

Rating the Justices: Lessons from Another Court

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Supreme Court observers have always compared the justices and rated their performances. Some such comparisons are simple ones such as when one justice replaces another. David Souter vs. William Brennan, or Clarence Thomas vs. Thurgood Marshall, for example. Other attempts have been more comprehensive, attempting to rate all those who have served over the years. Occasionally justices are compared on the basis of some specific ability, as with chief justices and their exercise of leadership. More frequently, though, the members of the Court have been evaluated on the basis of overall ability or "greatness." For the most part this evaluation literature has produced findings of limited utility.

The purpose of the present paper to examine the weaknesses of those previous rating attempts and to approach the problem from a different perspective. In short, we will rank the contributions made by those who have served on the Supreme Court guided by the lessons offered by an entirely different court--the basketball court.

The Search for Judicial Greatness

The legal and social science literature contains the results of a number of attempts to rate those who have served on the Supreme Court. The primary objective of these efforts has been to identify the truly "great" justices. Roscoe Pound published the first effort to do so in his The Formative Era of American Law (1938).¹ Pound examined the careers of state and federal judges and concluded that four United States Supreme Court justices were of such ability and accomplishment as to be considered truly outstanding: John Marshall, Joseph Story, Oliver Wendell Holmes, and Benjamin Cardozo.

¹See also Ewing (1938).

Two decades later a series of published pieces began where Pound had ended. Felix Frankfurter initiated this ratings activity in his famous 1957 article, "The Supreme Court in the Mirror of Justices." In that piece Frankfurter composed a list of nineteen justices he believed to merit classification as preeminent. In 1961, John Frank added seven justices to Frankfurter's list and deleted three. This was followed by similar efforts published by legal scholars and political scientists such as George Currie (1964), Stuart Nagel (1970), Albert Blaustein and Roy Mersky (1972; 1978), Bernard Schwartz (1979), and James Hambleton (1983). Each of these studies compiled a list of Supreme Court justices that the respective authors believed to deserve designation as "great." A summary of the findings appears in Table 1.

Table 1
The Great Justices

<u>Evaluators</u>	<u>Justices Rated as Great</u>
Roscoe Pound (1938)	Marshall, Story, Holmes, Cardozo
Felix Frankfurter (1957)	Marshall, William Johnson, Story, Taney, Curtis, Campbell, Miller, Field, Bradley, Harlan I, Matthews, Brewer, Brown, Edward White, Moody, Hughes, Holmes, Brandeis, Cardozo
John Frank (1961)	Marshall, William Johnson, Story, McLean, Taney, Curtis, Campbell, Miller, Davis, Field, Bradley, Waite, Harlan I, Brewer, Moody, Hughes, Holmes, Brandeis, Taft, Sutherland, Butler, Stone, Cardozo
George Currie (1964)	Marshall, Story, Holmes, William Johnson, Taney, Miller, Bradley, Brandeis, Hughes
Stuart Nagel (1970)	Marshall, William Johnson, Story, Taney, Curtis, Campbell, Miller, Field, Bradley, Harlan I, Brewer, Moody, Hughes, Holmes, Brandeis, Cardozo, Black, Frankfurter,

	Douglas, Robert Jackson, Warren
Albert Blaustein and Roy Mersky (1972)	Marshall, Story, Holmes, Cardozo, Black, Warren, Taney, Brandeis, Hughes, Harlan I, Stone, Frankfurter
Bernard Schwartz (1979)	Marshall, Story, Holmes, Cardozo, Black, Warren
James Hambleton (1983)	Marshall, Story, Taney, Holmes, Cardozo, Brandeis, Hughes, Black, Warren

Of all these efforts the Blaustein and Mersky (1972; 1978) study has received the most attention. This can be attributed to two factors. First, unlike the other studies, Blaustein and Mersky do not use their own subjective judgments concerning the accomplishments of the justices. Instead, their ratings are based on survey of 65 legal scholars, political scientists, and historians who were experts on the Supreme Court. This was a departure from earlier efforts which relied exclusively on the authors' evaluations alone. Second, Blaustein and Mersky went beyond a simple designation of the "great" justices. They classified all 100 justices who had served on the Court at the time their research was conducted. They placed each justice into one of five categories: great, near great, average, below average, and failure.

Because each of the justices received a rating the Blaustein-Mersky results have been used by other researchers studying factors that might be related to judicial performance. Gregory Caldeira (1988), for example, conducted a multivariate analysis of social background attributes in search of patterns that might be predictive of certain levels of judicial accomplishment (see also Walker and Hulbary, 1978). William Hulbary and Thomas Walker (1980) found that certain variables in the judicial nomination process were associated with the quality of the justices selected. And Saul Brenner (1985) explored the relationship between judicial competence and the assignment of majority opinions. In each

of these efforts the Blaustein-Mersky ratings served as an important variable.

Articles rating the justices are inherently interesting. They often attract a good bit of attention and the rankings occasionally generate some controversy. For two significant reasons, however, these previous efforts have not lead to particularly satisfying results. First, the previous studies have posed questions and used criteria that defy objective standards. Trying to identify the "great" justices may doom the process from the very beginning. There is no settled standard (objective or otherwise) of what constitutes judicial greatness.

Bernard Schwartz's (1979) definition of greatness, for example, is quite simple. In his study the great judge is described as one who has an affirmative approach to the judicial role and does not hesitate to use judicial power to meet the necessities of the times. George Currie's (1964) study offers a more complex, three-attribute model of judicial greatness. His first attribute is overall ability, defined as proficiency in the law, the ability to reason logically, the capability to write effectively, the power to rise above personal political and economic views, and the ability to decide objectively. Currie's second greatness trait is prophetic vision, the ability to discern the impact of rulings on the future. His third attribute is judicial statesmanship, the ability to draft an opinion dictated by prophetic vision but placed on proper legal and constitutional grounds. Sheldon Goldman's (1982) discussion of a good judge includes such traits as fair mindedness, personal integrity, judicial temperament, and the ability to handle judicial power sensibly.

