratings may be affected by the non-judicial careers of the justices. As Professors Blaustein and Mersky have pointed out, Taft’s mediocre rating as a justice may reflect the perception that he was a mediocre president, and the ranking of Byrnes as a “failure” may be due not only to his short

39. Taft was president from 1909 to 1913, Chase had a significant political career that included service as Secretary of the Treasury in Abraham Lincoln’s Cabinet, and Marshall was instrumental in organizing the legal challenges to segregation that culminated in *Brown v. Board of Education*, 349 U.S. 294 (1955).

40. Although Professor Nelson believes that “[Holmes] was not a great judge” and that “the canonization of Holmes was something that was artificially achieved by Frankfurter,” Nelson regards Holmes as “the titanic scholar in American legal history.” *Transcript, supra* note 22, at 678. Nelson explains that “*The Common Law* remains even today . . . a truly great book, and some of his later articles, like the ‘The Path of the Law,’ are truly seminal articles. Perhaps what Holmes is getting canonized for is less what he did on the bench and more what he did off the bench.” *Id.*

tenure but to his post-war careers as a Cold War Secretary of State and segregationist governor of South Carolina.⁴¹

Nevertheless, the distinction of a justice's pre-Court career does have a bearing on the justice's distinction on the High Bench insofar as his or her earlier experiences provide preparation for judicial service. As we have seen, for example, the scholarship of Story, Holmes, Frankfurter, and Cardozo immeasurably affected their performance on the Court. Brandeis's involvement in progressive causes unquestionably enriched his judicial perspective. Similarly, the experiences of Taft, Hughes, and Warren in national politics provided them with invaluable experience that helped them to navigate treacherous political shoals during periods when the Court was highly controversial.⁴²

There is perhaps less correlation, however, between prior judicial service and "greatness" on the Supreme Court. Two scholars who analyzed the rankings of the 1970 Blaustein-Mersky survey found a generally negative correlation between a justice's ranking and prior judicial service.⁴³ Another scholar, after analyzing the results of the 1992 Pederson-Provizer survey and other rankings, concluded that "[i]t may come as quite a surprise to recent presidents and their advisors, but prior service as a state or federal judge is no guarantee of great success on the Supreme Court."⁴⁴ Of the top twenty justices on the 1993 Blaustein and Mersky list, only eight served as judges before becoming Supreme Court justices and fewer still had significant judicial experience. On the one hand, such luminaries as John Marshall, Brandeis, Story, Warren, Stone, Douglas, and Frankfurter had never served as a judge. On the other hand, one might well argue that Holmes's twenty-year service on the Supreme Judicial Court of Massachusetts and Cardozo's long tenure on the New York Court of Appeals enhanced their effectiveness as Supreme Court justices, even though the common law

41. Blaustein & Mersky, *supra* note 2, at 1185.

42. See ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 88-156 (1965); G. EDWARD WHITE, EARL WARREN, A PUBLIC LIFE 159-369, *passim* (1982); 2 J. MERLO PUSEY, CHARLES EVANS HUGHES 749-65 (1951).

43. Thomas G. Walker and William E. Hulbary, *Selection of Capable Justices: Factors to Consider*, in BLAUSTEIN & MERSKY, *supra* note 7, at 66. These authors found that the 37 justices who had no judicial experience had an average "ability score" of 3.43; those who had "some" experience had an average score of 3.00, and that those who had "extensive" judicial experience had an average score of 3.03. *Id.*

44. Robert C. Bradley, *Who Are the Great Justices and What Criteria Did They Meet?*, in PEDERSON & PROVIZER, *supra* note 2, at 9. Professor Bradley states that "[i]n considering future Court appointees, presidents should heed the message that prior judicial experience is not related, and is possibly an adverse influence, to superior Court performance." *Id.*

cases they handled on those courts differed in many respects from the constitutional cases that occupied their time on the Supreme Court.

The importance of prior judicial experience in predicting judicial greatness became fraught with political controversy during the 1950s after President Eisenhower announced that judicial experience would be a major factor in making nominations to the Supreme Court.⁴⁵ It has remained a source of tension between proponents of judicial activism, who generally favor the appointment of politicians and academics, and advocates of judicial restraint, who generally perceive that prior judicial experience makes a justice more deferential to precedent and more sensitive to the technical nuances of the law.

Inasmuch as most justices have died in office or retired at an advanced age, few justices have had significant careers after leaving the bench that might influence rankings. The rankings of the few justices who have retired in their prime—Clarke, Byrnes, Goldberg, Fortas, and Whittaker—are the only twentieth century examples—are not likely to be enhanced by what they did after they retired from the Court.⁴⁶ In most instances, the service of these justices on the Court was so short and/or their post-Court careers so insignificant that what they did after leaving the Court is not likely to greatly affect their judicial reputation.

PROXIMITY IN TIME: THE MYOPIA FACTOR

Judicial reputation also is affected by temporal proximity. Students, and to a lesser extent judges and scholars, are naturally inclined to magnify the strengths and weaknesses of the reputations of justices who served during their own times.⁴⁷ Thirteen of the top fifteen justices in

45. The desire to prove that judicial experience is not an accurate indicator of the quality of a Supreme Court justice was one of the principal reasons why Frankfurter compiled his list in 1957 and Frank assembled his list in 1958. *Id.* at 7-8.

46. As we have seen, Byrnes's subsequent career may have diminished his reputation. Clarke's role as an advocate of world peace was noble but was ineffectual and is largely forgotten. See Carl Wittke, *Mr. Justice Clarke in Retirement*, 1 CASE W. RES. L. REV. 28-48 (1949). The United Nations ambassadorship for which Goldberg left the Court was short-lived, and his loss in the 1970 New York gubernatorial race and his twilight career in private practice have not burnished his reputation. Whittaker disappeared into the obscurity of a corporate law practice. Leon Friedman, *Charles Whittaker, in THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 2893, 2903-04 (Leon Friedman & Fred L. Israel, eds., 1969). Fortas returned to a private practice that lacked the high visibility of his pre-Court career. LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 379-401 (1990).

47. As one study observed, most law professors are primarily concerned with recent issues and often are not competent to evaluate nineteenth century justices. Moreover, "the Court's role in the twentieth century has been greater than in the nineteenth, magnifying the

the 1993 Blaustein-Mersky survey were appointed during the twentieth century, while only five of the next fifteen were appointed during this century. The bottom seven justices in that survey were twentieth century justices.

Since many of the participants in the surveys are judges, lawyers, and law professors, rather than legal historians, it is natural that many evaluators have a weakness for contemporary heroes. It is likely, for example, that Brennan's fifth-place ranking in the Pederson-Provizer survey and his seventh place ranking in the 1993 Blaustein-Mersky survey reflect admiration for his role as the Court's leading exponent of liberalism during the past two decades. Although Brennan seems destined to forever remain a highly esteemed justice, it is possible that his rankings will fall as his services pass from immediate memory. Similarly, Rehnquist's number two rating among students in the Pederson-Provizer survey and his number ten rating among attorneys in that survey may be more a reflection of familiarity than enduring judicial greatness. Although Rehnquist and Douglas are the only justices who have served during the past two decades whom the attorneys list among the top ten justices, the students list six such justices among their top ten. It is noteworthy that Douglas ranks seventh in the Pederson-Provizer survey of attorneys, but is absent from the student survey. Similarly, it is interesting that Hughes, who ranked sixth in the 1970 Blaustein-Mersky survey, and Stone, who ranked eighth, fell to ninth and twelfth place, respectively, in the 1993 update and do not appear among the top ten justices in any of the three 1992 Pederson-Provizer surveys. Both of these justices had served during the professional lifetimes of many or most of the respondents to the 1970 survey, but they were known only through history to most of the 1992 and 1993 respondents. It is also significant that Story, who ranked second in the 1970 Blaustein-Mersky survey and placed near the top of nearly all previous surveys⁴⁸ was absent from all four of the Pederson-Provizer lists and fell to fourth place in the 1993 Blaustein-Mersky survey.

Conversely, it is noteworthy that all of the justices who ranked as "failures" in the 1970 Blaustein-Mersky survey had served in recent times. The bottom four—Burton, Vinson, Minton, and Whittaker—all had left the Court between eight and seventeen years before that survey, and the other four—Van Devanter, McReynolds, Butler, and Byrnes—

virtues and vices — real or imagined — of every justice." Bryden & Flaherty, *supra* note 12, at 657.

48. See PEDERSON & PROVIZER, *supra* note 2, at 24-28.

—had left between twenty-eight and thirty-three years before the survey. Since it seems unlikely that the Court only recently produced a bumper crop of judicial duds and that none of the scores of justices who left the Court during its first 150 years were less able than these men, the inclusion only of recent justices among the ranks of the “failures” suggests that historical myopia inevitably affects judicial rankings. As we have seen, Van Devanter, McReynolds, and Butler may deserve better, and Vinson almost certainly does.

