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A TEXTBOOK CASE OF UNIMPORTANCE

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"Who is the greatest Supreme Court Justice of all time?"

This common question is a fun parlor game for court-watchers, and is sometimes a jumping-off point for serious historical scholarship. Invariably, though, it ends with the same answers: John Marshall, Oliver Wendell Holmes, Louis Brandeis.

"Who is the worst Supreme Court Justice of all time?"

This is also a fun parlor game, maybe even more fun than the "best of all time" question, if only because it speaks to our inner snark. It's also a trickier question than "best of all time," because there are different ways to define "worst." Did the "worst" Justice author a notorious opinion, a la Roger Taney, *Dred Scott*-ing his way into infamy? Perhaps the "worst" Justice quit the job quickly like James Byrnes, or was forced off the Court like Abe Fortas. Or maybe the "worst" Justice, like the "best" Justice, is simply a matter of scholarly opinion; poor Charles Whittaker, condemned to the dustbin of history by academic tastemakers.

While fun to ponder, both questions are clichés. We live in an age of ranking and listmaking, a time in which it is impossible to turn on our televisions for even ten minutes without stumbling onto some channel running a "Top Ten" or "Best Ever" show. (Imagine the cross-platform synergy possibilities here, though. "The Top Ten Justices, Presented by the NFL Network" … #1: Byron White. Perhaps a Food Network spinoff show, "The Best Justices I Ever Ate," featuring Warren Burger and Felix Frankfurter.)

If we're going to traffic in the common currency of ranking and listmaking, then, we might as well ask an unconventional question.

"Who is the most nondescript Supreme Court Justice of all time?"

There's a question that doesn't get asked every day. Better still, the answer to this question might well be reliably measurable.

There have been several renowned "Greatest Ever Justice" studies, all structured around surveys asking

academics and/or other commentators to rank the Justices along some defined continuum.[1]

While such polling does produce measureable data, the data is still at its core subjective.[2] This is especially true when pollsters invite respondents to formulate their own criteria for defining greatness.[3]

Determining the biggest nonentity in Supreme Court history could be done via similar survey instruments, but there is a way to do it in a more objective fashion. "Greatness" can be imputed in a number of contexts. Some of these contexts are institutional, such as the growth of the Court in the American political system (Marshall, Taney), or the imposition of needed internal reforms (William Rehnquist). The most common context of greatness, of course, is jurisprudential. In this case, we may start with the unremarkable premise that a "great" Justice has had influence on the development of the law.

Conversely, we can posit that a nondescript Justice lacks such influence. The task now is to assess judicial influence. One surefire indicator of influence on the law is whether a Justice's work is being taught in constitutional law classes, either at the undergraduate or law school level. To that end, we can measure a Justice's influence by asking a simple question – **how often are a given Justice's opinions being excerpted as "major cases" in constitutional law textbooks?**[4]

The following analysis stems from a study of eighteen leading constitutional law textbooks, all with current editions dated no earlier than 2006 (a full list of the textbooks appears in the Appendix).[6] Twelve of these eighteen textbooks are geared for law schools; the other six are designed for undergraduate courses in constitutional law.

Let us first consider the Justices whose work is excerpted most often. There are two ways to define "most-excerpted." One is to tabulate the number of a Justice's individual opinions which are excerpted in the textbooks. In other words, the majority opinion in *Lawrence v. Texas* counts as one opinion for Anthony Kennedy, and the dissent in *Lawrence* counts as one opinion for Antonin Scalia.[6]

Using this definition, the most-excerpted Justices are as follows:

LIST #1: INDIVIDUAL OPINIONS EXCERPTED
(MAIN OPINIONS, CONCURRING OPINIONS, AND DISSENTING OPINIONS)

JUSTICE	# OF OPINIONS	YEARS OF SERVICE
1. John Paul Stevens	185	1975-2010
2. William Rehnquist	153	1972-2005
3. William Brennan	131	1956-1990
4. Antonin Scalia	118	1986-current
5. Byron White	109	1962-1993
6. Sandra Day O'Connor	101	1981-2006
7. Harry Blackmun	94	1970-1994
8. Anthony Kennedy	88	1988-current
9. William O. Douglas	77	1939-1975
Thurgood Marshall (*tie*)	77	1967-1991
Potter Stewart (*tie*)	77	1958-1981

