



MICRO- SYMPOSIUM

Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents – and that the majority could not restrain itself from saying (and saying and saying) so.

Elena Kagan

Harris v. Quinn,
573 U.S. ____ (2014)
(dissenting)

pictured: U.S. Supreme Justice Elena Kagan.



INTRODUCTION TO THE MICRO-SYMPOSIUM ON TOP TEN RANKINGS OF THE U.S. SUPREME COURT

WHAT WOULD *U.S. NEWS* DO?

Ross E. Davies

A FEW MONTHS AGO we issued a call for short (1,500 words) essays on “Top Ten Rankings of the Supreme Court.” We were looking for “original and empirical stud[ies] involving some kind of ranking of the Justices or their work, accompanied by illuminating analysis and commentary, that will help readers better understand the Supreme Court of the United States, the people who work there, and the products of their labors.”¹ We found plenty. In fact, we received much more good work than we could print. So, we hardened our hearts and picked some excellent exemplars, and the result is this micro-symposium.

But before we get to the top-drawer rankings published here, we should address a question that surely gnaws at minds other than ours: With a public that is fascinated by the Supreme Court and has a taste for rankings (Rick Hasen’s *The Most Sarcastic Justice* already has more than 1,000 SSRN downloads²), why hasn’t *U.S. News* already moved to occupy this rankings niche?

The answer is that once upon a time it did.

Ross Davies is a law professor at George Mason University and an editor of the *Green Bag*.

¹ *Call for Papers: The Best of the Most/Least, Best/Worst, Etc./Etc. of the U.S. Supreme Court*, 18 GREEN BAG 2D 126 (2015).

² 18 GREEN BAG 2D 215 (2015); papers.ssrn.com/sol3/papers.cfm?abstract_id=2550923.

RANKING THE JUSTICES IN *U.S. NEWS*

In its March 7, 1977 issue, *U.S. News & World Report* ranked both the Justices and their Courts. The cover asked: “Burger vs. Warren WHOSE COURT IS BETTER?” Inside was “A Report Card on Supreme Court.” It was based on a “comprehensive nationwide survey”:

The survey drew 508 replies from: 211 judges of the U.S. district courts and courts of appeals, 110 justices of State supreme courts and 187 lawyers who rank high in their profession.³

That is an impressive pool of respondents.

One of the questions *U.S. News* asked those pillars of the bar dealt with the members of the Court as individual judges: “In general, how would you rate the quality of opinions written by each of the present Justices on the Supreme Court?” The magazine tabulated the results and listed the Justices in descending order of “Excellence” ratings. It also included each Justice’s “Average” and “Poor” ratings.⁴ Being an upbeat periodical, the *Green Bag* will accentuate the positive:

<u>Justice</u>	<u>% “Excellent” rating</u>
Lewis F. Powell, Jr.	60.3
William H. Rehnquist	43.9
Byron R. White	37.3
Potter Stewart.....	35.0
Warren E. Burger (Chief Justice).....	29.4
John Paul Stevens.....	29.2
William J. Brennan, Jr.....	29.1
Harry A. Blackmun.....	24.3
Thurgood Marshall	11.2

Unfortunately, *U.S. News*’s question was either too artful or not artful enough. What does “quality of opinions written” mean? Was it an invitation to judge the Justices’ writing styles? Or to judge their judgments? Or their capacities (as speakers for the Court) to build majorities? Or their capacities (as dissenters) to craft counterargu-

³ *A Report Card on Supreme Court: Judges and Lawyers Pass Judgment in Nationwide Survey*, U.S. NEWS, Mar. 7, 1977, at 60 (hereafter “Report Card”).

⁴ *Id.* at 65.

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ments? Or was it an invitation to judge their respect for precedent? Or something else? Whatever else it was, it was certainly a waste of an opportunity to get some useful, or at least interesting, information.

JUSTICES REACT

Back then, members of the Court reacted to ranking of themselves much as law deans tend to react now to ranking of their schools (and much, I imagine, as we at the *Green Bag* would react if we were worth ranking, and ranked). When the rank is high, it is an honor. When the rank is not so high, such surveys are not very credible, not very useful, and not things a serious person would take seriously.

Consider, for example, what Justice John Paul Stevens said to top-ranked Justice Lewis Powell:

Dear Lewis:

As I indicated on the bench, I think you should be proud of the fact that over 60% of any group of lawyers or judges rated the quality of your opinions as “excellent.” No matter how the group was selected, that is a real tribute and I congratulate you.⁵

Now compare what Powell said to Justice Thurgood Marshall:

Dear Thurgood:

You may have seen the story in last week’s U.S. News & World Report about the Court. The results of the “poll” reported in the story are hardly credible. I have no explanation for these, but do want you to know that neither I — nor any of your Brothers — put any credence in the ranking of our opinions.

I also want you to know that, although we often disagree (as can be said as to each of us), I think the writing and thoroughness of your opinions is of the highest order.

Putting it differently, you have the full respect of your Brothers, as a judge and a person, and this is the most that any of us can wish.⁶

⁵ John Paul Stevens to Lewis F. Powell, Jr., Mar. 1, 1977, Lewis F. Powell, Jr. Papers, Powell Archives, Washington and Lee University School of Law; cf. JOHN PAUL STEVENS, FIVE CHIEFS 173-74 (2011) (William Rehnquist’s opinions).

⁶ Lewis F. Powell, Jr. to Thurgood Marshall, Mar. 8, 1977, Lewis F. Powell, Jr. Papers, Powell Archives, Washington and Lee University School of Law.