The difficulty with these approaches to judicial greatness is that the defining criteria pose insurmountable measurement problems. Goldman (1982) acknowledges this by admitting that the objective measurement of the qualities of a good judge is "infinitely complex and to a large extent impossible." This problem is magnified when attempts are made to go beyond isolating only the great judges and instead also trying to identify judges who fall into lesser categories.

Second, previous studies have relied on subjective judgment. In most the authors

used their own personal standards to categorize the justices. The Blaustein and Mersky (1972) project went beyond the others by using the ratings of sixty-five experts, but the evaluators were instructed to use whatever standards they thought appropriate.

Consequently, the Blaustein/Mersky rankings are based upon the subjective, although informed, opinions of sixty-five individuals rather than the subjective views of a single Court observer. The use of subjective standards is, of course, understandable given the lack of agreement on what constitutes a great judge and the absence of objective measures to study judicial performance. Yet subjective evaluations based on vaguely worded standards do not lead to very satisfying results. The lack of objective criteria also allows personal and political biases to enter the rating process.

In this paper we depart from previous judicial ratings schemes in two ways. First, we are not interested in the concept of judicial greatness. Instead we prefer to rate the justices on the basis of the influence they have exerted on the development of the law. This decision carries with it some important implications. We are not concerned with making judgments regarding the moral or social value of a justice's influence, but only on the degree of that influence. For example, those justices who were responsible for decisions such as Dred Scott v. Sandford and Plessy v. Ferguson may not be held in high esteem, but there is no doubt that they had a significant influence on the law. Similarly, the "Four Horsemen" who blocked the implementation of Roosevelt's New Deal policies rarely appear on any list of "great" justices. In fact, three of the four (Van Devanter, Butler, and McReynolds) are rated by Blaustein and Mersky as failures. Such ratings derive from general evaluations that these justices were out of step with the times and that they obstructed necessary constitutional change. No one could seriously argue, however, that they had no impact on the law.

Avoiding the search for "greatness" also means that we are not particularly concerned with a justice's personal attributes, but instead on the impact the judge has had during his or her entire career on the Court. A good example of the implications of this

research focus is Benjamin Cardozo. Of the eight studies summarized in Table 1, seven rate Cardozo as "great." Given the justice's universally acknowledged intellect, writing ability, and legal prowess, such a rating is well justified. Yet Cardozo's influence on the law was limited by his short six-year tenure. A justice with less ability but a longer career could easily have a greater cumulative impact on the law than did Cardozo.

Our second departure from previous studies is that we will not use subjective judgment to rate the justices, but will rely on objective measures. We are able to do so because we will not be dealing with those difficult concepts associated with the judicial greatness literature such as judicial temperament or prophetic vision. Instead, we need to develop quantifiable indicators of a justice's impact on the law. In order to do so, we need to break away from the bounds imposed by the judicial greatness research. That can best be accomplished by gaining insights from an area of human activity completely outside the judicial context. In this paper we employ a sports analogy to help us develop measures of judicial influence.

The Supreme Court and the Basketball Court

The use of sports analogies as a vehicle for understanding the Supreme Court is certainly not novel, although previously baseball has been the preferred sport.² In fact, C. Herman Pritchett, who ushered in the most significant change in the way scholars view the Supreme Court, is said to have used a baseball analogy in devising his first quantifiable "box score" measures of judicial behavior (Ticktin, 1991). Some of the previous studies of judicial greatness have also used baseball symbolism as a means of understanding the Court. For example, George Currie's (1964) article was entitled "The Judicial All-Star Nine" and was written with "baseball precedents in mind." James Hambleton's (1983) compilation of great justices, "The All-Time All-Star All-Era Supreme Court," is not only couched in

²It is perhaps not an understatement to assert that few have a greater devotion to the statistical enterprise than sports addicts and political scientists.

baseball language but the American Bar Association Journal illustrated the piece with caricatures of the justices on a baseball diamond complete with uniforms, gloves and bats. As one commentator noted, "Today it is taken for granted that both the Court and the major leagues, whose seasons overlap closely and each of which utilize nine players, are best understood as statistical metaphors for the society both serve" (Ticktin, 1991, H4).

It would be natural to ask why we now use basketball as an analogy for judicial decision making, especially since the baseball analogy has been used in the past.³ Are their parallels between basketball and the Supreme Court that would aid our thinking about judicial performance? In fact, there are similarities. For example,

- Both basketball players and Supreme Court justices perform on a court and sit on a bench.
- The Supreme Court's term begins each year in October and normally runs until the end of June. The National Basketball Association begins its preseason games in October and does not determine its champion until June.
- Five players constitute a full team on the basketball court; five justices are necessary to make decisions on the Supreme Court.
- Both wear special uniforms when publicly engaged in their professions.
- Both Supreme Court justices and professional basketball players serve for terms of "good behavior."

In addition to these operational similarities, consider the birth and development of both.⁴ Basketball and the Supreme Court each entered the 1990s celebrating centennials. For the Supreme Court it had been 200 years since the justices handed down their first

³We would be remiss if we failed to note that scholars have occasionally used political science methodology to analyze sports performance. Jeffrey Segal and Alan Abramowitz, for example, have engaged in research rating professional basketball players. This work has been of sufficient quality to earn mention in such national publications as the New York Times and the Village Voice (see, for example, Hannon, 1986).

⁴For reviews of basketball history see Sporting News (1991), Hollander and Sachare (1989), and Ward (1991).

decisions. For basketball, the 100 year mark had just been passed since its inception.

Basketball was invented by Dr. James Naismith in 1891 at a Springfield, Massachusetts, YMCA Training School. Naismith had been given the task of devising an indoor activity that young men could play during the hard northeastern winters. The man who gave Naismith this assignment was Dr. Luther Halsey Gulick, then head of the physical education department at Springfield and later to become a founder of the Camp Fire Girls.⁵ After several failed experiments with new games, Naismith nailed two peach baskets on the balcony of the YMCA gymnasium and basketball was born. In the first game each team (like the current Supreme Court) had nine players.