Vinson’s role in increasing the Court’s activism in race cases alone is enough to rescue him from the cellar, even though his anti-civil libertarian role in other areas and his general lack of leadership blight his over-all record. His third-from-the-bottom ranking in the 1970 Blaustein-Mersky survey reflects the prejudices of a generation of scholars who compared him unfavorably with his successor, Warren. It is noteworthy that he moved up in the 1993 update, ranking fourteenth from the bottom. Similarly, Burton moved from fourth from the bottom to twenty-third from the end of the list. Also, the ranking of Clarence Thomas so near the bottom probably reflects his high visibility today.

The middle ranks of the justices in the 1970 Blaustein-Mersky survey are populated with many justices who were less influential than Vinson, McReynolds, Van Devanter, and Butler, as well as many who probably were less capable than those justices and Thomas. They also were less familiar to the evaluators, however, and those who participate in such surveys naturally consign to the middle ranks distant justices about whom they know and care little. There are very few scholars in the nation, even among the first ranks of constitutional lawyers and historians, who are intimately familiar with the records of every justice. Indeed, some of the participants in the 1970 Blaustein-Mersky survey admitted that they did not even recognize the names of some of the pre-Marshall justices.⁴⁹

The passage of time may also account for the significant reversals in the rankings of Justices Goldberg and Fortas between the 1970 and 1993 Blaustein-Mersky surveys. The ranking of Fortas fell from twenty-seven to sixty-four, while Goldberg rose from eighty-four to fifty. Fortas, who served for less than four years, may have been overranked at the bottom of the “near great” category in 1970 because liberals who participated in the 1970 survey were piqued over the Senate’s failure to confirm Fortas’s nomination to the chief justiceship in 1968 and believed that

49. Blaustein & Mersky, *supra* note 2, at 1185.

Fortas was unfairly forced to give up his seat in 1969. With the passage of a quarter of a century having healed or obscured animosities that were fresh in 1970, participants in the 1993 survey may have believed that Fortas's time on the Court was too short to justify a "near great" ranking, despite Fortas's solid accomplishments on the Court. Goldberg, who also made substantial contributions during a very short tenure of less than three years, may have risen in reputation because of fading memories of his highly reluctant relinquishment of his seat under pressure from Lyndon Johnson, which may have cast a pall over his tenure in the eyes of the 1970 evaluators. Moreover, Goldberg's advocacy of an expansive right to privacy has acquired greater significance since 1970 on account of the controversies over abortion and homosexuality.

Once securely established, the reputation of a justice is likely to remain stable despite the passage of time. It is noteworthy that two significant justices, Field and Taft, remained at exactly the same place (sixteenth and twentieth, respectively) in both the 1970 and 1993 Blaustein-Mersky surveys. Several other important justices also remained remarkably constant: Miller fell from fifteenth to nineteenth, Bradley from seventeenth to twenty-first, White from nineteenth to twenty-sixth, and William Johnson from thirteenth to eighteenth; Jay rose from twenty-eighth to twenty-fifth and Wilson from thirty-seventh to thirty-second.

ATTENTION FROM HISTORIANS: THE CLEO FACTOR

Judicial reputations also benefit from favorable attention from historians, as well as other scholars and members of the bar.⁵⁰ As Richard A. Posner has observed in his study of Cardozo's reputation, "reputation feeds on itself. Once a person is widely known, people do not have to invest heavily to find out about him and his qualities, but they do have to find out about a newcomer."⁵¹ Leo Pfeffer observed in commenting upon what he regarded as the exaggeration of the

50. As Professor Gordon has observed, "[j]udicial titans' are made, not born. What's more, they are made in the interest and reflection of their admirers." Sarah Barringer Gordon, *Commentary: The Creation of a Usable Judicial Past: Max Lerner, Class Conflict, and the Propagations of Judicial Titans*, 70 N.Y.U. L. REV. 622, 622 (1995).

51. POSNER, *supra* note 10, at 68. Similarly, Judge Noonan has pointed out that "the process is self-reinforcing. Once recognized as great, a judge is likely to be so recognized again." John T. Noonan, Jr., *Commentary: The Secular Search for the Sacred*, 70 N.Y.U. L. REV. 642, 642 (1995).

importance of *Marbury v. Madison*,⁵² "there is nothing great or important but historians make it so, and historians have made Marshall great and *Marbury v. Madison* important."⁵³

Michael Kammen has pointed out that the "apotheosis" of John Marshall was partly the result of a conscious effort by exponents of nationalism and private property during the first two centuries of this century to bolster support for a constitutional order that protected those values. After a half century of relative neglect, Marshall received widespread attention in 1901, when the American Bar Association organized a nationwide celebration to mark the centennial of his ascension to the chief justiceship. During the same year, James B. Thayer of Harvard Law School published a laudatory biography. Edward S. Corwin of Princeton published another favorable biography during 1919, and former Senator Albert Beveridge of Indiana produced a hagiographical four volume biography between 1916 and 1919 that reached a wide audience.⁵⁴

Similarly, William M. Wiecek has explained how Taney's notorious reputation was rehabilitated by the writings of Corwin, Charles Warren, Hughes, and Frankfurter between 1911 and 1937. Long execrated as an apologist for slavery, Taney was now portrayed as grappling more objectively with vexing constitutional issues concerning slavery and was lauded as the architect of the modern doctrine of the police power.⁵⁵

More recently, G. Edward White has described the process of what he calls the 'canonization' of Holmes and Brandeis. White contends that modernist commentators idealized these justices because they were the first justices to embrace "a modernist epistemological orientation" insofar as they rejected absolutes and believed that "humans were the principal architects of the universe."⁵⁶ He aptly concludes that "[t]heir

52. 5 U.S. (1 Cranch) 137 (1803).

53. LEO PFEFFER, *THIS HONORABLE COURT: A HISTORY OF THE UNITED STATES SUPREME COURT* 85 (1965).

54. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 209-13 (1986).

55. William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820-1860*, 22 AM. J. LEGAL HIST. 34, 34-35 (1978).

56. White, *supra* note 11, at 580. White points out that

[b]oth Holmes and Brandeis rejected the proposition that law was detached from its historical or social context—a timeless, finite entity. They agreed that at bottom judges 'made law,' that judicial decisions amounted to policy judgements on competing policy issues, and that doctrinal and constitutional formulas obfuscated rather than clarified the process of legal reasoning.

Id. at 616.

continued stature testifies to the resilience of those modernist premises.⁵⁷ Similarly, Boudin contends that Holmes and Brandeis became legends in their own time because "they aligned themselves more than any other two figures with the direction of constitutional history and the needs of the country. . . ."⁵⁸ Moreover, Professor Gordon contends that influential commentators in "the liberal press" such as the journalist Max Lerner and leading law review editors such as Abe Fortas of the *Yale Law Journal* conducted a campaign during the 1930s to create "a usable judicial past through the valorization of Holmes and Brandeis" in order to validate their belief that a vital democracy required judicial recognition of a multiplicity of competing economic interests.⁵⁹

Similarly, John Phillip Reid has wryly observed that "[t]he canonization of a . . . Justice does not always result from a burst of sudden revelation. Sometimes it has been the promotion of worshipful veneration by a mixed host of scheming angels made up of any combination of political scientists, law professors, journalists, dramatists, and professional opinion molders."⁶⁰ Reid and other commentators have pointed out that Felix Frankfurter and his students at Harvard Law School were influential in transforming Holmes and Brandeis into judicial icons.⁶¹

Although the "great" justices naturally attract competent biographers, the writing of good biographies in turn helps to sustain and nurture reputation. Holmes's reputation, like Marshall's, has been burnished by successive generations of biographers. Already the subject of a major biography and widespread popular and scholarly interest during his own lifetime, Holmes became even more widely renowned among the general public following the 1944 publication of Catherine Drinker Bowen's best-selling *Yankee From Olympus*, long a staple of book clubs. Holmes's high ranking on the 1992 Pederson-Provizer list and his movement from fifth to second place on the Blaustein and

57. *Id.* at 621.

58. *Transcript*, *supra* note 22, at 679.

59. Sarah Barringer Gordon, *supra* note 50, at 630.

60. John Phillip Reid, *Commentary: Beneath the Titans*, 70 N.Y.U. L. REV. 653, 661-62 (1995).

61. *Id.* at 662; *Transcript*, *supra* note 22, at 679. Professor Hoffer contends that [t]here's no question that Frankfurter was a relentless promoter, but you have to go beyond Frankfurter. This is a Harvard Law School program, a form of Harvard Law School's absolutely magnificent self-adoration project. . . . Frankfurter taught them how to do it. That's why Holmes is canonized, not [Harlan Fiske] Stone; because Columbia doesn't do it that well.