Powell was by all accounts a fine, kind colleague, and that shows here. But his offer of consolation to Marshall is not entirely consistent with the note he had received from Stevens a few days earlier.

And finally, compare what John Sexton (then dean at NYU) once said in the *Green Bag*. He nicely captures both outlooks – the pleasure of being near the top and the anxiety of not being near enough:

I think anything that posits a single norm universe, however, is very detrimental, because what it does is it creates . . . a kind of circular self-fulfilling prophecy. And I say this fully cognizant of the fact that, as you know, NYU Law School benefits in a way from the rankings because by the most prominent ranking we're clearly one of the eight schools that can claim to be in the top three.⁷

It is not easy, knowing how good we are and how hard we try, and also knowing that a few hundred nameless, faceless voters under-appreciate us. And their votes affect how the rest of the world sees us.

RANKING THE SUPREME COURTS

The answer to the question on the cover of *U.S. News* was: “More than 3 out of 4 of those jurists and lawyers – 78.1 per cent – prefer the Burger Court to the Court that was headed by the late Chief Justice Earl Warren.”⁸

There had recently been a lot of turnover on the Court. By 1977 only a minority (Brennan, Stewart, White, Marshall) were Warren Court holdovers. Could it be that the *U.S. News* poll reflected similar transitions elsewhere in the law? Had many of the respondents (say, 78.1%) been elevated to their courts or partnerships since Burger became Chief Justice in 1969? And did their votes correlate with their generational affiliation? It would be nice to know that much, at least – to have some chance to better comprehend the rankings. But I doubt we ever will. *U.S. News* was selling rankings, not comprehensibility.

Why did *U.S. News* abandon its juicy Supreme Court ranking project, especially with such obvious opportunities to do better the second time around? I have no idea.

⁷ John Sexton, *Legal Education, Today & Tomorrow*, 3 GREEN BAG 2D 417, 420 (2000).

⁸ *Report Card* at 60; *id.* at 62.



A TOP TEN RANKING OF THE U.S. SUPREME COURT

LITERARY JUSTICE

Scott Dodson & Ami Dodson

THERE ARE WISDOMS OF THE HEAD and wisdoms of the heart, but they are not altogether separate. Recent studies find that reading fiction literature develops deeper thinking, greater empathy, and better decisionmaking.¹ These are arguably virtuous qualities for a Supreme Court justice.² So the short and long of it (but mostly short of it) is this: who is the most literary justice? And, as an aside, which authors are most cited?

Scott Dodson is the Harry & Lillian Hastings Research Chair and Professor of Law at UC Hastings College of the Law. Ami Dodson is Senior Communications Writer at UC Hastings College of the Law. Copyright 2015 by Scott Dodson and Ami Dodson.

¹ David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 SCIENCE 377 (2013); Maja Djikic et al., *Opening the Closed Mind: The Effect of Exposure to Literature on the Need for Closure*, 25 CREATIVITY RESEARCH J. 149 (2013).

² See *The ‘Empathy’ Nominee*, WALL ST. J. (May 27, 2009), available at www.wsj.com/articles/SB124338457658756731; cf. Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1351 (1986) (arguing “that the study of literature . . . has something, perhaps a great deal, to contribute to the understanding and the improvement of judicial opinions”); Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1480 (1995) (arguing that, “properly constrained, the imagining characteristic of a literary artist – and his attentive reader – can often supplement the other aspects of judicial reasoning in a valuable way, offering insight into a number of issues”).

METHODOLOGY

To answer these questions, we searched all opinions authored by current justices for references to ninety-one of the greatest literary-fiction authors and their works.³ We limited our search to authors of “high” literature rather than popular fiction (with apologies to J.K. Rowling).⁴ We excluded references to the Bible. Because all the world – and the courtroom especially – is a stage, we included plays and lyrical epics but excluded standard poetry. We used search terms derived from author names and, for multiple-cited authors, additional searches based on key references to their works; we then read each case to ensure that the hit both referred to a great work of fiction and reflected some knowledge of it (as opposed to rote quoting of some other judge’s literary reference).⁵

RESULTS PART 1: MOST/LEAST POPULAR AUTHORS

We begin with the fun results first. The most-referenced fiction author by current justices is . . . a tie! William Shakespeare and Lewis Carroll (Charles Lutwidge Dodgson) each garnered sixteen references from the same five justices (Scalia, Kennedy, Thomas, Ginsburg, and Breyer). With that many references, Shakespeare and Carroll are likely to have significant longevity in the Supreme Court Reporter, for such words aptly uttered or written cannot be cut away with an axe, especially with stare decisis.

³ Without entering a debate about who are the greatest authors, we believe our cohort is representative.

⁴ See *King v. Burwell*, -- S. Ct. --, -- (2015) (Scalia, J., dissenting) (referencing the made-up spell “Jiggery Pokery” from *Harry Potter and the Chamber of Secrets*); cf. *Yates v. United States*, 135 S. Ct. 1074, 1091 (2015) (Kagan, J., dissenting) (citing Dr. Seuss); *Kimbel v. Marvel Entertainment, LLC*, -- S. Ct. --, -- (2015) (Kagan, J.) (citing the comic *Spider-Man*).

⁵ We excluded allusions that have taken on popular meaning so attenuated from their literary sources as to be only weak indicators of literary proficiency (e.g., “catch-22”). For any probative literary references we missed, we plead the confines of time and space. Brevity being the soul of wit, a full list of the references and the positive hits they generated is on file with the authors rather than reproduced here.