The creation of the Supreme Court shares certain similarities with basketball. The Court, too, was invented in the northeastern states. It was conceived during the 1787 Constitutional Convention in Philadelphia and born in New York when Congress passed the Judiciary Act of 1789. Like basketball, the Constitution came about only after a failed experiment (i.e. the Articles of Confederation). Basketball was seen as a third sport bridging the period between baseball and football seasons. The Court was similarly thought of as the third branch, tucked between Congress and the president. Immigrants (the Canadian Naismith and the former English colonists) invented both institutions.

Since their creations basketball and the Supreme Court have followed similar developmental routes. The following are illustrative:

- Both institutions got off to rocky starts. The Supreme Court's first terms were plagued with failures to achieve quorums, a dearth of cases, and even Court sessions cancelled by Congress. As for basketball, in its first game only one basket was scored and it took the game twenty years to realize the advantages of cutting the bottom out of the peach baskets.
- In the 1890s the first professional basketball game was played. During that same

⁵At the same time Gulick assigned Naismith the task of inventing basketball he was awaiting the imminent birth of his namesake nephew Luther Halsey Gulick who in 1953 would become president of the American Political Science Association.

decade the Supreme Court became a more professional body when the Circuit Court of Appeals Act was passed effectively ending circuit riding duty by the justices.

- In 1896, the justices made history by deciding that "separate but equal" was the law of the land (Plessy v. Ferguson). That same year basketball history was made when the first game using five players per side was played (Chicago v. Iowa).
- In 1936 when the Supreme Court was making headlines by nullifying a host of New Deal measures designed to revitalize the American economy (e.g., Carter v. Carter Coal, United States v. Butler, etc.), Hank Luisetti of Stanford essentially nullified the old basketball order when he took the first reported jump shot in front of astonished fans at Madison Square Garden (Stanford v. Long Island University).
- In 1937, professional basketball ushered in a period of stability with the formation of the National Basketball League, which a decade later evolved into the National Basketball Association. That same year the Supreme Court stabilized the American economy by finally giving constitutional approval to the New Deal (NLRB v. Jones and Laughlin Steel Corporation).
- In 1950, the Supreme Court began to get serious about racial equality when it ruled in favor of Herman Sweatt's challenge to the segregated University of Texas Law School (Sweatt v. Painter). Meanwhile in that same year, the National Basketball Association was breaking racial barriers when Charles Cooper (Duquesne) became the first black drafted by an NBA team (Boston Celtics), "Sweetwater" Clifton became the first black to sign an NBA contract (New York Knicks), and Earl Lloyd (West Virginia State) became the first black to take the floor in an NBA game (Washington Capitols).
- In 1951 college basketball suffered its first point "fixing" scandal. About the same time the Supreme Court world was caught up in the possible scandal of reported undue influence by law clerks over the Court's decision making.

- In 1954, both the Supreme Court and basketball made decisions that forever changed them. For the Supreme Court it was Brown v. Board of Education and for the National Basketball Association it was the introduction of the 24 second shot clock.
- While Linda Carol Brown made history in 1954 challenging the system of segregated public schools, Frank Selvy of Furman University made history by becoming the first player to score a 100 points in a college basketball game (Furman v. Newberry).
- In 1967 Bill Russell finished his maiden season as the first black to coach in the National Basketball Association (Celtics) and Thurgood Marshall became the first black to sit on the United States Supreme Court.
- In the contemporary period, Boston Celtics fans worry about Larry Bird's back. Supporters of the current Supreme Court worry about William Rehnquist's back.

These comparisons of basketball and the Supreme Court, although accurate, are somewhat forced and certainly spurious. No one would seriously make direct inferences from the basketball court to the Supreme Court. But this is not to say that there are not some interesting similarities. Both basketball and appellate decision-making involve individual and team efforts. Both involve competition. For basketball it is one team against another; for the appellate court it is appellant vs. appellee, and often ideological bloc vs. ideological bloc. In both basketball and appellate courts individual players contribute at different levels of performance. Both activities include offense (scoring points vs. writing preferred policy preferences into law) and defense (preventing the other team from scoring vs. blocking those justices with different ideological views from successfully setting precedent).

At a minimum, thinking about what makes greatness in an activity like basketball may spur our imagination in constructing measures of a justice's degree of influence on the development of the law. It helps us break out of the myopic process of trying to quantify

purely judicial (and probably unquantifiable) concepts such as judicial temperament, legal creativity, prophetic vision, etc.

In the pages that follow we provide some descriptive data comparing performance on the Supreme Court with performance on the basketball court, linking established measures of successful basketball behavior to their counterparts in judicial behavior.

Performance on the Court

Our process of ranking the justices began with the identification of indicators of basketball performance. We decided upon nine measures of basketball productivity: games played, points scored, field goals made, three-point baskets made, assists, blocked shots, steals, rebounds, and all-star status. These measures cover an array of behaviors through which a player may influence the game, both offensively and defensively. Our next task was to identify a judicial action that corresponded to each of our basketball productivity indicators. Our judicial measures, described below, were designed to tap such general performance areas as opinion writing productivity, additions to the legal corpus, success at writing personal policy preferences into law, participating in legal change, and influences on legal scholarship.

Because we were interested in measuring the cumulative influence a justice exerted on the Court, all of our statistics are based upon career productivity. This, of course, places a premium on length of service. In other types of analyses this might cause significant problems, but we proceed on the truism that only those sitting on the Court can exert influence and the longer they sit the greater their potential for having an impact on the law. Consequently, we assembled career data on our nine productivity variables for each of the 104 justices who served the Court from 1789 through the 1988 term.

Although our primary purpose was to rate the justices, we remained true to the basketball analogy by collecting corresponding career data for basketball players. We decided to use the statistics of professional basketball players, rather than college, because

the tenure of the professional ranks is open-ended as is the service of the justices. Our basketball data are based on career NBA statistics. These data include the combined NBA/ABA careers for those individuals who played in both leagues (The Sporting News, 1991, 134-135).

