Vanderbilt Law Review

Vol 62 MARCH 2009

2008 Symposium on Neglected Justices

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THE RANKINGS GAME

The world that law schools inhabit is obsessed with rankings. The most conspicuous example of this is the annual survey of law schools by *U.S. News and World Report.* Although university administrators ritually decry such rankings, their condemnations ring hollow. After all, law schools regularly rank applicants and students, as well as faculty performance. And it is common for the deans of schools that "move up" in the rankings to trumpet their success, if not to the world, then to their own faculties, alumni, students, and prospective students.[1] Thus, the schools themselves can hardly claim an exemption from this hierarchical mentality.

In a similar vein, scholars have long sought to identify "great" Supreme Court decisions.[2] The criteria for selection in such lists are contestable. Should cases be chosen for their immediate impact? What about decisions later overturned by the Supreme Court itself or by constitutional amendment? Should cases be designated "great" because of their enduring influence? Should cases be selected for their outcome or for skillful legal reasoning? How, for example, to rank *Lochner v. New York* (1905),[3] discussed *infra* in the Article on Rufus

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1. Indeed, there have been allegations that some law schools have attempted to game the scoring system to boost their rankings. Amir Efrati, *Law School Rankings Reviewed To Deter "Gaming,"* WALL ST. J., Aug. 26, 2008, at A1.

2. *E.g.*, PAUL FINKELMAN & MELVIN I. UROFSKY, LANDMARK DECISIONS OF THE UNITED STATES SUPREME COURT (2d ed. 2008); GARY HARTMAN ET AL., LANDMARK SUPREME COURT CASES: THE MOST INFLUENTIAL DECISIONS OF THE SUPREME COURT OF THE UNITED STATES (2004); JETHRO K. LIEBERMAN, MILESTONES!: 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY (1976).

3. 198 U.S. 45 (1905).

W. Peckham? The doctrine of liberty of contract endorsed in that decision was long ago abandoned. Yet *Lochner* remains at the heart of an ongoing debate about the role of the judiciary in American government and about the place of property and contract in the hierarchy of constitutional values. Even today, *Lochner* is the subject of a vast scholarly literature, which underscores the extent to which the decision's legacy hovers over modern constitutional jurisprudence.[4] The Court's decision in *Lochner* was clearly significant. Having been effectively overruled, however, should it be on a list of "great" decisions? And what of judicial opinions that, at the time at least, did not claim a majority on the Court? What of dissenting opinions? One thinks immediately, in this regard, of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896)[5] and Justice George Sutherland's dissent in *Home Building & Loan Ass'n v. Blaisdell* (1934).[6] But there are others, such as Justice Harlan F. Stone's dissent in *Minersville School District v. Gobitis* (1940),[7] Justice Felix Frankfurter's related but antithetical dissent in *West Virginia State Board of Education v. Barnette* (1943),[8] Justice Harry A. Blackmun's and Justice John Paul Stevens's dissents in *Bowers v. Hardwick* (1986),[9] and Justice Antonin Scalia's related but antithetical dissent in *Lawrence v. Texas* (2003).[10] Teachers and scholars of law have long maintained their lists of worthy (even canonical) decisions and opinions, regardless of their claim to a majority of votes on the Court.

Given the legal academy's penchant for ranking, it is hardly a surprise that legal scholars have turned their attention to crafting lists of the greatest Justices of the Supreme Court.[11] As with ratings of decisions, however, the difficulties of articulating and applying standards plague scholarly efforts to rank Justices. Are there defensible criteria by which to assess judicial performance? To the

4. *E.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 211–14 (2004); PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990); Hadley Arkes, Lochner v. New York *and the Cast of Our Laws, in* GREAT CASES IN CONSTITUTIONAL LAW 94, 94–129 (Robert P. George ed., 2000); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism,* 92 GEO. L.J. 1, 42–46 (2003); David E. Bernstein, Lochner v. New York: *A Centennial Retrospective,* 83 WASH. U. L.Q. 1469 (2005); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373 (2003).

5. 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

6. 290 U.S. 398, 448–83 (1934) (Sutherland, J., dissenting).

7. 310 U.S. 586, 601–07 (1940) (Stone, J., dissenting).

8. 319 U.S. 624, 646–71 (1943) (Frankfurter, J., dissenting).

9. 478 U.S. 186, 199–214 (1986) (Blackmun, J., dissenting).

10. 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting).