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Eight other authors made multiple appearances:

George Orwell (Eric Arthur Blair) (8)	Fyodor Dostoyevsky (2)
Charles Dickens (6)	William Faulkner (2)
Aldous Huxley (4)	Herman Melville (2)
Aesop (3)	J.D. Salinger (2)

Twenty-two authors were cited once each:

Dante Alighieri	John Milton
Jane Austen	Ovid
Geoffrey Chaucer	Sophocles
Daniel Defoe	Gertrude Stein
George Eliot (Mary Ann Evans)	Jonathan Swift
F. Scott Fitzgerald	Leo Tolstoy
William Golding	Mark Twain (Samuel Clemens)
Nathaniel Hawthorne	Virgil
Ernest Hemingway	Kurt Vonnegut, Jr.
Homer	Edith Wharton
Franz Kafka	Oscar Wilde

And the remaining fifty-nine authors, relegated to the seventh circle of author hell, were not cited at all:

Aeschylus	C.S. Lewis
Louisa May Alcott	Thomas Mann
Isabel Allende	Arthur Miller (playwright, not law prof)
Anonymous (<i>Arabian Nights</i>)	Thomas Moore
Anonymous (<i>Beowulf</i>)	Toni Morrison
Anonymous (<i>The Epic of Gilgamesh</i>)	Haruki Murakami
Hans Christian Andersen	Vladimir Nabokov
Charlotte Brontë	Seán O'Casey
Emily Brontë	Joyce Carol Oates
Albert Camus	Dorothy Parker
Willa Cather	Sylvia Plath
Miguel de Cervantes (Saavedra)	John Dos Passos
Joseph Conrad	Edgar Allen Poe
Anton Chekhov	Marcel Proust
Ralph Ellison	Thomas Pynchon
Euripides	Ayn Rand
Gustave Flaubert	Philip Roth
Nikolai Gogol	Salman Rushdie
Thomas Hardy	George Sand (Amantine Dupin)

Joseph Heller	Walter Scott
Horace (Quintus Horatius Flaccus)	Mary Shelley
Langston Hughes	John Steinbeck
Henrik Ibsen	Robert Louis Stevenson
John Irving	Hunter S. Thompson
Henry James	John Updike
James Joyce	H.G. Wells
Jack Kerouac	Tennessee Williams
Ring Lardner	Virginia Woolf
D.H. Lawrence	Richard Yates
Harper Lee	

We draw no conclusions about whether these numbers are high or low. For some, more literary references cannot be too much of a good thing. For others, fiction makes too much sense for a legal reality that rarely does. Still others may worry that even a fool’s words are sometimes enough to confound an intelligent man. We note only that one’s reactions will depend upon one’s normative assumptions about the Court.⁶

RESULTS PART 2: MOST LITERARY JUSTICES

And now to the justices. Table 1 sets out the raw data.

TABLE 1: RAW DATA

Justice	Citations/ References	Different Authors	All Opinions Authored
Scalia	39	15	813
Breyer	15	12	430
Thomas	11	9	514
Kennedy	8	8	501
Ginsburg	7	5	381
Roberts	2	2	135
Alito	1	1	190
Sotomayor	0	0	107
Kagan	0	0	53

⁶ For one reaction, see Confirmation Hearings for Stephen G. Breyer, 103d Cong., 2d Sess. 89 (July 13, 1994) (Breyer) (“[S]ometimes I have found literature very helpful as a way out of the tower.”).

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By simple counting, the most prolific citer and the widest read is Scalia, followed by the order presented in the table. But Scalia has been on the court the longest and has written far more opinions than any of the other sitting justices (belying the idea that one cannot consume much by sitting still and reading books); therefore, he has had more opportunity to showcase his literacy. As good luck would have it, there's a simplistic way to control for opportunity. Table 2 ranks the justices by citations per opinions authored:

TABLE 2: WEIGHTED CITATION RATE

Justice	References	Opinions Authored	References/Opinions
Scalia	39	813	4.80%
Breyer	15	430	3.49%
Thomas	11	514	2.14%
Ginsburg	7	381	1.84%
Kennedy	8	501	1.60%
Roberts	2	135	1.48%
Alito	1	190	0.53%
Kagan	0	53	0.00%
Sotomayor	0	107	0.00%

Scalia again tops the rest. But because each rate of citation per opinion is low, comparing them in a meaningful way is difficult. In other words, although Kagan and Sotomayor have made no references in their first few opinions, they are, after all, women with money and rooms of their own, and thus perhaps slow and steady will win the race.

There is method in this madness. To analyze the data, we held a two-tailed chi-squared round-robin tournament between pairs of justices. Table 3 sets out the results, with statistically significant p-values reported in *italics*.

TABLE 3: CHI-SQUARED P-VALUES

	AS	SGB	CT	RBG	JGR	AMK	EK	SS
SGB	.380							
CT	.017	.237						
RBG	.015	.196	.814					
JGR	.106	.384	1.000	1.000				
AMK	.003	.090	.645	.799	1.000			
EK	.162	.387	.611	1.000	1.000	1.000		
SS	.017	.089	.226	.355	.506	.362	1.000	
SAA	.006	.049	.198	.282	.573	.457	1.000	1.000

AS=Scalia; SGB=Breyer; CT=Thomas; RBG=Ginsburg; JGR=Roberts;
AMK=Kennedy; EK=Kagan; SS=Sotomayor; SAA=Alito

This table suggests that Scalia is statistically more likely to cite to literature than everyone except Roberts and Kagan, and the statistical insignificance of his rate compared to those two is due almost entirely to their few opinions. We therefore crown Scalia the most literary justice.⁷ By contrast, Alito is the only justice statistically less likely to cite to literary fiction than multiple colleagues (he is less likely than Scalia and Breyer), making him most plausibly the least literary justice.