Overall Service. Our first measure of influence centered on the concept of overall service. For basketball players the standard indicator is games played. A professional basketball player who plays in many games over several seasons is almost by definition a productive participant in the game. Our judicial measure corresponding to games played is the number of cases decided by the Court during a justice's tenure. Every time a justice participates in a decision he or she exercises a degree of influence on the law. The amount of influence in any one case may be large or small and may be positive or negative. When a member of the Court votes, writes an opinion, reacts to the drafted opinions of others, or engages in the other activities necessary for the Supreme Court to settle a dispute, the justice contributes to the development of the law. The sum total of all of those participations is one indicator of a justice's influence on the law.

Table 2 provides data for the top ten producers in overall service in the National Basketball Association and the Supreme Court. The basketball data are a straightforward reporting of total games played. The Court data represent the estimated number of cases decided by the Court with signed opinions during each justice's tenure.⁶

Table 2
Games Played vs. Estimated Number of Cases Decided During Tenure (Top Ten)

<u>NBA Games Played</u>		<u>Supreme Court Cases Decided</u>	
1. Kareem Abdul-Jabbar	1,560	1. John Marshall Harlan I	7,927
2. Artis Gilmore	1,329	2. Stephen Field	7,455
3. Elvin Hayes	1,303	3. Samuel Miller	5,839
4. Caldwell Jones	1,299	4. Edward White	5,807

⁶Data for our cases decided statistics were taken from Blaustein and Mersky (1978), Casper and Posner (1976), U.S. Bureau of the Census (successive editions).

5.	Moses Malone*	1,290	5.	Oliver Wendell Holmes	5,767
6.	John Havlicek	1,270	6.	Joseph McKenna	5,580
7.	Paul Silas	1,254	7.	Horace Gray	5,366
8.	Julius Erving	1,243	8.	Joseph Bradley	5,343
9.	Dan Issel	1,218	9.	Willis Van Devanter	5,220
10.	Alex English*	1,193	10.	James McReynolds	4,789

*Still active at time data were collected.

Obviously, only those justices who served long tenures could expect to make the top ten on this measure. But longevity alone was not enough. Some justices who served many years, such as William Johnson (30 years), John Marshall (34), and Bushrod Washington (31), did not make the top of this list because they served at a time when the Court decided relatively few cases per year. Those making high marks on this measure combined long tenures with service during Court eras in which large numbers of cases were decided. Eight of the top ten justices served more than twenty-five years. The careers of several overlapped around the turn of the century when Court's caseload was exceedingly heavy.

Overall Productivity. We next turned our attention to overall productivity. For the basketball player, the bottom line is scoring points. A corresponding activity for a justice is the total number of opinions written. Each time a justice publishes a majority, concurring, dissenting, or separate opinion he or she is adding something permanent to the overall corpus of the law in the same way the basketball player is adding points on the scoreboard. As Table 3 indicates, Kareem Abdul-Jabbar scored more points than any other player to put on an NBA uniform, and William O. Douglas produced more written opinions than any other person to put on a Supreme Court robe.⁷

Table 3
Points Scored vs. Total Opinions Written (Top Ten)

NBA Points Scored

Supreme Court Total Opinions Written

⁷Data for total opinions written was gathered from Blaustein and Mersky (1978), The Harvard Law Review (annual editions), and the Supreme Court Reporter (annual editions).

1.	Kareem Abdul-Jabbar	38,387	1.	William O. Douglas	1,232
2.	Wilt Chamberlain	31,419	2.	William Brennan*	1,044
3.	Julius Erving	30,026	3.	Oliver Wendell Holmes	975
4.	Moses Malone*	27,908	4.	Hugo Black	923
5.	Dan Issel	27,482	5.	Morrison Waite	908
6.	Elvin Hayes	27,313	6.	Melville Fuller	892
7.	Oscar Robertson	26,710	7.	John Marshall Harlan I	879
8.	George Gervin	26,595	8.	Byron White*	826
9.	John Havlicek	26,395	9.	Edward White	782
10.	Alex English*	25,613	10.	John Paul Stevens*	757

*Still active at time data were collected.

Again, length of service is important for a justice to obtain high ratings on this measure. But longevity is not the only factor. Once more we find that the particular era of service is significant. Prior to the 1940s Court norms frowned on writing dissenting and concurring opinions. Consequently, the opinions of justices who served before the modern era were overwhelmingly opinions for the Court. After the 1940s, the members of the Court had greater freedom to express individual views independent of the majority opinion.⁸ This expanded the opportunities for a justice to contribute to the law. It is therefore not surprising that the top two justices on our list, Douglas and Black, combined long service with a tenure during the modern era. It is also interesting to see John Paul Stevens break into the top ten in spite of having served less than 15 years at the time the data were collected.

Standard Performance Tasks. A standard unit of productivity on the basketball court is the normal two-point field goal. For justices on the Supreme Court the normal work unit is the writing of a majority opinion. In each case that is formally decided on the merits the Court must issue an opinion explaining its action. This task is given to a single justice who must draft a statement acceptable to the majority. The majority opinion is not only a unit of institutional work, but it is an opportunity for the opinion writer to frame the law according to his or her legal

⁸Walker, Epstein and Dixon (1988).

and public policy preferences. Majority opinions are precedent. They are binding on lower courts and normally are followed in subsequent Supreme Court decisions. Undoubtedly when a justice writes a majority opinion law is influenced.

Table 4
Field Goals Made vs. Majority Opinions Written (Top Ten)

<u>NBA Field Goals Made</u>			<u>Supreme Court Majority Opinions</u>		
<u>Written</u>					
1.	Kareem Abdul-Jabbar	15,837	1.	Oliver Wendell Holmes	873
2.	Wilt Chamberlain	12,681	2.	Morrison Waite	872
3.	Julius Erving	11,818	3.	Melville Fuller	750
4.	Elvin Hayes	10,976	4.	John Marshall Harlan I	737
5.	Alex English*	10,659	5.	Edward White	680
6.	John Havlicek	10,513	6.	Joseph McKenna	646
7.	Dan Issel	10,431	7.	Samuel Miller	608
8.	George Gervin	10,368	8.	Stephen Field	544
9.	Moses Malone*	9,709	9.	David Brewer	533
10.	Rick Barry	9,695	10.	William O. Douglas	524

*Still active at time data were collected.