11. *E.g.*, Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices,* 31 TULSA L.J. 93 (1995).

extent that personal perspective colors evaluation, how might one screen for political and ideological bias on the part of the evaluators? Or is political favoritism inevitable?[12] Another concern is whether a "presentist" bias skews ratings in a way that treats recent jurists more kindly than those of other eras?[13] Conversely, does reverence for certain eras of the past elevate the status of some Justices? Additional problems abound. The challenges facing the Justices in the pre-Marshall Court of the 1790s were, in many respects, radically different from those confronting the Supreme Court in the twenty-first century. The nature of the Court's docket has similarly changed. Throughout most of the nineteenth century, moreover, Supreme Court Justices were required to perform circuit court duties, an often onerous task that drained time and energy. For these and other reasons, few scholars and lawyers may be in a position to evaluate meaningfully the work of Justices across the length and breadth of American history. Before the 1920s, litigation of private law claims occupied a large portion of the Court's time. As contemporary scholars of the Court focus almost entirely on matters of public law, however, the contributions of eighteenth- and nineteenth-century Justices may be further downgraded. These issues of perspective aside, there is also a matter of evidence: Some Justices left a wealth of private papers while others did not. How might the availability of revealing documents have led historians to devote more attention to particular jurists, while overlooking others?[14]

Several prominent Justices are well known for their extra-judicial scholarship. Justices Joseph Story;[15] Oliver Wendell Holmes, Jr.;[16] and Benjamin Cardozo[17] come readily to mind. To what extent

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12. For one version of this position, see William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 405–06 (1996):

> 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. . . .
>
> . . . 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.

13. *See id.* at 420–21 ("Judicial reputation also is affected by temporal proximity . . . . 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.").

14. *See id.* at 428 ("[J]ustices are more likely to receive more kindly treatment from biographers if they maintain ample documentation of their work. . . . Justices whose papers have been lost or destroyed naturally will suffer from neglect by historians.").

15. *E.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

16. *E.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).

should the publication of influential writings be considered in assessing a Justice's work on the Court? Does significant scholarship make the author a great jurist? Does it unduly impress academic evaluators?

The reputation of some Justices may be enhanced or diminished by systematic campaigns.[18] The rankings of Holmes and Louis D. Brandeis, in particular, have benefited from active promotion of their "greatness" by devoted cheerleaders.[19] Conversely, Justices who championed economic liberty, and especially those perceived as opponents of New Deal constitutionalism, have often been belittled.[20] At the same time, we should note that a bevy of scholars today are seeking to rehabilitate the reputations of economic libertarian Justices[21] and to cast doubt on the work of New Deal Justices.[22]

In 1938, Roscoe Pound made a pioneering effort to identify the ten leading federal and state judges, four of whom were Supreme Court Justices.[23] Pound's list consisted of his own impressionistic (though well-informed) selections. In 1957, Justice Felix Frankfurter named sixteen Supreme Court Justices whom he considered great.[24] In 1972, Albert P. Blaustein and Roy M. Mersky undertook a more

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17. *E.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

18. John Phillip Reid, *Commentary: Beneath the Titans,* 70 N.Y.U. L. REV. 653, 661–62 (1995) ("[T]he canonization of . . . Justice[s] 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.").

19. *See generally* G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputation,* 70 N.Y.U. L. REV. 576 (1995).

20. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 284–88, 298–301 (2000) (arguing for a reevaluation of the conservative Justices once stigmatized as the Four Horsemen of the Apocalypse); Brian Tamanaha, *The Bogus Tale About the Legal Formalists* 76–83 (St. John's Legal Studies Research Paper No. 08-0130, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123498 (arguing that the description of pre-New Deal jurisprudence as "legal formalism" was driven "primarily by political considerations," and was largely false).

21. *E.g.*, HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910 (1995).

22. *E.g.*, ARKES, *supra* note 21, at 106–11, 159–62 (questioning sharply the reputation of Justice Benjamin Cardozo); RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 92–93 (2006) (criticizing Chief Justice Charles Evans Hughes's reasoning in *West Coast Hotel*, a minimum wage case); MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S, 99–105, 183–84 (2001) (casting doubt on the analysis of economic issues by Justice Louis D. Brandeis).

23. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 30–31 n.2 (1938) (including Justices John Marshall, Joseph Story, Oliver Wendell Holmes, and Benjamin Cardozo on the list).

24. Felix Frankfurter, *The Supreme Court in the Mirror of Justices,* 105 U. PA. L. REV. 781, 783–84 (1957).

systematic attempt to rank Justices.[25] They polled sixty-five professors of law, history, and political science regarding the first one hundred Justices to serve on the Supreme Court. Based on this poll, Mersky and Blaustein categorized the Justices as great, near great, average, below average, or failures. But this approach was not free of difficulty. For example, the ratings of some individual Justices seem questionable or dated. More troublesome, the study's methodology is suspect. For one thing, the device was a poll, consisting only of votes cast, with no reasons or evidence given other than the collective preferences of the evaluators. Mersky himself suspected that this method produced a bias in favor of twentieth-century Justices.[26] He also speculated that his rankings "show a liberal tilt."[27] Other scholars have also employed the survey method but asked respondents to indicate the criteria they used in making valuations.[28]

In recent years, scholars have proposed alternative approaches in an effort to rank Justices on the basis of visible, measurable criteria (and not merely the perceptions or preferences of the rankers). In 2000, Mersky and William D. Bader prepared a study of the number of books and articles written about particular Supreme Court Justices, and they used this information as a basis for ranking.[29] Taking a different path, some scholars have relied on citation counts to evaluate judicial performance.[30] Still, there is room to question whether ratings based on such criteria can sensitively, much less accurately, determine the greatness of a Justice.