CONCLUSION

This study is lighthearted. We do not mean to suggest that mere references in judicial opinions necessarily say anything about the justices. The most we hope for is to provide fodder for the parlor games of the legal elite and literary intelligentsia. Still, and in the best traditions of the liberal arts, that itself may not be clapping for the wrong reasons. After all, nothing in the world is so irresistibly contagious as good humor.

GD

⁷ Of course, not even Scalia's prowess compares to our sixteen literary references in this single, six-page article. Points to whoever can identify them all.



A TOP TEN RANKING OF THE U.S. SUPREME COURT

THE MOST SCHOLARLY JUSTICES

Brian L. Frye

ABSTRACT

Supreme Court justices both use and produce legal scholarship. This article identifies the ten most scholarly justices, based on both productivity and impact.

INTRODUCTION

THE SUPREME COURT'S opinion of legal scholarship has changed over time. Historically, it was quite deferential, relying heavily on learned treatises.¹ But its deference gradually waned. Recently, some justices have even suggested that most contemporary legal scholarship is irrelevant to legal practice.²

Bryan L. Frye is an Assistant Professor of Law at the University of Kentucky College of Law.

¹ See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803) (citing Blackstone's Commentaries four times).

² See, e.g., Chief Justice of the United States John G. Roberts, Jr., Interview at Fourth Circuit Court of Appeals Annual Conference, available at www.cspanvideo.org/

But Supreme Court justices don't just use (or ignore) legal scholarship in their judicial opinions. They also produce it themselves. Over the years, they have published many scholarly (and some not-so-scholarly) books and articles.³ In fact, some of the most important (or at least influential) legal scholarship was written by Supreme Court justices.⁴ This empirical study identifies the "most scholarly justices" by counting both the number of law review articles written by each justice and the number of citations to those articles.

Legal scholarship takes many forms: books, treatises, hornbooks, restatements, monographs, reports, articles, essays, manuscripts, editorials, speeches, and so on. But today, the paradigmatic form of legal scholarship is the law review article.⁵

program/FourthCi at approx. 30:30 (June 25, 2011) ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."). See also, Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in Eighteenth Century Bulgaria* (2015), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2586464 (concluding that Kant probably had no influence on evidentiary approaches in 18th century Bulgaria).

³ See, e.g., Oliver Wendell Holmes, *The Common Law* (1881) and Ruth Bader Ginsburg, *Civil Procedure in Sweden* (1965). But see Sandra Day O'Connor, *Lazy B: Growing Up on a Cattle Ranch in the American Southwest* (2002).

⁴ See Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483 (2012) (showing that three of the ten most-cited law review articles were written by Supreme Court justices: Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) (#2); O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) (#3); and William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) (#9)). See also Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 Cal. L. Rev. 1540 (1985) and Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent. L. Rev. 751 (1996). But see Ross E. Davies, *The Most Important Article of All Time*, 5 Green Bag 2d 351 (2002).

⁵ See, e.g. Paul F. Campos, *Advocacy and Scholarship*, 81 Cal. L. Rev. 817 (1993) ("The apex of American legal thought is embodied in two types of writings: the federal appellate opinion and the law review article.").

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Of course, it wasn't always so. For most of the 19th Century, the prevailing forms of legal scholarship were treatises and case reports, and student-edited law reviews were largely ignored prior to the founding of the Harvard Law Review in 1886.⁶ Indeed, Justice Holmes (at least apocryphally) "admonished counsel who had the temerity to refer to them in argument that they were merely the 'work of boys.'"⁷

Some may object that excluding forms of legal scholarship other than law review articles unfairly disfavors those justices who chose to produce legal scholarship in other formats.⁸ But you can't argue with the "rules of the game."⁹ We must be as unforgiving as a tenure committee: the benchmark for legal scholars is their production of law review articles.

Some may also object that including all law review articles unfairly rewards justices for producing articles unworthy of consideration as legal scholarship.¹⁰ But it is an academic truism that a tenure committee knows how to count, even if it doesn't know how to read.

METHODOLOGY

The dataset used for this study was the HeinOnline database of United States law reviews, which is the most comprehensive database of legal periodicals.¹¹ In order to measure scholarly productivity, I performed an author search for the name of each Supreme

⁶ See Michael I. Swygert & Jon W. Bruce, The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews, 36 *Hastings L.J.* 739, 742 (1985).

⁷ Charles E. Hughes, Foreword, 50 *Yale L.J.* 737 (1941).

⁸ See, e.g., Ronald Collins, 353 books by Supreme Court Justices, SCOTUSblog, November 7, 2012, at www.scotusblog.com/2012/03/351-books-by-supreme-court-justices/

⁹ Cf. *The Rules of the Game* (Jean Renoir 1939).

¹⁰ See, e.g., Warren E. Burger, Tribute to Wade McCree, 21 *Loy. L. A. L. Rev.* 1051 (1987-1988).

¹¹ The HeinOnline Law Journal Library "includes more than 2000 law and law-related periodicals from inception." www.heinonline.org.ezproxy.uky.edu/HeinDocs/LawJournalLibrary.pdf.