Alternatively, we could define "most-excerpted" as the number of **times** a Justice's opinions are excerpted. Here, since Kennedy's *Lawrence* opinion appears in each of the eighteen books in this study, that counts as eighteen excerpts for Kennedy (the same is true for Scalia's *Lawrence* dissent, which also appears in each of the eight-

een books). In this instance, the list changes, but only slightly:

LIST #2: TOTAL NUMBER OF EXCERPTS

JUSTICE	# OF EXCERPTS	YEARS OF SERVICE
1. John Paul Stevens	634	1975-2010
2. William Rehnquist	600	1972-2005
3. Antonin Scalia	482	1986-current
4. William Brennan	463	1956-1990
5. Sandra Day O'Connor	414	1981-2006
6. Byron White	375	1962-1993
7. Anthony Kennedy	349	1988-current
8. Harry Blackmun	298	1970-1994
9. David Souter	294	1990-2009
10. Clarence Thomas	280	1991-current

Naturally, neither of these lists "proves" that John Paul Stevens is the greatest Justice of all time. The prevalence of excerpts of a given Justice's opinions is not necessarily a sign of judicial greatness, because these numbers are distorted both by a Justice's sheer longevity on the Court, and also by an unavoidable presentist bias.

As is seen in List #1 (Justices ranked by the number of different cases in which they wrote either the Opinion of the Court, a concurrence, or a dissent), each of the top eight most-excerpted Justices served on the Court at least into the 1990's, and five of them served into the 2000's. List #2 (Justices ranked by the total number of excerpts) is even more presentist: every Justice on this list served into the 1990's; seven served into the 2000's, and three are still on the Court today.

The explanation for this presentist bias is uncomplicated. Law school classes are not really historical enterprises. Fundamentally, they are exercises devoted to the dissemination of current legal principles (although these exercises can be part of a larger project designed to inculcate the habits and techniques of legal reasoning). Even undergraduate constitutional law classes – which can afford to spend more time on jurisprudential development – must focus predominantly on contemporary law.

While this presentist bias means that lists of "most-excerpted" Justices are not necessarily indicia of greatness, a list of the "least-excerpted" Justices is almost certainly an indicator of mediocrity. At the very least, it is an indicator of a comprehensive failure to produce work that had any seminal impact or enduring value.[7]

As it turns out, we can not only compile a list of Justices who are having a minimal impact on constitutional law curricula, but we can also compile a list of Justices whose impact is wholly nonexistent. Of the 111 Justices of the United States Supreme Court who served during the period covered by the textbooks in this study,[8] 22 of them are completely shut out of the constitutional law textbooks in this study – **they do not have any of their opinions excerpted even once**:

LIST #3: UNEXCERPTED JUSTICES

JUSTICE	YEARS OF SERVICE	TOTAL YEARS
Samuel Blatchford	1882-1893	11
John Campbell	1853-1861	8
John Catron	1837-1865	28
Nathan Clifford	1858-1881	23
Gabriel Duvall	1811-1835	24
Oliver Ellsworth	1796-1800	4
Ward Hunt	1873-1882	9
Howell Jackson	1893-1895	2
Thomas Johnson	1791-1793	2
Joseph Lamar	1911-1916	5
Henry Livingston	1807-1823	16
Joseph McKenna	1898-1925	27
John McKinley	1837-1852	15
Alfred Moore	1799-1804	5
John Rutledge	1789-1791	2
George Shiras	1892-1903	11
Thomas Todd	1807-1826	19
Robert Trimble	1826-1828	2
Bushrod Washington	1798-1829	31
James Wayne	1835-1867	32
Charles Whittaker	1957-1962	5
Levi Woodbury	1845-1851	6

In one respect, the "shut-outs" list contradicts the durational assumption derived from the most-excerpted list. Six of the shut-out Justices served on the Court for at least twenty years, two served for over thirty years, and James Wayne's 32-year tenure places him among the top ten longest-serving Justices in history. If one explanation for the surfeit of excerpts by John Paul Stevens and William Rehnquist is that they each spent over thirty years on the Court, then one would logically expect that at least some of James Wayne's three-decades-long body of work would appear in the textbooks.

However, this durational expectation is trumped by the expectation that contemporary Justices will feature more often than long-departed ones (and having left this earth during Andrew Johnson's presidency, Justice Wayne is assuredly long-departed). Here, the "shut-outs" list is the unsurprising inverse of the most-excerpted lists. With only four exceptions, none of the shut-out Justices served in the 20th century. Of the four who did serve in the 20th century, two of them – Joseph Lamar and Charles Whittaker – only served on the Court for five years. A third, George Shiras, served for eleven years, but his 20th century service on the Court is brief; he retired in 1903.