Table 4 summarizes the performance levels of the top career producers in both basketball and the Supreme Court.⁹ As expected, among the basketball players we find the names of those athletes who ranked highly on the games played and total points scored measures. The list of justices is led by Oliver Wendell Holmes and Morrison Waite who are followed by others who served for long periods during eras in which the decision-making productivity of the Court was especially high. Absent from this list are those justices whose appearance in Table 3 was due largely to the frequent writing of dissenting and concurring opinions.

Significant Contributions. Obviously not all opinions written on the Supreme Court are equal. Some cases present especially important issues. Because these disputes involve fundamental questions their resolution is particularly significant. Explicating the

⁹Data on opinions for the Court were gathered from the same sources as listed in footnote 7.

law in these cases obviously is a more important task with greater ramifications than the routine majority opinion. One indicator of judicial influence is the number of times a particular justice writes especially significant opinions. Justices who score highly on this measure will be those on whom the Court relies when unusually important legal issues are at stake and those whose legal reasoning and writing abilities have a tendency to produce especially high quality work. Clearly the justice who is able to control the opinion in important cases exercises a special influence over the development of the law.

In Table 5 we rank those justices who have most frequently authored majority opinions in especially significant cases. Deciding which cases to classify as significant is always a difficult enterprise. For this study we used the list of approximately 450 "major decisions" which appears in Congressional Quarterly's Guide to the U.S. Supreme Court (Witt, 1990, 885-929). To continue our basketball comparisons we also list the top NBA producers of three-point baskets, a type of shot carrying a fifty percent greater payoff than the standard field goal.

The justices who rank highly on numbers of majority opinions written in significant cases differ substantially from our list of those justices who wrote the most opinions for the Court. In significant cases, eight of the top ten opinion writers served during the era after the New Deal revolution. Only John Marshall, who dominated the formative period of constitutional law, and Charles Evans Hughes, who served during the first third of the twentieth century, run contrary to this pattern. This bias toward the more modern jurists reflects the fact that for much of its history the Court was essentially a private law tribunal with little control over its own docket. Consequently it handed down relatively few decisions of major significance. In the more modern era the Court has developed into an institutional decision maker of truly significant issues.¹⁰

¹⁰In addition, it is reasonable to expect that any listing of significant opinions will have a bias in favor of the more recently decided cases. With rare exceptions Court decisions have a tendency to lose their relevance over the years as law and societal conditions evolve in new directions.

Table 5
Three-Point Shots Made vs. Majority Opinions Written in Significant Cases (Top Ten)

<u>NBA Three-Point Shots Made</u>			<u>Significant Majority Opinions Written</u>		
1.	Louie Dampier	794	1.	William Brennan*	39
2.	Michael Adams*	658	2.5.	Warren Burger	23
3.	Dale Ellis*	625	2.5.	Byron White*	23
4.	Danny Ainge*	616	4.	Charles Evans Hughes	19
5.	Larry Bird*	597	5.5.	John Marshall	17
6.	Darrell Griffith*	530	5.5.	Earl Warren	17
7.	Craig Hodges*	527	8.	William Rehnquist*	16
8.	Billy Keller	506	8.	Potter Stewart	16
9.	Trent Tucker*	504	8.	Lewis Powell	16
10.	Glen Combs	503	10.	Hugo Black	15

*Still active at time data were collected.

Support. For both basketball clubs and the Supreme Court to function effectively a certain amount of teamwork is required. In order for basketball teams to score and the Supreme Court to arrive at majority opinions, the participants must support one another. On the basketball court a good measure of such activity is the assist, passing the ball to a teammate who then is able to score. On the Supreme Court support activity takes the form of joining a majority opinion. This is especially important in significant cases where an opinion majority is necessary to settle fundamental issues definitively and set binding precedent.

Table 6 provides information on the NBA's career assist leaders as well as the justices who most often joined the majority opinion in significant cases (majority opinion writer excluded).¹¹ Here the more recent justices clearly dominate the upper ranks, as they did in the previous analysis of significant cases.

¹¹Data for joining a majority opinion in significant cases was gathered from Witt (1990) and United States Reports.

Table 6
Assists vs. Signed Majority Opinion in Significant Cases (Top Ten)

<u>NBA Assists</u>			<u>Signed Majority Opinion in Significant Cases</u>		
1.	Magic Johnson*	9,921	1.	Byron White*	116
2.	Oscar Robertson	9,887	2.	William Brennan*	107
3.	Isiah Thomas*	7,431	3.5.	William Douglas	104
4.	Len Wilkins	7,211	3.5.	Harry Blackmun*	104
5.	Maurice Cheeks*	7,100	5.	Hugo Black	95
6.	Bob Cousy	6,955	6.	Thurgood Marshall*	92
7.	Guy Rogers	6,917	7.	Potter Stewart	88
8.	Nate Archibald	6,476	8.	Lewis Powell	85
9.	John Lucas	6,454	9.	Warren Burger	70
10.	Reggie Theus*	6,453	10.	John Paul Stevens*	68

*Still active at time data were collected.

Negative Influence. It is frequently the case that influence is exerted in a negative rather than a positive manner. An individual who defeats an initiative may be exercising as much influence as one who is responsible for a positive action being taken. In basketball, the blocked shots statistic measures such defensive productivity. For a comparable measure in the judicial context, we assembled data on the number of times each justice voted with the majority but refused to sign the drafted opinion of the Court and by doing so blocked the formation of a majority opinion. Such an action effectively reduces the impact of the Court's decision in a case because no precedent-setting opinion of the Court is achieved.