Id. at 681.

Mersky list may be attributable in part to the recent publication of three full length biographies⁶² and several other scholarly studies of aspects of Holmes's career.⁶³

After several decades of relative indifference toward Brandeis, biographers have produced a cornucopia of studies during recent years.⁶⁴ Meanwhile, Brandeis rose from seventh place in the 1970 Blaustein-Mersky survey to third in the 1993 update. Murphy, who ranked seventy-seventh in the 1970 survey, shortly after a splendid but less than laudatory biography,⁶⁵ vaulted to thirty-first in 1993, after the publication of an exhaustive and more positive account of his career.⁶⁶ Similarly, the ascent of Salmon P. Chase from fifty-ninth in 1970 to twenty-third in 1993 may reflect in part the publication in 1987 of the first major Chase biography.⁶⁷ Likewise, the ascent in Harlan II's reputation from twenty-fifth in 1970 to tenth in the 1993 survey may reflect the recent attention that scholars have devoted to his career.⁶⁸ Finally, the high "average" ranking of the relatively obscure Justice Peter V. Daniel in the 1970 survey may reflect the influence of John P. Frank's 1964 biography, which praised the justices's opposition to unfair criminal procedures, economic monopolies, and commercial exploitation

62. SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989); LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* (1991); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993).

63. See H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984); MICHAEL H. HOFFHEIMER, *JUSTICE HOLMES AND THE NATURAL LAW* (1992); *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (Robert W. Gordon, ed.) (1992); JOHN S. MONOGAN, *THE GRAND PANJANDRUM: MELLOW YEARS OF JUSTICE HOLMES* (1988).

64. See STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* (1994); PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* (1993); PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984); MELVIN I. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* (1981); LEWIS J. PAPER, *BRANDEIS: AN INTIMATE BIOGRAPHY OF ONE OF AMERICA'S TRULY GREAT SUPREME COURT JUSTICES* (1983); LEONARD BAKER, *BRANDEIS AND FRANKFURT-ER: A DUAL BIOGRAPHY* (1984); ALLON GAL, *BRANDEIS OF BOSTON* (1980); BEN HALPERN, *A CLASH OF HEROES: BRANDEIS, WEIZMANN, AND AMERICAN ZIONISM* (1987).

65. J. WOODFORD HOWARD, JR., *MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY* (1968).

66. SIDNEY FINE, *FRANK MURPHY: THE WASHINGTON YEARS* (1984). Professor Fine also published two volumes about Murphy's pre-Court career, *FRANK MURPHY, THE DETROIT YEARS* (1975) and *FRANK MURPHY: THE NEW DEAL YEARS* (1979).

67. FREDERICK J. BLUE, *SALMON P. CHASE: A LIFE IN POLITICS* (1987).

68. See YARBROUGH, *supra* note 19.

of public lands.⁶⁹ After Daniel receded back into obscurity, his rating in the 1993 survey fell from thirty-second to sixty-sixth.

Conversely, the relative decline in the reputation of Charles Evans Hughes, who fell from sixth to ninth in the Blaustein-Mersky survey and did not appear on any of the top ten Pederson-Provizer lists, may be attributable to a lack of interest among biographers, who have not produced a major study in more than four decades.⁷⁰ The absence of any recent biographies of Stone and Wiley B. Rutledge may help to explain why these three notable justices are beginning to pass into obscurity. Stone, who has not been the subject of a biography since 1956,⁷¹ fell from eighth to twelfth between 1970 and 1993 in the Blaustein-Mersky surveys. Rutledge, who has never received major biographical treatment, ranked twenty-fourth in 1970, but placed only thirty-fifth in the 1993 survey. Lack of biographical studies, however, do not alone insure obscurity. Robert Jackson, who has never been the subject of a major biography and has not been the subject of any serious study since 1958,⁷² rose from twenty-third in the 1970 Blaustein-Mersky survey to fifteenth in their 1993 survey.

Biographical treatment alone, however, is not likely to rehabilitate the reputation of a poorly ranked justice. The recently published first biography of McReynolds, for example, probably will not alter the essentially negative verdict of historians, even though its author generally favors McReynolds's libertarian jurisprudence and challenges the image of McReynolds as an incorrigible misanthrope.⁷³ Indeed, the author admits that McReynolds was "not a great jurist" insofar as he generally failed "to clothe his Jeffersonian views in convincing argument and enduring language."⁷⁴

The reputation of other judges who espoused substantive due process may benefit, however, from recent scholarship that re-evaluates the "Lochner Era" and concludes that substantive due process was more principled and intellectually coherent than has been supposed. In particular, Owen Fiss's publication of a reevaluation of the Fuller Court

69. JOHN P. FRANK, *JUSTICE DANIEL DISSENTING: A BIOGRAPHY OF PETER V. DANIEL, 1784-1860* (1964).

70. The last major work was MERLO J. PUSEY, *CHARLES EVANS HUGHES* (1951).

71. The last major work was ALPHEUS T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956).

72. EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* (1958).

73. JAMES E. BOND, *I DISSENT: THE LEGACY OF CHIEF [sic] JUSTICE JAMES CLARK MCREYNOLDS* (1992).

74. *Id.* at 137.

as part of the official history of the Supreme Court may help to elevate or least maintain the reputation of Fuller, who rose from the lower rungs of the "average" group in the 1970 Blaustein-Mersky study to a somewhat higher place among the "average" justices in the 1993 update. James W. Ely, Jr.'s fine study, published in 1995, may also contribute to his rehabilitation.⁷⁵

Although solid accomplishments are the principal requisites for favorable biographies, justices are more likely to receive more kindly treatment from biographers if they maintain ample documentation of their work. The recent descent of a small army of researchers on the Manuscript Division of the Library of Congress on the day when the Thurgood Marshall papers were opened underscores the immense significance of such collections. The extensive records of Holmes, Brandeis, Taft, Frankfurter, Douglas, and Black provide a wealth of information that helps to maintain the interest of historians in these justices. Even though these papers sometimes reveal warts, unfavorable attention from historians is more likely to burnish judicial reputation, at least up to a point, than is neglect.

Justices whose papers have been lost or destroyed naturally will suffer from neglect by historians. Edward Douglass White, for example, might have received somewhat better than a rating of twenty-sixth in the 1993 Blaustein-Mersky survey for his twenty-six years as justice and chief justice if all of his papers had not been destroyed. Although White's general conservatism and his lack of brilliance are not likely to endear him to historians, his role in helping to make the Court at least somewhat more receptive to economic legislation and civil liberties during the "Lochner Era" might attract more sympathetic interest from historians if they had more raw materials with which to assess his work. White's fall from nineteenth in the 1970 Blaustein-Mersky survey may reflect the paucity of biographical attention. He has been the subject of only two relatively short studies that necessarily were stunted by the lack of archival material.⁷⁶ Similarly, Field might attract more interest if his papers were not so scarce, although it is difficult to imagine that this proponent of substantive economic due process could ever rise much

75. See OWEN M. FISS, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES*, VOL. 8, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1889-1910* (1994); JAMES W. ELY, *CHIEF JUSTICE OF MELVILLE W. FULLER 1888-1910* (1995).

76. See ROBERT BAKER HIGSAW, *EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH* (1981); MARIE CAROLYN KLINKHAMER, *EDWARD DOUGLASS WHITE, CHIEF JUSTICE OF THE UNITED STATES* (1943).

higher than the ranking of sixteenth that he received in the 1970 and 1993 Blaustein-Mersky surveys. Even McReynolds might rise a few notches in the estimation of historians if most of his private papers, including virtually the entire record of his twenty-seven years on the Court, had not been obliterated.

Extensive documentation, however, is not likely to do much good unless it is effectively mined by historians. The Library of Congress's massive collection of the papers of Wiley B. Rutledge, for example, could be used to good effect by a competent biographer. The extensive records of Hughes and Stone likewise could be tapped for modern biographies. The use of these collections by biographers might help to raise the ratings of both of these justices in future surveys.

Since all present and future justices are likely to retain extensive records of their careers, historians of those justices will have a more even-handed basis for evaluating their reputations. No longer will reputations be so greatly diminished by a paucity of documentation or so unduly magnified by a plethora of it. Even the reputations of present and future justices, however, will be affected by the availability of archival sources. A justice, for example, who conducts extensive written correspondence, tapes his or her conversations, or maintains intimate diaries is much more likely to receive biographical attention that will enhance his or her reputation.