This brings us to Joseph McKenna.

At 27 full years of service (1898-1925), McKenna is the 21st-longest-serving Justice in Supreme Court history, and is in the top 20% all time. He is also one of the longest-serving Justices of his particular era. Only three of the Justices with whom McKenna served – John Harlan "the elder", Oliver Wendell Holmes, and Edward White – spent a longer time on the Court than McKenna did.

On a purely statistical level, it's not quite fair to burden McKenna with the designation of Most Nondescript

Justice of All Time. John Catron, Bushrod Washington, and James Wayne each share McKenna's dubious distinction of not having any of their work reproduced in constitutional law textbooks, but all of them sat on the Court for a longer period than McKenna did.

Yet there is one key fact which distinguishes McKenna from Catron, Washington, and Wayne. Indeed, this key fact distinguishes McKenna from almost all of the shut-out Justices, including every one of the shut-outs who served for longer than five years on the Court. Joseph McKenna is the lone shut-out Justice who served for an extended time on the Supreme Court during the 20th century.

The other shut-out Justices all served on the Court during a time which is generally under-represented in the textbooks in this study. Altogether, these textbooks include excerpts from 837 different cases, but only 71 of those 837 cases occurred before 1900. Although one major reason that Bushrod Washington's work is completely missing from the textbooks is that Washington produced little work of any real significance,[9] an equally-salient reason is that hardly any opinions from Washington's era are excerpted.[10] What is true of Washington is true of almost all of the long-serving shut-out Justices: they all served in a period of time which is just not covered very much (at least in terms of reproduction of actual opinions) by these textbooks.

The lone exception here is McKenna. While McKenna's service period of 1898-1925 is not nearly as well-represented in this study as the latter years of the 20th century, it is nevertheless a period of time which is substantially documented in the textbooks. There are 34 cases between 1898 and 1925 which appear in the textbooks. Importantly, those 34 cases feature nearly comprehensive coverage of the Court's personnel in that era.

Counting the Justices who were already on the Court when he arrived in 1898, Joseph McKenna served with 23 other Justices during his tenure on the Court. Fifteen of those 23 Justices wrote at least one main Opinion of the Court while serving with McKenna which is excerpted in at least one textbook in this study: (see page 20)

That leaves eight other Justices who served with McKenna, but who did not write a main opinion during McKenna's tenure on the Court which is excepted in these textbooks: Louis Brandeis, Henry Brown, Pierce Butler, Melville Fuller, Horace Gray, Joseph Lamar, George Shiras, and Willis Van Devanter.

However, six of these eight Justices are accounted for in the books in this study anyway. These six did produce excerpted main opinions, but did so outside of McKenna's tenure: Brown, Fuller, and Gray each wrote at least one main opinion prior to McKenna's 1898 arrival which is excerpted in these textbooks; Brandeis, Butler, and Van Devanter each wrote main opinions after McKenna's 1925 departure which are excerpted.[11] Furthermore, Brandeis, Butler, and Fuller also wrote concurrences and/or dissents during McKenna's tenure which are excerpted in at least one textbook.

Of the 23 Justices who served on the Supreme Court with Joseph McKenna, then, only Joseph Lamar and George Shiras are completely absent from the textbooks in this study. However, neither Lamar nor Shiras approached the length of McKenna's tenure; Lamar served for only five years on the Court, and Shiras served for only eleven years. McKenna's 27 years on the Court far outstrips even their combined 16 years of service.

Even some of McKenna's contemporaries whose Supreme Court service was a comparative eye-blink nevertheless appear in these textbooks. Horace Lurton, who was on the Court for less than five years before dying in office in 1914, has a cameo appearance; so does John Clarke, who served for a shade over six years before resigning in 1922 out of fear that the job would push him to an early grave (smart move; he lived another 23 years). Even in his own era, when almost every other Justice had at least a minimal impact on the future teaching of constitutional law, McKenna had no impact whatsoever.

No Justice, then, served so long while saying nothing of consequence quite like Joseph McKenna. Charles Whittaker, you're off the hook.