Court justice, and counted the number of articles properly attributed to that justice, screening out false positives, and counting both co-authored and reprinted articles. In order to measure scholarly influence, I counted the number of citations to articles written by each justice, as reported by HeinOnline.¹²

Of course, social and technological changes complicate cross-historical comparisons of scholarly productivity. For example, the first American law review was the American Law Register, which was founded in 1852, so many justices had little or no opportunity to publish law review articles. Moreover, the number of law reviews has gradually increased over time, creating ever more opportunities to publish law review articles. However, while 20th Century justices had more opportunities to publish law review articles, 19th Century justices had more opportunities to make a scholarly impact.

TABLE I:
THE TEN MOST SCHOLARLY JUSTICES
BASED ON PRODUCTIVITY (AS OF MAY 9, 2015)

Rank	Name	Number of Articles
1	Warren E. Burger	188
2	Ruth Bader Ginsburg	155
3	Tom C. Clark	124
4	William J. Brennan, Jr.	121
5	William Rehnquist	116
6	William O. Douglas	112
7	Earl Warren	97
8	Lewis F. Powell, Jr.	90
9	Felix Frankfurter	89
9	Robert H. Jackson	89

¹² The complete dataset is available at <https://perma.cc/4FXQ-3YJ9>.

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TABLE II:
THE TEN MOST SCHOLARLY JUSTICES
BASED ON INFLUENCE (AS OF MAY 9, 2015)

Rank	Name	Number of Citations
1	Oliver Wendell Holmes, Jr.	5379
2	William J. Brennan, Jr.	4699
3	Felix Frankfurter	4220
4	Antonin Scalia	4130
5	Louis Brandeis	4110
6	Stephen Breyer	3324
7	Ruth Bader Ginsburg	2631
8	William O. Douglas	2278
9	Warren E. Burger	2141
10	William Rehnquist	1692

REFLECTIONS

Table I lists the ten most scholarly justices, based on scholarly productivity. Unsurprisingly, it shows that 20th Century justices were the most productive scholars, reflecting the increased prevalence and prominence of law reviews in the 20th Century. But it also shows that mid-20th Century justices were more productive scholars than most of the more recent justices. Four of the ten most productive scholars were former law professors: Burger, Ginsburg, Douglas, and Frankfurter. And while some of the ten most productive scholars are popularly associated with legal scholarship, others are not.

Table II lists the ten most scholarly justices, based on scholarly impact. While six of the ten most productive scholars are also among the ten most impactful scholars, four are not: Clark, Warren, Powell, and Jackson.¹³ Six of the ten most impactful scholars were

¹³ Their rankings based on scholarly impact are: Jackson (#13: 1312 citations); Warren (#19: 657 citations); Powell (#20: 614 citations); and Clark (#22: 521 citations).

former law professors: Holmes, Frankfurter, Scalia, Ginsburg, Douglas, and Burger. Presumably, former law professors have an edge on producing impactful scholarship. Notably, the scholarly impact of several of the ten most impactful scholars depends primarily or exclusively on one particularly impactful article. For example, Holmes's article, *The Path of the Law*, received 3600 of his 5379 citations; Brandeis's article, *The Right to Privacy*, received 4002 of his 4110 citations; and Brennan's article, *State Constitutions and the Protection of Individual Rights*, received 1855 of his 4699 citations.

CONCLUSION

This article identifies the ten most scholarly Supreme Court justices, based on both productivity and impact. The results suggest that scholarly productivity and scholarly impact are only partially correlated. They also suggest that scholarly productivity peaked in the mid-20th Century, but scholarly impact is broadly distributed.





A TOP TEN RANKING OF THE U.S. SUPREME COURT

MOST TWEETABLE JUSTICE

AN EMPIRICAL STUDY

Jack Metzler

TWITTER¹ has profoundly changed how people communicate with one another and learn about the world. In less than a decade since it first launched, Twitter has become the place where all news breaks first, where political revolutions are launched, and where presidential campaigns are conducted.² The service has more than half a billion users, who use Twitter to talk about the news, follow celebrities, support sports teams, conduct business, and learn about one another. Twitter has touched every area of human interaction, and the law is no exception.³ Thus, although

Jack Metzler tweets @SCOTUSPlaces.

¹ Twitter is a social-networking tool that allows its users to post short messages – no more than 140 characters – called “tweets.” Users can “follow” other users, whose tweets then appear in a personalized feed. Users can respond to others’ tweets directly, and may also “retweet” them to the user’s own followers. *See generally* en.wikipedia.com/wiki/Twitter. Users can access Twitter with a web browser or via a smartphone app. *Id.*

² *See, e.g.,* Dave Lee, How Twitter changed the world, hashtag-by-hashtag, BBC News, www.bbc.com/news/technology-24802766 (Nov. 7, 2013).

³ Twitter users include countless legal professionals. A sampling of just a few prominent users includes prominent Supreme Court advocates (*e.g.*, @KannonShanmugam, @johnpelwood, @TomGoldsteinSB), the editor of Black’s Law Dictionary (@BryanAGarner), the leading Fourth Amendment scholar (@OrinKerr), several

no member of the Supreme Court uses Twitter officially (yet),⁴ the world needs to know which Justice is most “tweetable.”

By “most tweetable” I do not mean “most quotable.” To the contrary, there is no particular quality that makes a statement worth tweeting.⁵ Since its inception, Twitter has permitted, and even celebrated, tweeting all manner of inconsequentialities.⁶ But Twitter does have a feature that provides a basis to rank the Justices from most- to least-tweetable; namely, the 140-character limit on the length of tweets. A statement that is more than 140 characters is not “tweetable” absent editing, abbreviation, awkwardly splitting the message up into multiple tweets, or posting the message as an image.⁷ Thus, unlike other Supreme Court Justice rankings, which involve subjective factors, lead to endless debate, and offer no reliable answers,⁸ tweetability can be accurately determined as an empirical matter.