The growing media attention that justices receive also will help to insure that no present or future justices are likely to slip into obscurity since popular attention during a justice's own lifetime also affects judicial reputation. Justice Douglas's much publicized athletic exploits, environmentalism, farflung travels, and numerous marriages and divorces made him the most publicly visible justice during his lifetime. The combination of a robust lifestyle, vocal championship of liberal political causes, and libertarian jurisprudence transformed him into something of a folk hero. His visibility during his own time may help to explain why he remains on most top-ten lists even though scholars increasingly question the durability of his contributions. The attention that Sandra Day O'Connor has received as the Court's first female justice may help to explain why students ranked her third in the Pederson-Provizer survey.⁷⁷

77. PEDERSON & PROVIZER, *supra* note 2, at 17. Respondents to the 1993 Blaustein-Mersky survey placed her only at thirty-third. Blaustein & Mersky, *supra* note 2.

Finally, it is possible that the reputations of some justices benefit from mere notoriety because it rescues them from obscurity. John Rutledge, for example, stood near the top of the "average" group, within shooting distance of the "near great" category, in the 1970 Blaustein-Mersky survey, even though he served on the Court for only two years, contributed almost nothing during that short period, and failed to obtain confirmation as chief justice. The Senate's defeat of Rutledge's nomination, however, is well known among scholars and received special attention after the defeats of the Haynsworth nomination late in 1969 and the Carswell nomination early in 1970, just before the survey was taken. This may have given him a visibility that contributed to his high ranking. Despite the attention that Rutledge received in more recent years in the spate of articles written in the wake of renewed controversy over the Supreme Court nomination process, however, his ranking fell to seventy-second in 1993.

ECCENTRIC DECISIONS: THE DRED SCOTT FACTOR

Lawyers, judges, and even scholars may have a tendency to base their opinion of a justice on a few of the justice's best known opinions and dissents, particularly when the justice is remote in time, rather than upon a careful study of the justice's overall judicial record. In most instances, however, little harm is done since a justice's most dramatic decisions generally are consistent with his or her over-all performance on the Court.

Although judicial reputations naturally suffer from decisions that are widely regarded as wrong-headed, critics of the justices seem generally willing to accord a high reputation to justices who have handed down such decisions that seem inconsistent with the justice's overall record.⁷⁸ The most notable example is Taney, who, until recently, had consistently received high rankings despite universal execration of his *Dred Scott* decision.⁷⁹ Growing sensitivity toward the racial implications of this blot on his record, however, may explain why he fell from third place to twenty-ninth between 1970 and 1993 in the Blaustein-Mersky surveys

78. As one scholar has pointed out, however, "[t]he aberration theory . . . is problematic in assessing the greatness of any justice, for one assumes that the author himself did not regard any one opinion, no matter how despicable or unsatisfactory later generations may find it, as eccentric and somehow not really 'his.'" Kenneth M. Holland, *Roger B. Taney: A Great Chief Justice?*, in PEDERSON & PROVIZER, *supra* note 2, at 75.

79. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

and why he failed to appear on the Pederson-Provizer list,⁸⁰ despite his consistently high rankings in all previous lists of great justices.⁸¹ One scholar, however, has argued recently that the opinion of Taney in *Dred Scott* "is the true warrant for his inclusion in the national pantheon" since he so boldly asserted the Court's power in that decision.⁸² Moreover, lawyers and historians continue to recognize Taney's significant contributions to the development of American law during the mid-nineteenth century and to admire many of his decisions on subjects other than slavery, particularly those decisions that fostered economic development.⁸³ Professor Finkelman contends, however, that

[i]n the end Taney must always be remembered more for *Dred Scott* than his opinions about the economy. *Dred Scott* indeed, has come to stand for all that can go wrong in a Supreme Court decision, and all that did go wrong under the pro-slavery Constitution. It remains the most infamous decision in American constitutional history, and its author suffers accordingly. . . . However we may admire Taney's personal grace, his clever opinions on commercial issues, and his sometimes brilliant analysis of constitutional issues, his racism, pro-slavery dogmatism, and secessionist sentiments will remain his legacy. Whenever the name of Taney comes up, there will always be the echo of hooting.⁸⁴

80. Although Taney did not place among the top justices on the final Pederson-Provizer list, he ranked ninth among attorneys who participated in that survey. PEDERSON & PROVIZER, *supra* note 2, at 16.

81. Felix Frankfurter ranked Taney fourth in his 1957 survey of justices, John Frank ranked him fifth in 1958, George Currie placed him fourth in 1964, Stuart Nagel ranked him fourth in 1970, and James E. Hambleton placed him third in 1983. *Id.* at 24-28.

82. Holland, *supra* note 78, at 94-95. Contrary to the widespread contention that Taney's decision helped bring the Court into such widespread disrepute that the Court did not recover its power for decades to come, Professor Holland argues that Taney "set in motion a trend that resulted in an explosion of judicial policymaking in the 1870s and 1880s that has continued to the present." *Id.* at 76. Holland contends that the Court in *Dred Scott* "became a major player in the legislative process, and neither the Court nor the nation have looked back since." *Id.* at 94.

83. Paul Finkelman, *Hooted Down the Page of History: Reconsidering the Greatness of Chief Justice Taney*, 1994 J. SUPREME CT. HIST. 83, 98-99.

84. *Id.* at 100. Professor Finkelman has explained how Taney's reputation suffered from the time of *Dred Scott* throughout most of the remainder of the nineteenth century. *Id.* at 83-84. During the early twentieth century, Taney's reputation improved, both as the result of a recrudescence of racial discrimination and because Taney's support of "the right of the states to regulate their economics without federal interference or supervision" was popular among Progressives and early New Dealers. *Id.* at 84-85. Finkelman points out that Taney "seemed almost Brandeisian" in his "economic federalism" and demonstrates how Felix Frankfurter, while a law professor, vigorously worked to rehabilitate Taney's reputation. *Id.*

Similarly, Bradley's authorship of a notorious opinion upholding denial of admission of a woman to the bar solely on account of gender⁸⁵ did not prevent him from attaining high rankings in the 1970 and 1993 Blaustein-Mersky surveys. Growing sensitivity about gender issues during the past two decades, however, may account in part for his fall from seventeenth to twenty-first.

In some instances, scholars and commentators have magnified the ideologically attractive aspects of the justices that they have admired and overlooked or minimized those characteristics that they found less congenial. The most notable example of the willingness of critics to overlook judicial shortcomings is Holmes. As numerous scholars have pointed out, Holmes's reputation for enlightenment is blighted by his votes to sustain laws for the sterilization the mentally handicapped,⁸⁶ the prohibition on the teaching of foreign languages,⁸⁷ and peonage.⁸⁸ Holmes's espousal of judicial positions that would be unpopular with most persons today, however, has not tarnished the lustre of his reputation.

In explaining the process by which Holmes and Brandeis were elevated to "the status of professional and cultural icons" during the 1930s,⁸⁹ G. Edward White has pointed out that commentators "emphasized their occasional dissents and ignored the more numerous instances in which they joined Taft, Van Devanter, McReynolds, Sutherland, and Butler in extending and refining the categories of orthodox early-twentieth century jurisprudence."⁹⁰ White explains that students of the Court have 'canonized' Holmes and Brandeis in spite of these shortcomings because they were the first justices to adopt a modernist philosophy of jurisprudence.⁹¹

at 85-86.

85. *Bradwell v. Illinois* 83 U.S. (16 Wall.) 130 (1873).

86. *Buck v. Bell*, 274 U.S. 200 (1927).

87. *Bartels v. Iowa*, 262 U.S. 412 (1923) (Holmes, J., dissenting).

88. *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (Holmes, J., dissenting).

89. White, *supra* note 11, at 576.

90. *Id.* at 578.

91. *Id.* Judge Noonan, however,

would place the secret of their appeal elsewhere: in the spareness, trenchancy, and vigor of Holmes's style, the Jamesian complexity of his personal affairs, and his adamant assertion of his own responsibility as a judge; and in the patient marshalling of reasons in a Brandeis opinion, the concentrated force of the analysis, the calm, uncompromising laying bare of the issues, combined with the passion for service and the sense of personal responsibility that he, the first Jewish Justice, brought to his work.