LIST #4: EXCERPTED MAIN OPINIONS WRITTEN BY McKENNA'S CONTEMPORARIES DURING McKENNA'S SERVICE ON THE SUPREME COURT (1898-1925)

JUSTICE	# OF OPINIONS
David Brewer	2
John Clarke	1
William Day	4
John Harlan "the elder"	3
Oliver Wendell Holmes	6
Charles Evans Hughes	2
Horace Lurton	1
James McReynolds	2
William Moody	1
Rufus Peckham	2
Mahlon Pitney	1
Edward Sanford	1
George Sutherland	2
William Howard Taft	3
Edward White	3

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[1] Albert Blaustein and Roy Mersky distributed a survey instrument to law professors asking them to categorize Justices on a scale ranging from "great" to "failure," see "Rating Supreme Court Justices," 58 AMERICAN BAR ASSOCIATION JOURNAL 1183 (1972), see also William G. Ross, "The Ratings Game: Ranking Supreme Court Justices," 79 MARQUETTE LAW REVIEW 401 (1996) (provides 1993 update to Blaustein-Merksy data). In a 1993 study, William Pederson and Norman Provizer went to the trouble of designing separate polls for academics, judges, practitioners, and students, see *Great Justices of the Supreme Court: Ratings and Case Studies* (Peter Lang, 1993), see also Pederson and Provizer, *Leaders of the Pack: Polls and Case Studies of Great Supreme Court Justices* (Peter Lang, 2003). Michael Comiskey designed a two-level survey that asked for both retrospective overall rankings of the Justices and also for assessments of how well-qualified they were for the Court at the time of a Justice's nomination, see *Seeking Justices: The Judging of Supreme Court Nominees* (Univ. Press of Kansas, 2004) , 87-89.

[2] Scholars are developing empirical methods of evaluating federal judges, see Stephen J. Choi and G. Mitu Gulati, "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance," 78 SOUTHERN CALIFORNIA LAW REVIEW 23 (2004); see also Frank B. Cross and Stefanie Lindquist, "Judging the Judges," 58 DUKE LAW JOURNAL 427 (2009). However, these studies are focused on vetting the fitness of federal judges for possible nomination to the Supreme Court, and it is a question whether these empirical techniques can be translated into a means of evaluating the performance of Supreme Court Justices themselves. See W.E.R.L., "On Tournaments for Appointing Great Justices ot the U.S. Supreme Court," 78 SOUTHERN CALIFORNIA LAW REVIEW 157 (2004). ("W.E.R.L." is a reference to the Workshop on Empirical Research in the Law that is held regularly at Washington University in St. Louis.) Even here, the question of whether the "merit" of a potential Supreme Court nominee can be objectively determined at all is highly debatable. See Michael J. Gerhardt, "Judicial Selection By the Numbers," 32 FLORIDA STATE LAW REVIEW 1197, 1199 (Summer 2005) ("[T]here has never been some objective, or neutral, criterion of merit. Instead, the governing elite has made judicial appointments to further its own interests. Consequently, merit is defined so as to allow for, if not to maximize, the appointments of relatives, friends, and especially political allies.").

[3] See Blaustein and Mersky, supra n.2 See also Robert C. Bradley, "Selecting and Ranking Great Justices: Poll Results," in Pederson and Provizer, *Leaders of the Pack*, supra. n. 2, at 7 ("To avoid author perceptions or feelings from introducing bias into development of the list, the survey was constructed to give no indication of the criteria to be used.")

[4] I define a "major case" as a case that is set off with its name and citation (as opposed to other cases which are identified and discussed in the text of the casebook as "lesser" cases). While many textbooks reproduce some verbatim sections of "lesser" cases, this study takes into account the editorial decision that is made to designate cases as major. In other words, if the authors of the casebooks are "telling" their readers that certain cases are more significant than other ones, that is prima facie evidence of a case's importance and influence

[5] This study was also the basis for an article identifying the leading cases in American constitutional law which recently appeared in these

pages. See Lichtman, "The Canon of Constitutional Law in 2010," *American Political Science Association Law and Politics Section Newsletter*, vol. 20, no. 3 (Summer 2010).

[6] Note that this definition makes no distinction between main opinions and concurrences/dissents. If anything, it could be argued that excerpted concurrences and dissents are an even larger signal of a Justice's influence than excerpted main opinions, since concurrences and dissents are generally opinions that are not needed to teach the holding of a given case. Their inclusion is an editorial decision made by the textbook's author(s) that something in this ancillary opinion (or the mere fact that a given Justice contributed such an opinion) is as important a teaching tool as the main opinion itself.