Table 7 provides career statistics on NBA blocked shots and Supreme Court concurrence behavior that blocks majority opinion formation.¹² In this context Harry Blackmun is the functional equivalent of Kareem Abdul-Jabbar and Artis Gilmore. All of the justices in the top ten ranking are from the more contemporary period. This reflects the lack of consensus norms operative in the modern era and the badly splintered voting and

¹²Data on concurring behavior that blocks the formation of a majority opinion was gathered through a LEXIS search.

opinion patterns that the Court has recently experienced. The lack of strong consensus expectations has provided the conditions necessary for negative influence to be exercised. Opportunities for such behavior prior to the 1940s were minimal.

Table 7
Blocked Shots vs. Concurrence Blocking Majority Opinion Formation (Top Ten)

<u>NBA Blocked Shots</u>			<u>Concurrence Blocking Majority Opinion</u>		
1.	Kareem Abdul-Jabbar	3,189	1.	Harry Blackmun*	42
2.	Artis Gilmore	3,178	2.	William Brennan*	34
3.	Mark Eaton*	2,780	3.	Lewis Powell	31
4.	Wayne Rollins*	2,394	4.	Byron White*	30
5.	Caldwell Jones	2,297	5.	Thurgood Marshall*	26
6.	George T. Johnson	2,082	6.5.	Warren Burger	24
7.	Robert Parish*	1,952	6.5.	John Paul Stevens*	24
8.	Julius Erving	1,941	8.	Sandra Day O'Connor*	21
9.	Hakeem Olajuwon*	1,798	9.	Hugo Black	18
10.	Moses Malone*	1,797	10.	William Rehnquist*	16

*Still active at time data were collected.

Inducing Change. Influence is exercised when an individual engages in behavior that produces change. On the basketball court a steal is an example of such an action. A steal occurs when a defensive player takes the ball away from the offense and thereby removes from the opponent the opportunity to score. An equivalent behavior on the Supreme Court occurs when a justice votes with the majority to overrule precedent. By doing so established law is nullified and a new precedent created. Legal change occurs.

Table 8 provides information on NBA steals and the number of times the justices voted with the majority to overrule precedent.¹³ The top ten justices, once again, all served during the post New Deal period, the era in which the Court performed in a particularly activist mode. William Brennan and William Douglas are tied for the first position, but it

¹³Data on decisions overruling precedent was taken from The Constitution of the United States of America: Analysis and Interpretation (Washington, D.C.: United States Government Printing Office, 1973 and supplemental editions).

appears inevitable that Byron White will become the all-time leader in participating in this variety of legal change behavior before his career is finished. Interestingly the top ten justices include not only liberals, but some conservative and moderate justices as well.

Table 8
Steals vs. Voting with Majority to Overrule Precedent (Top Ten)

<u>NBA Steals</u>			<u>Majority Vote to Overrule Precedent</u>		
1.	Julius Erving	2,272	1.5.	William O. Douglas	67
2.	Maurice Cheeks*	2,194	1.5.	William Brennan*	67
3.	Don Buse	1,818	3.	Byron White*	66
4.	Magic Johnson*	1,698	4.	Hugo Black	56
5.	Gus Williams	1,638	5.	Potter Stewart	53
6.	Alvin Robertson*	1,581	6.5.	Harry Blackmun*	39
7.	Isiah Thomas*	1,552	6.5.	Thurgood Marshall*	39
8.	Larry Bird*	1,514	8.	Earl Warren	36
9.	Dennis Johnson	1,477	9.	Lewis Powell	34
10.	Michael Ray Richardson	1,463	10.	Warren Burger	33

*Still active at time data were collected.

Error Correction and Prophetic Vision. Error occurs in all human endeavors. Particularly influential are those individuals who alert others to the fact that that an error is being committed or have the opportunity to correct errors. On the basketball court rebounding is an example. A rebound takes place when a player recognizes that a shot will miss the mark and is able to take control of the ball after it hits the rim or backboard. In professional basketball the careers of Wilt Chamberlain and Bill Russell are model examples of this ability.

For the Supreme Court we operationalized this brand of influence as the casting of a dissenting vote in a case that is later overruled. In doing so a justice departs from the majority in a case, indicating his or her view that the majority is committing an error. Then at some later date the dissenting justice is vindicated when a subsequent Court reverses the first decision. Perhaps this comes close to measuring the quality of prophetic vision that the

great justices literature often discusses in qualitative terms. As Table 9 reveals, Hugo Black is the Court's leader in exercising this form of influence. Furthermore, he is likely to hold his number one position for quite some time. No active member of the Court comes close to the number of times Black had the vision and the courage to declare the majority in error and then later have his views prevail.

Table 9
Rebounds vs. Dissenting Votes in Cases Later Overturned (Top Ten)

<u>NBA Rebounds</u>			<u>Dissenting Votes in Cases Later Overturned</u>		
1.	Wilt Chamberlain	23,924	1.	Hugo Black	30
2.	Bill Russell	21,620	2.	William O. Douglas	27
3.	Kareem Abdul-Jabbar	17,440	3.	Louis Brandeis	16
4.	Moses Malone*	16,772	4.	Oliver Wendell Holmes	13
5.	Artis Gilmore	16,330	5.	Earl Warren	11
6.	Elvin Hayes	16,279	6.5.	Harlan Fiske Stone	10
7.	Nate Thurmond	14,464	6.5.	John Marshall Harlan I	10
8.	Walt Bellamy	14,241	8.5.	William Brennan*	8
9.	Wes Unseld	13,769	8.5.	Wiley Rutledge	8
10.	Jerry Lucas	12,942	10.5.	Potter Stewart	7
			10.5.	Frank Murphy	7

*Still active at time data were collected.

Reputational Influence. The final form of influence we examine is reputational. A person's power may be based not only on actual ability but perceived ability as well. An individual with an exceptionally strong reputation is in a position to exert more influence than might otherwise be expected. This may occur for several reasons. First, reputation may reflect abilities that are not otherwise apparent. Second, the respect of one's peers may lead to their deferential behavior. And third, a strong reputation tends to magnify the worth of a person's actions.