Although many of Holmes's opinions might disappoint his admirers, there is at least a substantial body of law upon which to base his reputation as a judicial modernist. The same cannot be said of the first Justice Harlan, whose glowing reputation is based largely upon his status as the sole dissenter in *Plessy v. Ferguson*.⁹² As Professor White has observed, Harlan "was transformed by commentators from an eccentric to a visionary" during the Civil Rights Revolution.⁹³ Similarly, John Phillip Reid has observed with regard to Harlan that "[s]tandards have changed since the canonization of Holmes and Brandeis. Legal academics now need only one dissent to nominate a candidate for sainthood."⁹⁴

Conversely, occasional decisions that are widely lauded today often are not enough to substantially improve the reputations of justices who have made themselves unpopular through the balance of their record. Perhaps the most notable example is McReynolds, who ranked sixth from the bottom in 1970 and is widely regarded as a "failure" despite his authorship of a triad of opinions during the 1920s that broke new frontiers in civil liberties by upholding the rights of private schools against racial and religious bigots who sought to significantly curtail or destroy private education.⁹⁵

Nevertheless, a well regarded opinion by an otherwise obscure justice may sometimes help him to emerge from the ranks of the non-entities and obtain a ranking that may not be warranted by his overall record. The classic example is Benjamin R. Curtis, who ranked second in the "near great" category in the 1970 Blaustein-Mersky survey. Although Curtis, who served for only six years during the 1850s, made some useful contributions in commercial cases and wrote the majority opinion in *Cooley v. Board of Wardens*,⁹⁶ his reputation probably is based largely upon his dissent in *Dred Scott*. While this dissent and his other work during his brief tenure on the Court were highly important and suggest

John T. Noonan, Jr. *Commentary: The Secular Search for the Sacred*, 70 N.Y.U. L. Rev. 642, 652 (1995).

92. 163 U.S. 537 (1896).

93. White, *supra* note 11, at 576.

94. John Phillip Reid, *Commentary: Beneath the Titans*, 70 N.Y.U. L. Rev. 653, 664 (1995).

95. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down laws that restricted the teaching of foreign languages in private and parochial schools); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down law that required all elementary school age children to attend a public school); *Farrington v. Tokushige* 273 U.S. 284 (1927) (striking down law aimed at restricting Asian-American schools in Hawaii).

96. 53 U.S. (12 How.) 299 (1852).

that Curtis would have achieved real greatness if his service had not been cut short, they do not necessarily entitle him to a higher ranking than justices whose total contributions and influence were greater.

Similarly, Ward Hunt's dissent in *United States v. Reese*⁹⁷ may help to explain why he placed in the middle of the "average" category in the 1970 Blaustein-Mersky survey, despite his dismal record on race in other cases and his cramped view of federal power during his brief tenure of nine years (only six of them active) on the Court.⁹⁸ Likewise, William Strong's decisions in *Strauder v. West Virginia*⁹⁹ and *Ex parte Virginia*¹⁰⁰ may explain why he received a similar ranking even though these are the exceptions to a short ten year tenure that was more notable for narrow reading of the civil rights laws and opposition to regulation of business. Finally, Sutherland's opinion in *Powell v. Alabama*,¹⁰¹ requiring a right to counsel in capital cases, may help explain why he is ranked as a near great even though he was a proponent of a less popular form of judicial activism in cases involving economic regulation.

PERSONAL CHARACTERISTICS: THE INTEGRITY FACTOR

Personal traits also affect judicial reputation, and indeed this is a criterion that respondents to the Pederson-Provizer survey listed as one of the factors they used to identify a justice as "great." Charles Fairman believed that in evaluating judicial greatness, "we look first to integrity."¹⁰² Since judicial ranking is an inherently subjective process, the importance of personal traits should not be underestimated. As Posner has observed, "[h]igh achievers tend not to be likable; when they are, we like them all the more and extend some of our favor to the work itself."¹⁰³

The warmth and decency of Warren, the integrity and sensitivity of Cardozo, and the charming eccentricities of Holmes have contributed to their renown. On the other hand, the public remoteness of Hughes, who

97. 92 U.S. 214, 238 (1876) (Hunt, J., dissenting from invalidation of penal section of statute enforcing the right of citizens to vote).

98. His well known dissent in *Pennoy v. Neff*, 95 U.S. 715, 736 (1878) also may have enhanced his reputation.

99. 100 U.S. 303 (1880) (holding that state law that excluded African Americans from juries violated the fourteenth amendment's equal protection clause).

100. 100 U.S. 339 (1880) (upholding the section of the Civil Rights Act of 1875 which prohibited racial discrimination in the selection of juries).

101. 287 U.S. 45 (1932).

102. Fairman, *supra* note 4, at 83.

103. POSNER, *supra* note 51, at 130.

was described in his lifetime as an icicle with a beard, may help to explain his growing obscurity. The incorrigible enmity of McReynolds toward Jews, African Americans, and women has forever blighted his reputation, assuring the low rankings from which his occasional defenses of personal liberties might otherwise have rescued him.

Similarly, the reputation of Butler may have suffered from the perception that he was a bully who hectored anyone who failed to subscribe to his rugged individualism. Butler's role in purging the University of Minnesota faculty of political dissidents during his years as a trustee continues to haunt his reputation.¹⁰⁴ In contrast, Sutherland's relatively sunny personality may help to explain why he was ranked as a "near great" in the 1970 Blaustein-Mersky survey and "average" in the 1993 update while his three less personable fellow Horsemen were ranked as "failures" even though Sutherland's record was not notably more liberal than theirs. Richard A. Posner believes that "[e]mphasis on personality has done unwarranted damage to the reputation of Felix Frankfurter, an extremely accomplished judge,"¹⁰⁵ who fell from eleventh in the 1970 Blaustein-Mersky survey to fourteenth in their 1993 survey. Posner explains that "[w]e find it hard to accept that jerk and genius are often found in the same body."¹⁰⁶

The extent to which justices have led exciting or interesting lives may also contribute to their reputation, even when the incidents that make more for a savory biography have little or nothing to do with the justice's legal career. Justice Douglas's much-publicized exploits as an outdoorsman and an environmentalist, and even perhaps his four marriages to progressively younger women, may have given him a public visibility that has burnished his judicial reputation. Similarly, Oliver Wendell Holmes's dramatic experiences as a twice-wounded soldier in the Civil War probably helped to contribute to what G. Edward White has called Holmes's "canonization."¹⁰⁷

Since few justices have had much spice in their lives, those whose lives have had dramatic incidents naturally are likely to attract more attention and command higher ratings. Thomas C. Grey has pointed out, however, that "judges are (and should be) generally conventional

104. See John T. Hubbell, *A Question of Academic Freedom: The William A. Schaper Case*, 17 *MIDWEST Q.* 11-21 (1976); DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* 100-05, 197-99 (1964).

105. Posner, *supra* note 8, at 513.

106. *Id.*

107. White, *supra* note 11, at 595.

people whose lives do not make good stories.”¹⁰⁸ Similarly, Posner contends that “[f]ew judges, however prominent, have been extraordinary individuals; few have led interesting lives. . . .”¹⁰⁹ Although one might argue that one can hardly dismiss as dull any life spent shaping the law and public policy, it is true that few judges have had unusual experiences outside of their official careers and that too unconventional a life might under some circumstances deprive a judge of the balance that is critical to a judicial temperament.

The greatest justices also have been regarded as persons of high integrity. As Posner observed in his study of Cardozo’s reputation, “[c]haracter is important to a judicial reputation because in dealing with the work of judges we inevitably must take much on faith.”¹¹⁰ The obvious diligence, conscientiousness, and sincerity of justices such as Cardozo, Brennan, both Harlans, Warren, Brandeis, and Black, as well as their essential desire to do justice, has clearly contributed to their reputations.

Moreover, Supreme Court justices have been remarkably free from scandal.¹¹¹ They have almost entirely escaped (fairly, one hopes) the financial, sexual, and ethical imbroglios that have sullied the reputations of many presidents and members of Congress, as well as countless state judges, executives, and legislators. The most lurid stories about justices involve senility and physical infirmities, natural occupational hazards of a lifetime post.¹¹² Even the most popular and extravagant backstairs

108. Thomas C. Grey, *Commentary: Unrepeatable Lessons*, 70 N.Y.U. L. REV. 524, 526 (1995).

109. Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 505, 512 (1995).

110. POSNER, *supra* note 51, at 131-32.

111. Professor Fairman observed in 1950 that “in the primary sense of being uncorrupted, every Justice of the Supreme Court seems to have had integrity.” Fairman believed that “integrity” was the “most fundamental of all the requirements” of a great judge. Fairman, *supra* note 4, at 83. Not everyone, however, has agreed that the Justices have not been corrupt. Early in the century, for example, the socialist journalist Gustavus Myers published a lengthy study of constitutional history that purported to reveal that economic ideologies and financial conflicts of interest had significantly biased many of the Justices. GUSTAVUS MYERS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (reprinted 1968) (1912).