[7] This is not to say that the existence of an excerpted opinion in the textbooks bears any relationship to the "quality" of a Justice. Nobody would ever suggest that Rufus Peckham was a great Justice (the original Blaustein-Mersky survey, for example, somewhat charitably, rated him as "average"), nor would anyone ever suggest that his constitutional claim to fame, *Lochner v. New York*, has any positive enduring value. Via *Lochner*, though, there is little question that Peckham's work has had an impact on the study of constitutional law, albeit a negative one. Notorious though it is, the *Lochner* decision – and by extension, its author – is a presence in the field.

[8] The 112th Justice, Elena Kagan, had not issued any opinions prior to the publication of any of the textbooks used in this study; her first opinion was published on January 11, 2011, in which she wrote for the Court in an unremarkable bankruptcy case, *Ransom v. FIA Card Services, Inc.* As of the writing of this article, Justice Kagan has not contributed any concurrences or dissents.

[9] As Richard E. Ellis writes in the invaluable *Oxford Companion to the Supreme Court of the United States, 2nd ed.* (Oxford, 2005), "Although he served on the Court for thirty-one years, Washington is not really know for handing down any important decisions" (at 1072).

[10] Even the lions of the early 19th century, John Marshall and Joseph Story, combine to have only seventeen opinions excerpted; eleven by Marshall (all main opinions), and six by Story (three main opinions, one concurrence, and two dissents).

[11] Brown's lone contribution to the books in this study is one of the most reviled cases of all time: *Plessy v. Ferguson*.

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Sullivan, Kathleen M.; and Gerald Gunther, *Constitutional Law,* 17th ed. (Foundation Press, 2010)

Varat, Jonathan D; William Cohen; and Vikram D. Amar, *Constitutional Law,* 13th ed. (Foundation Press, 2009)

Six of these texts are designed for undergraduate constitutional law courses: Epstein/Walker, Fisher/Harriger, Mason/Stephenson, O'Brien, Rossum/Tarr, and Schultz/Vile/Deardorff. Five of these six texts are two-volume sets, geared towards the typical collegiate constitutional law regimen of separate semester classes in civil liberties and governmental powers/structure. Only the Mason/Stephenson text is a single volume designed for undergraduate courses.

The other twelve texts are law school casebooks.

ADVENTURES AND LEARNINGS OF A FIELD RESEARCH ENTHUSIAST

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Field research may be the one opportunity we academics have to feel a little bit like Indiana Jones—well, without the paranormal artifacts, the damsel in distress, and in all probability without danger lurking behind every corner. Granted, Indiana Jones may be a bit of a stretch, but field research can feel like a real (albeit benign) adventure. Though discovering that something is crawling down my back during an interview with a Supreme Court judge in El Salvador ('don't panic—it's probably an ant and not a spider') has become part of my particular experiences, the adventure I refer to is of the less unnerving kind and lies in the often unpredictable discoveries made in interviews, the hunt for documents, or simply in talking to people. And before you know it, it has happened: You have fallen in love with your project all over again.

I certainly did—which is a good thing in the long process of writing a dissertation. Mine led me to London, where I interviewed Queen's Council barristers on the trade-offs between security and rights protection by the Supreme Court.[1] My first stop, of course, was the home of the newly created Supreme Court. The beautifully renovated Middlesex Guildhall stands on the western side of Parliament Square, facing the Palace of Westminster and the Big Ben.

I met with the Head of Communications to the UK Supreme Court, who talked about the different measures the Court had taken to become more approachable to the general public (including televised proceedings, still unimaginable in their US counterpart). The Court is open to the public, and when it is not in session, visitors are welcome to try out the very chairs occupied by the judges. One of the security guards and I chatted about his aspirations on becoming a lawyer while I swiveled around in Baroness Hale's seat.[2]

While that was the closest I got to the judges on this first visit to London, I had the opportunity to participate in interviewing supreme court judges in Nicaragua and El Salvador (in addition to journalists, human rights activists, and legal scholars) as a graduate assistant to Don Songer's and Lee Walker's NSF sponsored field research.[3]

I came back from each trip knowing more about what worked and what did not. While my learnings are not revolutionary, certainly not exhaustive, and may not be applicable to all situations, they helped me and I offer them in the hopes others will find them useful.

As several people have told me and I happily repeat here: in procuring interviews, one has to be persistent, and follow up on unanswered requests. Naturally, the behavior should stop miles short before it can be considered pestering. If the direct route to an interview is not available, seek detours. When it comes to interviews, it may be a little bit about who you are (ABD v. Full Professor), but it is much more about whom you know. It is not unusual, for example, for repeat players on the UK Supreme Court to have ties to legal advocates to the Parliament or to the Law Lords themselves. The last question in every interview should therefore be a request for potential contacts