Justices of the Supreme Court of Texas (*e.g.*, @NathanLHecht, @judgejeffbrown, @JeffBoydTX), and the Tweeter Laureate of Texas (@JusticeWillett).

⁴ Numerous accounts bear the names of Justices, their photographs, or both, but none of them seriously purport to be the real Justice. *E.g.*, @ChiefJusticeJR; (tagline: “John Roberts is my name, judicial review is my game.”); @Justice_Scalia (“PARODY account (Or is it?)”); @AKennedySCOTUS (“Justice of the United States Supreme Court.”); @FakeThomas; @FakeSotomayor; @JusticeKaganNot; @RuthBGinsburg (“Clinton nominated, since then I’ve dominated.”). Nor do any of these accounts feature Twitter’s coveted checkmark, denoting that the account owner has been verified. *Cf.*, *e.g.*, @JusticeWillett, @JudgeDillard.

⁵ *Cf.* Webster’s New Int’l Dictionary 2d Unabridged 2046 (1959) (defining “quotable” as “effective for quotation”).

⁶ The very first tweet set a good example: “just setting up my twttr”. *See* twitter.com/jack/status/20; *see also*, *e.g.*, @everyword (robot account that tweeted every word in the English language, one word per hour, from 2007 to 2014).

⁷ The Green Bag (@gb2d) employs this latter technique for its popular “Lunchtime Law Quiz.” *See* twitter.com/gb2d. Considering the accepted picture-to-word value ratio (1 picture = 1,000 words), tweeting an image is bargain: One image counts for 24 characters against the 140-character count.

⁸ “Significance,” for example, or “greatness.” *See*, *e.g.*, Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. Chi. Law Rev. 481 (1983); Lee Epstein et al., *The Supreme Court Compendium* 401-402, Table 5-8: Justices Rated “Great,” Selected Studies (3d Ed. 2003).

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Further, the most accurate measure of the Justices' overall tweetability is found by applying this tweetability metric to their statements and questions at oral argument. Unlike other potential data sources (*e.g.*, the Justices' opinions, other published writing, and speeches) oral argument questions are not part of a larger work. Moreover, the give-and-take of oral argument – in which Justices regularly interrupt advocates, crack jokes, and cut one another off – more closely resembles the group conversation that is Twitter than any other part of the Justices' work.⁹

Although the task of ranking the Justices by the length of their oral argument questions would otherwise be daunting, the SCOTUS Search project¹⁰ has compiled the statements made in Court's oral arguments into a searchable database. Given the obvious importance of the tweetability question, the operators of the site readily agreed to prepare custom queries for this project, with the following results:

TABLE 1: MOST TWEETABLE STATEMENTS

OT 2013		OT 2014	
1. Scalia	824	1. Scalia	828
2. Roberts	755	2. Sotomayor	700
3. Sotomayor	651	3. Roberts	650
4. Breyer	546	4. Breyer	509
5. Kennedy	383	5. Kennedy	350
6. Alito	321	6. Ginsburg	318
7. Kagan	277	7. Kagan	274
8. Ginsburg	263	8. Alito	232
9. Thomas	0	9. Thomas	0

Table One ranks the Justices by the raw number of oral argument statements they made during the 2013 and 2014 Terms that

⁹ At least any other part that is accessible to the public. Whatever happens at the Justices' conferences apparently stays at the Justices' conferences.

¹⁰ @SCOTUSSearch. For purposes of this study, a "statement" is everything between the name of a Justice and the name of the next speaker in an oral argument transcript.

occupied 140 or fewer characters. Under this metric, Justice Scalia runs away with first place for both Terms, consistently making around 825 tweetable statements each year, surpassing the second place finishers (Chief Justice Roberts and Justice Sotomayor) by wide margins (69 and 128 statements, respectively).

But that's not the end of the story. As shown in Table 2, Justice Scalia also leads both Terms in *total* oral argument statements. To avoid giving the honor of Most Tweetable Justice to the most *talkative* Justice,¹¹ the Justices are ranked in Table 3 by their Tweetability Average; that is, their tweetable statements divided by their total statements.¹² This measure shows the proportion of each Justice's statements that were tweetable in each Term. Here, the Chief Justice earns the award for 2013 with an impressive .634 average, 30 points higher than Justice Scalia at .604. The Chief improved his average 23 points to .657 in 2014, but Justice Scalia improved even more, overtaking the Chief with a 59-point improvement and a whopping .663 average.¹³

TABLE 2: TOTAL ORAL ARGUMENT STATEMENTS

OT 2013		OT 2014	
1. Scalia	1364	1. Scalia	1279
2. Roberts	1191	2. Sotomayor	1133
3. Breyer	1185	3. Breyer	1017
4. Sotomayor	1081	4. Roberts	989

¹¹ Most Talkative Justice merits its own award, although this analysis indicates that one might just call it the Scalia Award.

¹² The Justices' average character counts per statement were also determined, but no awards were possible because only one Justice (the Chief in OT 2014) averaged statements below the 140-character tweetability metric. His character-count average for that Term barely edged under the limit at 139.3 characters. Justice Breyer had the highest calculated character-count average at 287.2 characters in OT 2013.

¹³ All of the non-Thomas Justices improved on their 2013 average in 2014. Though Scalia's 59-point improvement was impressive, he ranks third in Most Improved Tweetability Average, behind Justice Ginsburg, who improved 69 points from .408 to .477, and Justice Kennedy, who improved 67 points from .515 to .582.