112. See David N. Atkinson, *The Problems of Disabled Justices: Supreme Court Deaths and Resignations 1865-1900*, 38 DRAKE L. REV. 903-25 (1988-89); Merlo J. Pusey, *The Court Copes With Disability*, YEARBOOK SUPREME COURT HISTORICAL SOCIETY 63-69, 100 (1979); John S. Goff, *Old Age and the Supreme Court*, 4 AM. J. LEGAL HIST. 95-106 (1960).

study of the justices, *The Brethren*, portrays an exceptionally honorable group of public officials.¹¹³

Fortas is the only justice who has resigned from the Court in the wake of widespread questions about personal misconduct, which was relatively insignificant, if indeed there was any at all.¹¹⁴ Attacks on the integrity of justices during their tenure on the Court have been rare, generally motivated by politics, and have left no blot on the reputations of those justices. The 1970 investigation of Douglas by Republican members of Congress, for example, failed to discredit Douglas and the few possible ethical lapses that it uncovered have not seriously blemished Douglas's reputation. Similarly, Taft emerged unscathed from 1923 attacks by socialists and other leftists who charged that he improperly accepted an annuity under the will of Andrew Carnegie.¹¹⁵ Neither has there emerged any serious posthumous revelations about improper judicial conduct. Bruce Allen Murphy's 1982 book about the surprising scope of the extrajudicial activities of Brandeis raises serious questions about the propriety of judicial participation in non-judicial public affairs, but it is not likely to diminish the reputation of either Brandeis or Frankfurter, who before going on the Court, assisted Brandeis in his far flung political activities.¹¹⁶

ADMINISTRATIVE SKILLS: THE DRUDGE FACTOR

Administrative ability, while not usually cited among the bases for ranking justices, is a legitimate criterion. It is, of course, primarily relevant to chief justices, on whom the most significant administrative burdens fall. Since the chief justice is the head of the federal judicial administration and not merely *primus inter pares* among the justices, it is not unfair to allow the chief justice's broader duties to influence his judicial ranking. Some justices, notably Taft and Burger, have devoted far more energy to administration of the federal judiciary than have other justices. Scholars accord Taft and Burger nearly unanimous plaudits for their untiring efforts to improve the fairness and efficiency of the federal judicial system. The administrative talents of these chief

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

114. See generally, BRUCE A. MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* (1988).

115. See WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 234-40 (1994).

116. BRUCE A. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982).

justices clearly have helped raise their rankings among scholars, who generally have been cool toward their conservative jurisprudence and have not thought highly of their intellectual abilities. It is significant that the judges in the Pederson-Provizer survey were the only one of the four groups in that survey to place Taft among the top ten justices. Judges perhaps have more appreciation of the importance of efficient judicial administration.

EXTRA-JUDICIAL ACTIVITIES: THE GLOBETROTTER FACTOR

Although not generally cited as a criterion in ranking justices, extra-judicial activities during the period of service on the Court may properly be taken into account in measuring judicial reputations since virtually everything that a justice does reflects on the Court. Since tradition frowns upon such activities, justices who undertake extrajudicial work are placing themselves in a parlous position. The two most notable examples of significant outside activities by justices—Warren's chairing of the commission that investigated the assassination of President Kennedy and Jackson's absence from the Court for a year to serve as head prosecutor of Nazi war crimes at the Nuremberg trials—involved those justices in controversies that have not helped to burnish their reputations.

INFLUENCE AND LEADERSHIP ON THE COURT: THE PERSUASION FACTOR

A justice's ability to influence his or her associates and to build consensus on the Court often is cited by scholars and judges as an attribute of judicial greatness. The ability to bring harmony to the Court and to unite querulous associates on the great issues of the day is widely regarded as a particularly admirable attribute for a chief justice. It is therefore not surprising that John Marshall, who has been ranked first in literally every known survey, is famous for his ability to impose his will on his colleagues and to make the Court in many cases speak with one voice. Marshall's accomplishment in promoting Federalist ideals is particularly remarkable since all of his colleagues, in time, were appointed by Republican presidents. Earl Warren's powers in this regard were particularly formidable—his success in obtaining unanimity in *Brown v. Board of Education* is the classic example—and this accounts in large measure for Warren's high rankings. Conversely, scholars often have faulted Chief Justice Vinson for failing to promote

judicial harmony, which contributes to Vinson's relatively low rankings despite the many important decisions in which he participated.

Leadership and influence are also important to the reputations of associate justices. Murphy's reputation, for example, has suffered from the perception that he was unduly influenced by Black and Douglas, even though his liberal votes would be likely to appeal to many survey participants. Similarly, the reputation of another "liberal," Thurgood Marshall, has suffered from the perception that he had little intellectual or political influence over his colleagues.

On the whole, however, there does not appear to be a particularly strong correlation between influence and consensus building and high rankings. On the contrary, those who rank judges seem particularly to admire "great dissenters" who went their own way on the Court. Of the top ten justices in the Pederson-Provizer survey, as many as seven are notable more for their dissents than for their ability to forge majorities. Three of the ten—Holmes, Brandeis, and Harlan I—have reputations that are built largely upon their dissents in famous cases. On important issues, all three of these justices, particularly Holmes and Brandeis, swam against the tide of their times and had little apparent success in making converts among their brethren on the Court. Four other justices—Brennan, Black, Douglas, and Frankfurter—were more often in the majority in great cases but are perhaps more renowned for their many dissents than for their participation in majority decisions. Although Brennan and Black may have had significant influence over some of their colleagues on some important issues, Douglas was notorious for his lack of interest in persuading colleagues to join him, and Frankfurter became notorious for the failure of his prodigious efforts to influence colleagues.

The so-called "great dissenters" nevertheless tend to receive high rankings because they so often have influenced future generations if not their own colleagues. Harlan I and Holmes are classic examples. More recent dissenters, such as Brennan, may have benefitted from the perception that they are likely to influence future generations, or at least that their intellectually trenchant dissents have influenced scholars and have articulated a significant point of view.

Conversely, the evaluators have not assigned high ranks to justices who have failed to influence future generations even though they influenced the outcome of decisions in their own times. Many of the lower ranked justices were powerful because theirs were the "swing" votes in many close decisions. Such power, however, does not appear to have burnished their reputations. Justice Roberts, for example, was

consigned to the lower echelons of the "average" category in the 1970 Blaustein-Mersky survey and no higher than the upper levels of that category in 1993 even though his "switch in time" in 1937 triggered the Judicial Revolution of that year and signalled a major shift in the Court. Similarly, Justices Stewart and White were near the bottom of the "average" category in the 1970 survey even though they often cast the deciding votes in Warren Court cases. Justice Powell is unlikely to receive many plaudits for his central position during the Burger years, although the good sense of his opinions appear to have won him many admirers and he ranked a respectable twenty-second in the 1970 Blaustein-Mersky survey.

Those who evaluate justices are likely to give credit for being a swing vote only if the justice was able to carry other justices with him. For example, Hughes may benefit from the belief that he succeeded in persuading some of his more moderate colleagues, including Roberts, from voting against social reform legislation during the 1930s.

Moreover, a justice may actually suffer from casting important deciding votes if he votes in a manner of which the evaluators disapprove. Professors Blaustein and Mersky have pointed out that Whittaker's reputation has suffered because he "cast the deciding vote in forty-one crucial decisions—each time standing on the side that would deny civil rights or the extension of liberty."¹¹⁷

QUALITY AND QUANTITY OF OPINIONS: THE LITERARY FACTOR

Closely related to a justice's influence is his ability to express himself clearly and forcefully in his writings. Attorneys and students in the Pederson-Provizer survey mentioned "writing ability" more frequently than any other attribute as a criteria for greatness, while scholars ranked it second only to intellectual ability, and judges ranked it fourth, after intellectual ability, leadership, and impact on the law.¹¹⁸ Richard A. Posner has aptly observed that "literary distinction is a central element in the reputation of the great judges, such as Holmes, Cardozo, and Hand."¹¹⁹

All of the great justices have been noted for the quality and quantity of their judicial opinions. Several, particularly Brandeis and Cardozo,

117. Blaustein and Mersky, *supra* note 2, at 1187.

118. PEDERSON & PROVIZER, *supra* note 2, at 20.

119. Posner, *supra* note 8, at 512-13.

are remembered as great stylists.¹²⁰ Despite the opacity of some of his writing, Holmes also is regarded as a great stylist and author of many famous epigrams. Although Warren and John Marshall are not renowned for the elegance of their prose, their most significant opinions were written with power and force.¹²¹

Robert C. Post contends that Holmes and Brandeis are more highly regarded than Stone, even though Post believes that Stone was the "most modernist" justice of the 1920s, because "Holmes and Brandeis simply write better and smarter opinions than their contemporaries. Their work glows with competence and mastery and style. It leaps off the page, in part because it points so directly to what modern eyes view as essential."¹²²

Scholars have often correlated judicial ability with the number of opinions produced by a judge. Blaustein and Mersky, for example, found that the nineteen most prolific opinion writers included six of the twelve "great" justices in their 1970 survey, five of the fifteen "near-great justices," seven of the fifty-five "average" justices, and one of the fourteen below-average justices and judicial failures.¹²³

Quality may be correlated with quantity, moreover, because judges who are competent writers generally like to write, are more willing to

120. During Cardozo's tenure on the New York Court of Appeals, Frankfurter remarked that "[t]he bar reads his opinions for pleasure, and even a disappointed litigant must feel, when Judge Cardozo writes, that a cause greater than his private interest prevailed." Felix Frankfurter, *When Judge Cardozo Writes*, in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND CONSTITUTION 245 (Phillip B. Kurland, ed., 1970) (reprinted from NEW REPUBLIC, Apr. 8, 1931).