We measured reputation for NBA players as the number of seasons an athlete was selected to be a member of the first or second All-NBA team. This is an indication of how

the profession views a player's overall accomplishments. For the Supreme Court, we operationalized reputation by the number of books and articles written about each of the justices.¹⁴ This reveals how the legal and scholarly community views the contributions of the justices. It also indicates the degree to which the career of the justice has had an impact on legal scholarship. As Table 10 illustrates, John Marshall leads all other justices on this measure, followed by Oliver Wendell Holmes and Louis Brandeis. The justices on this top ten list are those who normally come to mind when we think of the giants of the profession. In fact, these are the justices regularly highlighted in the great justices literature.

Table 10
All-NBA First or Second Team vs. Books, Articles Written About Justices (Top Ten)

<u>All-NBA First or Second Team</u>		<u>Books, Articles Written About Justices</u>		
1.	Kareem Abdul-Jabbar	15	1. John Marshall	248
3.5	Bob Cousy	12	2. Oliver Wendell Holmes	233
3.5	Jerry West	12	3. Louis Brandeis	184
3.5	Dolph Schayes	12	4. Hugo Black	152
3.5	Julius Erving	12	5. William Howard Taft	150
7.5	Bob Pettit	11	6. Felix Frankfurter	115
7.5	Oscar Robertson	11	7. William O. Douglas	107
7.5	John Havlicek	11	8. Joseph Story	86
7.5	Bill Russell	11	9. Roger B. Taney	81
10+	Several Others	10	10. Benjamin Cardozo	76

*Still active at time data were collected.

Combined Influence: Ranking the Justices. Our final step was to construct an overall ranking of all 104 justices. We did this by combining the nine indicators previously discussed. On each of the indices a justice was given a score based on his or her rank on that measure. The top rated judge was given a score of 104 and the bottom rated judge the score of 1. Tied ranks were averaged. The scores for each justice were then summed and divided by the number of

¹⁴This measure was calculated by counting the number of books and articles about each justice cited in Abraham (1992) and Martin and Goehlert (1990).

indices (9). The resulting composite scores were used to rank all 104 justices. The results are found in Table 11.

Table 11
Composite Ranking of Supreme Court Justices

<u>Rank</u>	<u>Justice</u>	<u>Composite Score</u>	<u>Rank</u>	<u>Justice</u>	<u>Composite Score</u>
1.	William O. Douglas	98.06	46.	Nathan Clifford	55.56
2.	Hugo L. Black	97.44	47.5.	Samuel Blatchford	55.44
3.	William Brennan*	97.00	47.5.	John Marshall	55.44
4.	Felix Frankfurter	88.06	49.	Fred Vinson	54.22
5.	Oliver Wendell Holmes	87.50	50.	Wiley Rutledge	54.11
6.	Byron White*	87.44	51.	Abe Fortas	52.56
7.	Potter Stewart	87.11	52.	Noah Swayne	51.83
8.	Thurgood Marshall*	86.67	53.	Joseph Story	51.39
9.	Edward White	85.89	54.	Rufus Peckham	50.39
10.	John Marshall Harlan I	84.17	55.	John Catron	49.50
11.	Charles Evans Hughes	83.28	56.	Salmon P. Chase	49.11
12.	Harry Blackmun*	81.94	57.	Arthur Goldberg	48.78
13.	Harlan Fiske Stone	81.89	58.	Robert C. Grier	48.67
14.	Stephen J. Field	81.11	59.	John McLean	48.11
15.	William Rehnquist*	80.17	60.	William Strong	46.78
16.	John Marshall Harlan II	80.06	61.	Stanley Matthews	45.50
17.	Earl Warren	79.89	62.	Samuel Nelson	44.56
18.	Samuel Miller	76.94	63.	Edward T. Sanford	44.50
19.	Warren Burger	76.50	64.5.	Antonin Scalia*	44.44
20.	John Paul Stevens*	76.28	64.5.	George Shiras	44.44
21.	Lewis Powell	76.11	66.5.	David Davis	44.28
22.	Louis Brandeis	75.28	66.5.	James M. Wayne	44.28
23.	James C. McReynolds	74.67	68.	William Johnson	40.56
24.	Tom Clark	72.94	69.5.	Bushrod Washington	40.22
25.	Stanley F. Reed	72.61	69.5.	Ward Hunt	40.22
26.5.	Joseph McKenna	71.67	71.	Sherman Minton	40.17
26.5.	Joseph Bradley	71.67	72.	Joseph R. Lamar	38.72
28.	Melville W. Fuller	71.50	73.	Lucius Q. C. Lamar	38.39
29.	David J. Brewer	71.22	74.	William Woods	38.00
30.	Owen Roberts	70.78	75.	John H. Clarke	36.61
31.	Robert Jackson	68.17	76.	Peter Daniel	36.06
32.	Morrison Waite	67.67	77.	Anthony Kennedy*	34.61
33.	Willis Van Devanter	67.39	78.	Charles Whittaker	34.44
34.	William R. Day	66.78	79.	Smith Thompson	31.61
35.	Horace Gray	66.56	80.	Benjamin Curtis	30.00
36.	Henry B. Brown	66.22	81.	Samuel Chase	29.11
37.	Frank Murphy	65.83	82.	John Campbell	28.83
38.	Sandra Day O'Connor*	63.17	83.	James Byrnes	28.50
39.	Pierce Butler	61.44	84.	Horace Lurton	27.39
40.	George Sutherland	61.22	85.	William Moody	26.89

41.	William Howard Taft	60.06	86.	Howell Jackson	24.61
42.	Benjamin Cardozo	58.83	87.	John McKinley	24.44
43.	Harold Burton	58.44	88.	Gabriel Duvall	24.28
44.	Mahlon Pitney	57.72	89.	William Paterson	23.72
45.	Roger B. Taney	56.67	90.	Levi Woodbury	23.67

Table 11. (cont'd)

<u>Rank</u>	<u>Justice</u>	<u>Composite Score</u>	<u>Rank</u>	<u>Justice</u>	<u>Composite</u>
91.	John Jay	23.61	98.	Oliver Ellsworth	19.17
92.	Henry B. Livingston	23.22	99.	Thomas Todd	18.22
93.	Henry Baldwin	23.06	100.	John Rutledge	17.44
94.	James Wilson	22.44	101.	Robert Trimble	16.67
95.	Philip Barbour	22.22	102.	John Blair	13.44
96.	William Cushing	20.17	103.	Thomas Johnson	12.33
97.	James Iredell	20.00	104.	Alfred Moore	11.06

Note: The 104 justices included in this study were ranked on each of the nine indicators and given a score based on their rank. The top ranked justice was given a score of 104 and the bottom ranked justice a score of 1. This composite ranking is based on the average score each justice obtained on the nine measures.