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OT 2013		OT 2014	
5. Alito	768	5. Kagan	723
6. Kagan	765	6. Ginsburg	666
7. Kennedy	743	7. Kennedy	601
8. Ginsburg	645	8. Alito	529
9. Thomas	0	9. Thomas	0
Total	7742	Total	6937

TABLE 3: TWEETABILITY PERCENTAGE

OT 2013		OT 2014	
1. Roberts	.634	1. Scalia	.663
2. Scalia	.604	2. Roberts	.657
3. Sotomayor	.602	3. Sotomayor	.618
4. Kennedy	.515	4. Kennedy	.582
5. Breyer	.461	5. Breyer	.500
6. Alito	.418	6. Ginsburg	.477
7. Ginsburg	.408	7. Alito	.439
8. Kagan	.362	8. Kagan	.379
9. Thomas	-	9. Thomas	-
All Justices	.519	All Justices	.559

The tweetability of Supreme Court Justices clearly warrants further study. It remains to be seen, for example, whether Justices Ginsburg and Kennedy will continue to surge in tweetability, particularly with Kennedy on the verge of breaking into the top three. The 2015 Term will also give the Chief Justice the opportunity to reclaim the top spot. Can Scalia sustain his stratospheric Tweetability Average? Will the Court as a whole continue to improve, or was the 2013 to 2014 increase an anomaly? And can Justice Kagan recover from two years straight as Least Tweetable Justice?¹⁴

¹⁴ Justice Kagan also had the Least Improved Tweetability Average, with only a 17-point improvement.

Finally, the Tweetability Rankings could also be expanded to cover such areas as argument-by-argument tweetability, and to find out how tweetable the Court has been historically. Indeed, is Justice Scalia the Most Tweetable Justice, or the Most Tweetable Justice Ever?





A TOP TEN RANKING OF THE U.S. SUPREME COURT

THE SISTREN

RANKING THE TOP 10 FEMALE SUPREME COURT JUSTICES

Meg Penrose

OF ALL THE “BEST” AND “WORST” Supreme Court lists published, there has never been a listing of the Top Ten female Justices. The reason for this scholarly void is simple: only four women have served on the Court. Indeed, only five women have been nominated. I am pleased to present the first, though admittedly incomplete, listing of the Top Ten female Justices.

I. BRETHREN AND SISTREN

At the current rate, 4 females in 112 Justices,¹ a complete “Top Ten” list should be available around 2075. This calculation is based on several factors, including the fact modern Justices serve lengthy terms, with most modern Justices’ tenure averaging over 25 years.² Longer terms equate to fewer appointments. Once women began to be included, however, they have experienced an increasingly

Meg Penrose is a Professor of Law at Texas A&M Law. Copyright 2015 by Meg Penrose.

¹ www.supremecourt.gov/about/faq_justices.aspx.

² www.supremecourt.gov/about/members.aspx.

higher percentage of appointments. Of the eleven Justices appointed since 1981, four (36% percent) have been women.³ Assuming the advancing ages of the current Justices portends the appointment of five Justices over the next twelve years, we could see two additional females appointed by 2027.⁴ Of course, this depends on whether a Democrat or Republican occupies the White House, as no Republican since 1981 has successfully nominated a female to the Court.⁵

President Reagan was the first President, and only Republican, to appoint a female Justice.⁶ President Clinton, with one of his two selections, added another female in 1993.⁷ Most recently, President Obama, using both his selections, consecutively appointed women for the first time in history, in 2009 and 2010.⁸

II. PERSPECTIVE

To place the dearth of female Justices in perspective, there are more Supreme Court Justices' *spouses* buried in Arlington National Cemetery than women having served on the Court. There have been twice as many Kentuckians (8) to serve on the Court as women.⁹ There have been more Justices born outside the United States (6) than female Justices.¹⁰ Justice William O. Douglas had as many wives as our nation has had female Justices.¹¹

³ *Id.*

⁴ Four current Justices are 77 or older (Ginsburg, Scalia, Kennedy and Breyer). www.supremecourt.gov/about/biographies.aspx. Two current Justices are over 65 (Thomas and Alito), two over 60 (Sotomayor and Roberts).

⁵ www.supremecourt.gov/about/members.aspx. Reagan's two other appointees, Scalia and Kennedy, remain on the Court. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Gardner, *Kentucky Justices on the U.S. Supreme Court*, 70 REGISTER OF KENTUCKY HISTORICAL SOCIETY 121 (1972)(eight natives, two residents).

¹⁰ www.supremecourt.gov/faq_justices.aspx (Justice Wilson, Scotland; Justices Iredell and Sutherland, England; Justice Paterson, Ireland; Justice Brewer, Turkey; and, Justice Frankfurter, Austria).

¹¹ Garrow, *The Tragedy of William O. Douglas*, THE NATION (March 27, 2003).

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More Justices have served the Supreme Court as law clerks (6) than women have sat on the Court.¹² More Solicitor Generals (5) have been appointed than women.¹³ There have been more Jewish Justices than women.¹⁴ And, there are more Catholics *currently* on the Court (6) than women that have served in the Court's history.

Rather than belabor the point, I shall begin ranking those serving, having previously served and two worthy of mentioning as *almost* serving. With only four women to account for, the criteria for inclusion necessarily loosens.