121. Praising Marshall's prose, Cardozo stated that "We hear the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power. Thus Marshall seemed to judge, and a hush falls upon us even now as we listen to his words. Those organ tones of his were meant to fill cathedrals . . . We feel the mystery and the awe of inspired revelation." BENJAMIN N. CARDOZO, *LAW AND LITERATURE* 10-11 (1931). Although Professor Schwartz has acknowledged that Warren "does not rank with Holmes or Cardozo as a master of the quotable phrase," he aptly points out that "his important opinions have a simple power of their own; if they do not resound with the cathedral tones of a Marshall, they speak with the moral decency of a Modern Micah." Schwartz, *supra* note 1, at 437-38.

122. *Transcript*, *supra* note 22, at 681.

123. Professors Blaustein and Mersky, for example, found that the nineteen most prolific opinion writers included six of the twelve "great" justices in the 1970 survey, five of the fifteen "near-great" justices, seven of the fifty-five "average" justices, and one of the fourteen "below-average" justices and judicial "failures". BLAUSTEIN & MERSKY, *supra* note 7, at 101-02. In their wry attempts to identify "the most insignificant justice," Professors Currie and Easterbrook placed much emphasis on the number of opinions written. Currie, *supra* note 1, at 469-73; Easterbrook, *supra* note 27, at 487, 495-96. See also Atkinson, *supra* note 18, at 349-50.

write, and are more likely to be assigned to write opinions in significant cases. A judge who is not a prolific writer, however, is not necessarily without influence. Professor Langran, for example, has pointed out that Van Devanter's ranking as a "failure" may be related to the paucity of his written output, but that this may not be a fair measurement of his significance since he was influential during conferences and "left a lot of the opinion writing to Justice Sutherland. . . ."¹²⁴

The importance of quantity should not be greatly emphasized, however. As Felix Frankfurter observed, "precious wines are not drunk out of beer mugs, and significant, original, and enduring judicial work is not measured by the pound."¹²⁵ Although Professor Mersky has found a distinct correlation between the number of opinions that a justice has written and his ranking in his 1970 survey, he concluded that it is not significant insofar as it is more closely related to the longevity of tenure that characterizes the justices who receive high rankings.¹²⁶ Similarly, Professor Atkinson has observed that "longevity of service is apt to be signally important" in considering opinion output as a status criterion. He points out that signed opinions therefore assume an added importance for the "vast majority of Justices whose tenures are neither overly long nor unduly short. . . ."¹²⁷

Unfortunately, the quality and quantity of writing may become a more difficult and problematic factor in evaluating judicial reputations as justices continue to delegate more work to their law clerks. As Richard A. Posner has observed, "[i]ncreasingly, judicial output is a corporate affair (it always was in a more limited sense, because of the heavy reliance that most judges place on the briefs of the parties). The biographies of modern judges may come to resemble histories of General Motors or the New York Public Library."¹²⁸

124. Langran, *supra* note 13, at 8. Similarly, Professor Atkinson believes that "his performance in conference, where he was invariably well-informed and verbal, added a needed dimension to the Taft Court" and that his "expertise in federal jurisdiction and procedure, along with his general acumen, permitted him to contribute significantly to the Supreme Court despite his seeming inability to fashion opinions." Atkinson, *supra* note 18, at 354.

125. Felix Frankfurter to Harlan Fiske Stone, June 2, 1937, Felix Frankfurter Papers, Series 3, Reel 3 (on file with author).

126. BLAUSTEIN & MERSKY, *supra* note 7, at 101-02.

127. Atkinson, *supra* note 18, at 349.

128. Posner, *supra* note 8, at 513.

CONCLUSION

Judicial reputations are the products of many circumstances, and greatness may manifest itself in different ways among different justices.¹²⁹ Both internal and external factors affect the renown of the justices. The greatest of them have shared formidable internal qualities, including powerful intellects, writing talents, abundant energy, pleasing personalities, and the ability to influence their fellow justices and future generations of jurists. These traits do not alone make great reputations, however, for judicial renown is heavily influenced by three external factors: longevity of tenure, the ideological predilections of those who evaluate the justices, and proximity in time.

Of these three external factors, longevity of tenure is perhaps the most crucial element since nearly all of the "great" justices have enjoyed lengthy tenures on the Court and could not have attained such renown if their tenures had been significantly curtailed. All of the great justices also have espoused a judicial philosophy that "liberal" evaluators might find congenial. Although ideology helps to account for the selection of the "great" justices as well as the "failures," there are independent variables that help to explain why justices who have defended civil liberties have great reputations. Finally, although evaluators tend to exaggerate the strengths and weaknesses of the more recent justices, a significant number of temporally distant justices remain in the upper ranks.

Although judicial reputations wax and wane, there is a remarkable level of uniformity among different surveys that have been conducted during the past half century. The similarities between the results of the 1970 and 1993 Blaustein-Mersky surveys are particularly striking. Although this stability in part reflects a consensus among academicians about what makes judicial greatness, the Pederson-Provizer survey demonstrates that scholars, judges, and lawyers tend to identify the same justices as "great," although students had a considerably different list.

129. As Frankfurter observed, "greatness may manifest itself through the power of penetrating analysis exerted by a trenchant mind, as in the case of Bradley; it may be due to long persistence in a point of view forcefully expressed over a long judicial stretch, as shown by Field; it may derive from a coherent judicial philosophy, expressed with pungency and brilliance, reinforced by the *Zeitgeist*. . . as was true with Holmes; it may be achieved by the resourceful deployment of vast experience and an originating mind, as illustrated by Brandeis; it may result from the influence of a singularly endearing personality in the service of sweet reason, as Cardozo proves; it may come through the kind of vigor that exerts moral authority over others, as embodied in Hughes." Frankfurter, *supra* note 1, at 784.

While the uniformity of the surveys helps to validate their reliability as indicators of the opinions of students of the Court, the changes in the reputations of various justices over time reflect shifts in attitudes toward the role of the Supreme Court in American society. These changes provide a barometer of trends in historiography and offer insights into the type of persons whom Americans would like to see appointed to the Court in the future.

APPENDIX I:
RESULTS OF THE 1993 SURVEY
BY
PROFESSORS ROY A. MERSKY & ALBERT P. BLAUSTEIN

Justice	# Rankings - Great	# Rankings - Near Great	# Rankings - Average	# Rankings - Below Average	# Rankings - Failing	Missing Responses	Mean Ranking
John Marshall	94	4	0	0	1	3	1.081
Oliver W. Holmes, Jr.	93	8	1	0	0	0	1.098
Louis D. Brandeis	90	8	2	0	1	1	1.158
Joseph Story	69	27	3	0	0	4	1.333
Earl Warren	75	15	6	3	1	1	1.400
Hugo L. Black	65	32	3	0	1	1	1.416
William J. Brennan, Jr.	65	30	3	0	2	2	1.440
John M. Harlan	59	32	6	0	1	4	1.490
Charles E. Hughes	49	41	6	0	1	5	1.588
John M. Harlan (II)	39	51	10	0	0	2	1.710
Benjamin N. Cardozo	43	36	17	0	1	5	1.763
Harlan F. Stone	32	53	12	0	1	4	1.827
William O. Douglas	38	40	14	7	2	1	1.960
Felix Frankfurter	29	51	17	3	1	1	1.970
Robert H. Jackson	18	56	21	1	1	5	2.082
Stephen J. Field	12	50	18	3	1	18	2.179
Thurgood Marshall	22	35	35	6	2	2	2.310
William Johnson	3	35	2	8	0	30	2.313
Samuel F. Miller	4	35	29	9	0	25	2.558
William H. Taft	4	44	34	10	1	9	2.570
Joseph P. Bradley	2	38	30	7	1	24	2.577

APPENDIX I (CONT.)