*Still active at time data were collected.

At the very top of the list are William O. Douglas and Hugo Black. They owe their high rankings to a number of factors. Both had exceptionally long tenures. The Court's docket was packed with important constitutional cases throughout the three and a half decades they served. They participated in two important legal revolutions, the New Deal era with its reformed view of economic regulation and the period of civil liberties activism under Earl Warren. At the bottom end of the list are John Blair, Thomas Johnson and Alfred Moore, justices whose names would be recognized only by the most accomplished Court scholars. All three served in the Court's earliest years, none past 1804. Their combined tenure amounted to 11 years. Together they were responsible for five opinions, all of the seriatim variety customary during their time. Alfred

Moore, the least productive, wrote only one opinion in four years of service.

In addition to length of tenure, a justice's ranking on these measures is sensitive to the particular era in which he or she served. Those members of the Court who sat during the earliest periods did not do well in these ratings. The reasons are several. During its first fifty years the Court's docket was light. With few exceptions the cases brought before the justices were private law controversies of little significance beyond the parties to the litigation and of even less importance by the standards of today. Starting with a clean slate, the justices rarely found precedents in need of being overruled. The consensus norms were quite strong, effectively discouraging the writing of dissenting and concurring opinions. Majority opinion coalitions were uniformly large, giving the early justices little opportunity to exert influence by blocking the formation of a majority statement. These conditions made it exceedingly difficult for any of the early justices to earn favorable positions based on the measures used in this study. Of the 33 justices appointed prior to 1855, only John Marshall (rank 47.5) and Roger Taney (45) appear in the top half of the list.

Those justices who were appointed between the Civil War and the turn of the century did much better in our rankings. A large number of these justices served for lengthy tenures and did so on a Court that had an overburdened docket. But the cases on that docket were of relatively low importance in large measure due to the fact that the justices did not yet have full control of their own agenda. Several of these justices were rated quite highly, with four ranking in the top twenty, Edward White (9), John Marshall Harlan I (10), Stephen Field (14), and Samuel Miller (18). However, the lack of large numbers of significant cases to be decided and the tight reins still enforced on concurring and dissenting behavior limited the opportunity of justices from this era to be ranked in the top ten.

The twentieth century justices did much better in the composite ratings. Sixteen of the top twenty were appointed in this century, and thirteen took their seats after the election of Franklin Roosevelt. Only Oliver Wendell Holmes (5), Charles Evans Hughes (11) and Harlan Fiske Stone (13) were first nominated prior to the New Deal. As the twentieth century

progressed the Court increasingly became a major player in American politics. The proportion of cases on the Court's docket that was considered significant steadily rose, due both to the growing willingness of the justices to tackle tough legal and societal issues and the Court's new ability to control its own docket. The consensus norms broke down giving individual justices greater freedom to add their personal views to the law books in the form of dissenting and concurring opinions and to use the politics of building majorities to increase their influence.

In one sense, the patterns that exist in our rankings suggest that our indices are time bound. We examine certain methods of influence that were not available to the justices of the earlier periods. It may well be that the role of the Supreme Court justice in the early nineteenth century was so different from the role of a member today that justices should only be ranked against others from their own era. On the other hand, there is little doubt that the twentieth century justice does in fact wield more influence over law and society than the justices of 150 years ago. To the extent that our ratings reflect that historical evolution they have value.

In spite of this, however, there do appear to be some injustices in the ratings. The most obvious is our treatment of John Marshall. The fact that the universally recognized greatest chief justice rates not better than forty-seventh on our list (and tied with Samuel Blatchford at that !) gives us pause. If Marshall had been responsible only for Marbury v. Madison and McCulloch v. Maryland and nothing else, he would probably be worthy of a top five position. Although he is ranked significantly above his contemporaries, Marshall's rating suffers from the condition of the Court and the environment in which it operated during his tenure. In addition, Marshall's strength was his political and legal leadership, a form of influence that our indicators do not directly measure.

Conclusion

The purpose of this paper was to review previous attempts to rate the justices of the Supreme Court. In doing so we found past efforts to be limited because of their reliance on the search for the "great justice," their inability to define in any objective fashion the components of greatness, and their reliance on subjective evaluation. In order to provide an

alternative method of ranking the justices we thought it worthwhile to break away from the confines of the previous studies and approach the task from an entirely different perspective.

In doing so we departed from past efforts in two important ways. First, we did not join the search for the "great justice." We were not interested in finding the justices with the most impressive legal minds or the most compelling reasoning abilities. Instead, we wanted to rate the justices in terms of the impact their careers have had on the law. Second, we did not want to use subjective evaluations. Instead, we preferred to develop several objective indicators of judicial influence and rank the justices on those dimensions.

To develop our measures we used a basketball analogy, first identifying nine indicators of successful behavior on the basketball court and then developing nine counterpart behaviors on the Supreme Court. In reality, of course, similarities between a basketball player and a Supreme Court justice are virtually nonexistent. Yet trying to extrapolate from a human activity radically different from the one actually under study can encourage new ideas and approaches.

Was our effort successful? Given that we started with modest goals, it probably was. We did depart from the methods used in past ratings efforts and developed nine objective indicators of judicial influence. Some of the measures we used were a direct result of generalizing from the basketball world. The individual indicators and composite rankings have some admitted limitations and certainly do not fully capture what we were hoping to measure. If nothing else, our effort produced some interesting data comparing the behavior of individual justices in areas not previously explored. The findings underscore how the Court and the role of a justice has evolved over the past two centuries and how comparing judicial performance over time can lead to an increased appreciation of the institution.

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