With the inadequacy of various rating systems in mind, the Program in Constitutional Law and Theory at Vanderbilt University Law School sponsored a Conference on Neglected Justices, held over two days in April of 2008. Professor James W. Ely, Jr., was the principal organizer. The Conference was grounded on the thought that our understanding of the history of the Supreme Court may be distorted by an undue concentration on a handful of notable figures. One consequence of this preoccupation is that a number of Justices,

25. ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES (1978).

26. Roy M. Mersky & Gary R. Hartman, *Ranking of the Justices, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 823, 823 (Kermit L. Hall ed., 2d ed. 2005).

27. *Id.*

28. Robert C. Bradley, *Who Are the Great Justices and What Criteria Did They Meet?, in* GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES 1, 1–29 (William D. Pederson & Norman W. Provizer eds., 1993).

29. WILLIAM D. BADER & ROY M. MERSKY, THE FIRST ONE HUNDRED EIGHT JUSTICES 21–32 (2004).

30. *E.g.*, RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 80–91 (1990).

some of whom may have been prominent in their own day, receive little attention from today's scholars. The Conference was designed not only to shed light on the contributions of less well-known jurists, but also to consider the broader question of judicial reputation. The reputations of historical figures—judges included—are continually evolving and frequently ephemeral. Why are some Justices relegated to the back pages of history while others seemingly enjoy an enduring high repute? Are those reputations deserved? Is it time for a reassessment? Our goal was to assemble a group of leading scholars to consider these issues while exploring the careers of individual Justices.

The articles in this Symposium issue of the Vanderbilt Law Review came from presentations at the April 2008 Conference. They span the Supreme Court's history from the 1790s to the 1950s. The authors examine Justices whose contributions to the Court and to constitutional history have arguably been overlooked or undervalued by current scholars. Several of these jurists wrote landmark decisions or dissenting opinions. All of them participated in important cases. We make no claim that each of these individuals was a judicial giant. Rather, our suggestion is that scholars cannot fully comprehend the Supreme Court's history by focusing only on the giants. History is best understood as a mosaic composed of many pieces.

Which pieces to consider? The Justices covered in the Conference do not constitute a comprehensive list. In fact, we received several insightful suggestions for additional inclusion. It was largely because of constraints on time that we confined the list to the Justices discussed. We recognize that some of the Justices discussed at the Conference—Samuel Chase, David J. Brewer, and George Sutherland, for example—have received more scholarly attention than some others. But it was our judgment that each Justice included in the Symposium deserved a fresh look. Still, when all was said and done, a few of us in attendance concluded that, if certain of the Justices were obscure, they deserved to be.

Conversation in and around the Conference raised one further, intriguing question: If some Justices are neglected, might others be overrated? Should the legacies and reputations of such notable jurists as John Marshall, Story, Roger B. Taney, Holmes, or Brandeis—to mention only a few of the names that participants and interested parties offered—be reexamined with a more critical eye?[31] This issue was beyond the scope of this particular Conference and Symposium,

31. For a suggestive study along these lines, see ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000).

but it may well serve to stimulate new avenues of inquiry, conversation, and scholarship.[32]

To explore these questions we assembled a group of leading scholars. G. Edward White, in a keynote address, questioned the existence of meaningful baselines to compare the performance of Justices over time. Other participants presented major papers dealing with individual Justices: Stephen B. Presser (Samuel Chase); William R. Casto (James Iredell); Mark R. Killenbeck (William Johnson); Herbert A. Johnson (Bushrod Washington); Austin L. Allen (John Catron); Paul Finkelman (John McLean); J. Gordon Hylton (David J. Brewer); James W. Ely, Jr. (Rufus W. Peckham); Samuel R. Olken (George Sutherland); David R. Stras (Pierce Butler); and Linda C. Gugin (Sherman Minton). The intellectual dialogue at the Conference was strengthened by the thoughtful remarks of the commentators: Mark E. Brandon, Daniel Sharfstein, Alfred L. Brophy, Linda Przbyszewski, and Lisa Bressman. Suzanna Sherry moderated a stimulating roundtable discussion to conclude the Conference.

We should acknowledge and express our appreciation to several persons who played essential roles in the Conference. We are grateful to the staff and editors of the Vanderbilt Law Review, especially Symposium Editors Ty Shaffer and Andrew Smith. Ty recognized from the beginning the Conference's scholarly potential, and both Ty and Andy have helped to ensure that the knowledge generated is disseminated beyond the impressive audience that attended the event. Linda Reynolds managed with skill and aplomb the difficult logistics of planning and putting on a program of this nature, a challenge that involves endless details. With efficiency and good cheer, Dorothy Kuchinski also assisted in organizing the event.

Last, but certainly not least, we extend our gratitude to the participants in the Conference and Symposium. The Conference was distinguished by fine papers and dynamic intellectual exchanges, from beginning to end. We learned from every one. And we believe that the resulting Articles in this Symposium constitute a major addition to the literature on the Supreme Court's history.

32. Similarly, lists of so-called "great" cases could be reconsidered. For a different approach, see ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM (2008) (selecting the twelve "worst" Supreme Court decisions between the New Deal era and the present, measured by a commitment to limited government).

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