Lewis F. Powell	5	34	54	7	1	1	2.653
Salmon P. Chase	3	32	35	11	0	21	2.667
Harry Blackmun	7	33	46	9	4	3	2.697
John Jay	3	25	42	4	2	26	2.697
Edward D. White	3	24	48	7	0	20	2.720
Benjamin R. Curtis	4	19	37	8	0	34	2.721
Potter Stewart	2	30	60	8	0	2	2.740
Roger B. Taney	15	43	8	13	18	5	2.753
James Iredell	1	24	41	10	0	26	2.789
Francis W. Murphy	5	23	56	10	2	6	2.802
James Wilson	1	22	36	10	1	32	2.829
John Paul Stevens	0	25	66	7	1	3	2.838
Sandra Day O'Connor	2	19	69	7	1	4	2.857
Wiley B. Rutledge	3	19	61	12	0	7	2.863
Morrison R. Waite	0	19	47	9	0	27	2.867
Melville W. Fuller	0	19	45	9	1	28	2.892
Owen J. Roberts	1	23	56	13	2	7	2.916
Bushrod Washington	0	17	45	12	0	28	2.932
David J. Brewer	1	12	49	7	2	31	2.958
Byron R. White	1	14	73	9	2	3	2.970
Antonin Scalia	3	22	40	16	7	14	3.023
John McLean	0	9	46	11	0	36	3.030
Oliver Ellsworth	1	9	48	14	0	30	3.042

Horace Gray	0	7	51	11	0	33	3,058
Anthony M. Kennedy	0	5	72	9	1	15	3,069
William Paterson	0	6	52	12	0	32	3,086
William H. Rehnquist	1	19	55	16	8	3	3,111
Tom C. Clark	0	13	66	21	2	0	3,118
Arthur J. Goldberg	0	14	63	16	5	4	3,122
Stanley F. Reed	0	8	70	16	2	6	3,125
David Davis	1	3	51	12	1	34	3,132
Samuel Nelson	0	3	52	10	1	36	3,136
Henry Livingston	0	5	47	15	0	35	3,149
William Cushing	0	2	54	11	1	34	3,162
David H. Souter	0	3	56	13	1	29	3,164
William R. Day	0	1	57	14	0	30	3,181
John Catron	0	3	48	13	1	37	3,185
George Sutherland	2	20	38	19	11	12	3,189
Samuel Chase	2	15	37	15	10	23	3,203
William Strong	0	4	44	15	1	38	3,203
Stanley Matthews	1	1	48	15	1	36	3,212
James Wayne	0	1	50	11	2	38	3,219
Abe Fortas	1	15	54	17	12	3	3,242
Robert C. Grier	0	1	50	14	2	35	3,254
Peter V. Daniel	1	2	42	17	2	38	3,266
Joseph McKenna	0	4	46	20	3	29	3,301

APPENDIX I (CONT.)

Lucius Q.C. Lamar	0	3	41	21	1	36	3.303
Smith Thompson	0	1	44	21	0	36	3.303
Rufus W. Peckham	1	6	42	24	4	25	3.312
Henry Baldwin	0	2	41	20	1	38	3.313
John H. Clarke	1	5	41	23	4	28	3.324
Thomas Todd	0	1	42	20	1	38	3.328
Nathan Clifford	0	1	45	15	4	37	3.338
John McKinley	0	0	46	16	3	37	3.338
Gabriel Duval	0	4	40	20	4	34	3.353
Noah H. Swayne	0	0	46	16	4	36	3.364
William H. Moody	1	1	39	21	3	37	3.369
Samuel Blatchford	0	2	37	24	1	38	3.375
John A. Campbell	0	1	41	17	4	39	3.381
Henry B. Brown	0	1	40	20	3	38	3.391
John Blair, Jr.	0	0	38	25	0	39	3.397
Levi Woodbury	0	2	37	21	3	39	3.397
Harold H. Burton	0	1	59	33	4	5	3.412
George Shiras, Jr.	0	0	39	22	2	39	3.413
John Rutledge	0	5	39	14	10	34	3.426
Edward T. Sanford	0	3	43	28	5	23	3.443
William B. Woods	0	1	35	25	2	39	3.444
Philip P. Barbour	0	1	33	25	2	41	3.459
Warren Earl Burger	1	5	53	30	12	1	3.465

Ward Hunt	0	0	0	35	26	2	39	3,476
Joseph R. Lamar	0	0	0	34	27	3	38	3,516
Frederick M. Vinson	1	2	2	49	36	10	4	3,531
Horace H. Lurton	0	1	1	31	30	3	37	3,538
Mahlon Pitney	0	1	1	30	33	2	36	3,545
Alfred Moore	3	0	0	23	34	4	38	3,563
Thomas Johnson	0	2	2	31	25	7	37	3,569
Robert Trimble	0	0	0	24	29	3	46	3,625
Howell E. Jackson	0	0	0	26	30	5	41	3,656
Willis Van Devanter	0	3	3	36	37	13	13	3,674
Sherman Minton	0	0	0	32	55	10	5	3,773
James F. Byrnes	1	4	4	23	44	16	14	3,795
Pierce Butler	0	0	0	35	35	18	14	3,807
Clarence Thomas	1	3	3	13	32	18	35	3,940
Charles E. Whittaker	0	1	1	26	38	32	5	4,041
James C. McReynolds	0	3	3	18	34	38	9	4,151

APPENDIX II — RESULTS OF THE 1970 SURVEY BY PROFESSORS

ROY A. MERSKY & ALBERT P. BLAUSTEIN

John Marshall	1801-1835
Joseph Story	1811-1845
Roger B. Taney	1836-1864
John M. Harlan	1877-1911
Oliver W. Holmes, Jr.,	1902-1932
Charles E. Hughes	1910-1916 & 1930-1941
Louis D. Brandeis	1916-1939
Harlan F. Stone	1925-1946
Benjamin N. Cardozo	1932-1938
Hugo L. Black	1937-1971
Felix Frankfurter	1939-1962
Earl Warren	1953-1969
William Johnson	1804-1834
Benjamin R. Curtis	1851-1857
Samuel F. Miller	1862-1890
Stephen J. Field	1863-1897
Joseph P. Bradley	1870-1892
Morrison R. Waite	1874-1888
Edward D. White	1911-1921
William H. Taft	1921-1930
George Sutherland	1922-1938
William O. Douglas	1939-1975
Robert H. Jackson	1941-1954
Wiley B. Rutledge	1943-1949
John Harlan II	1955-1971
William J. Brennan, Jr.,	1956-1990
Abe Fortas	1965-1969
John Jay	1789-1795
John Rutledge	1789-1791; 1795
William Cushing	1789-1810
James Wilson	1789-1798
John Blair	1789-1796
James Iredell	1790-1799
William Paterson	1793-1806
Samuel Chase	1796-1811
Oliver Ellsworth	1796-1799
Bushrod Washington	1798-1829
Brockholst Livingston	1806-1823

APPENDIX II — CONT.

Thomas Todd	1807-1826
Gabriel Duval	1812-1835
Smith Thompson	1823-1843
John McLean	1829-1861
Henry Baldwin	1830-1844
James M. Wayne	1835-1867
John Catron	1837-1865
John McKinley	1837-1852
Peter V. Daniel	1841-1860
Samuel Nelson	1845-1872
Levi Woodbury	1845-1851
Robert C. Grier	1846-1870
John Campbell	1853-1861
Nathan Clifford	1858-1881
Noah H. Swayne	1862-1881
David Davis	1862-1877
Salmon P. Chase	1864-1873
William Strong	1808-1895
Ward Hunt	1873-1882
Stanley Matthews	1881-1889
Horace Gray	1882-1902
Samuel Blatchford	1882-1893
Lucius Q.C. Lamar	1888-1893
Melville W. Fuller	1888-1910
David J. Brewer	1890-1910
Henry B. Brown	1891-1906
George Shiras, Jr.	1892-1903
Rufus W. Peckham	1896-1909
Joseph McKenna	1898-1925
William R. Day	1903-1922
William H. Moody	1906-1910
Horace H. Lurton	1910-1914
Joseph R. Lamar	1911-1916
Mahlon Pitney	1912-1922
John H. Clarke	1916-1922
Edward T. Sanford	1923-1930
Owen J. Roberts	1930-1945

APPENDIX II — CONT.

Stanley F. Reed	1935-1957
Frank Murphy	1940-1949
Tom C. Clark	1949-1967
Potter Stewart	1958-1981
Byron R. White	1962-1993
Arthur J. Goldberg	1962-1965
Thurgood Marshall	1967-1991
Thomas Johnson	1791-1793
Alfred Moore	1799-1804
Robert Trimble	1826-1828
Philip P. Barbour	1836-1841
William B. Woods	1881-1887
Howell E. Jackson	1893-1895
Willis Van Devanter	1911-1937
James C. McReynolds	1914-1941
Pierce Butler	1922-1939
James F. Byrnes	1941-1942
Harold H. Burton	1945-1958
Fred M. Vinson	1946-1953
Sherman Minton	1949-1956
Charles Whittaker	1957-1962