III. THE INCOMPLETE RANKING

While only four women have served on the Court, this essay ranks six women, in descending order, including the only failed female nominee and the only other woman to have been seriously considered, but ultimately passed over, for the Court.

*a. The "Pit Bull in Size 6 Shoes,"*¹⁵

In 2005, President George W. Bush nominated White House counsel, Harriet Miers, to become the 110th Justice.¹⁶ Like the women that have successfully ascended to the Court, Miers accomplished many firsts: "first woman hired by her law firm, in 1972; first woman president of the Dallas Bar Association, in 1985; first woman president of the Texas Bar, in 1992; and first woman president of her law firm, in 1996."¹⁷

¹² *Id.* (White, Rehnquist, Stevens, Breyer, Roberts and Kagan).

¹³ Smelcer, *From Solicitor General to Supreme Court Nominee*, CONGRESSIONAL RESEARCH SERVICE (June 23, 2010).

¹⁴ Five between 1916-1969 and three currently. Keister & Sherkat, eds., *RELIGION AND INEQUALITY IN AMERICA*, at 211.

¹⁵ *Harriet Miers Submits Resignation as White House Counsel*, USA TODAY (Jan. 1, 2007) (Bush's nickname for Miers).

¹⁶ Fletcher & Babington, *Miers, Under Fire From Right, Withdrawn as Court Nominee*, WASH. POST (Oct. 28, 2005).

¹⁷ *Id.*

Miers' nomination was bungled by opposition from the political right, left and split public opinion.¹⁸ Facing a likely negative vote, Miers voluntarily withdrew her nomination.¹⁹

b. Truman's Missed Opportunity

For a brief moment, it appeared the first woman to serve as an Article III judge, Florence Allen, would become the first female Justice.²⁰ Allen remains the ultimate pioneer for female lawyers: "first female assistant prosecutor in the country; first woman elected to sit on a court of general jurisdiction; and the nation's first female state supreme court justice."²¹ She also served as the Sixth Circuit's first female Chief Judge.²² Concerns about how a woman would blend in with the Brethren doomed Allen's seat.²³

c. The Woman Who "Saved Baseball"

Justice Sotomayor helped saved both professional baseball and football as a judge.²⁴ Still, some remember her more for her "wise Latina" musing that nearly thwarted her appointment. As a former prosecutor, it is unsurprising she is one of the most vigorous questioners during oral argument. She also has written passionate dissents from denials of certiorari, with a particular focus on criminal procedure and prisoner cases.

At this stage it is too early to know where Sotomayor will ultimately rank among the female Justices. She has penned 44 majority opinions, 31 concurring opinions and 32 dissenting opinions. For now, however, Sotomayor comes up just short of her Sistren.

¹⁸ *Miers Withdraws Nomination*, FOXNEWS.COM (Oct. 27, 2005).

¹⁹ *Id.*

²⁰ RBG, *Remarks on Women's Progress at the Bar and on the Bench*, 89 CORNELL L. REV. 801 (2004).

²¹ *Id.* at 805.

²² *Id.*

²³ *Id.*

²⁴ Gregory, *How Sotomayor 'Saved' Baseball*, TIME (May 26, 2009).

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d. "Shorty"

Despite her brief tenure, Justice Kagan distinguishes herself as an exceptional writer.²⁵ She has written 36 majority opinions, 7 concurring opinions and 12 dissenting opinions. Like all on this list, Kagan has achieved notable firsts: first female Dean of Harvard Law School and first female Solicitor General.²⁶ Her wittiness, as demonstrated by her recent Marvel Entertainment opinion, propels her to number three on this list.

Kagan is the only female Justice to have served as a judicial law clerk for another Justice.²⁷ In fact, it was her boss, Justice Thurgood Marshall, who dubbed her "Shorty."²⁸ She was the first Solicitor General, since Marshall, to be elevated to the Court.²⁹ Known for bringing frozen-yogurt to the Supreme Court dining room, Kagan has quickly made her indelible mark.³⁰

e. "The Original"

Justice O'Connor was the original. Being first does not always make one great. But, O'Connor is. She remains a heralded trailblazer, with a legacy of legislative and judicial achievements. O'Connor was the first female Majority Leader of any state senate.³¹ For nearly 25 years, she served the Court with grace and distinction. She authored 286 majority opinions, 183 concurring opinions and 161 dissenting opinions. The quintessential "swing vote," Justice O'Connor's opinions often carried greater weight than her single vote suggested.

She refers to herself as FWOTSC.³² All Americans should remain grateful to O'Connor for merging femininity with intellect and forging a path for all to follow.

²⁵ Rosen, *Strong Opinions*, NEW REPUBLIC (July 28, 2011).

²⁶ Smelcer, *supra* note 13.

²⁷ www.supremecourt.gov/faq_justices.aspx.

²⁸ Savage, *Kagan's Link to Marshall Cuts 2 Ways*, NY TIMES (May 12, 2010).

²⁹ Smelcer, *supra* note 13.

³⁰ Lithwick, *Her Honor*, NEW YORK MAGAZINE (NOV. 27, 2011).

³¹ *Sandra Day O'Connor Fast Facts*, CNN (March 23, 2015).

³² Michiko Kakutani, N.Y. TIMES BOOKS (March 4, 2013).

f. "Notorious RBG"

At age 82, Justice Ginsburg (a/k/a "Notorious RBG") has achieved cult status.³³ She has both an opera and movie written about her life. She is listed by Time Magazine as a Top 100 icon.³⁴ Having served over 20 years, RBG asserts there will be enough women on the Court when "there are nine."³⁵ She has authored 167 majority opinions, 98 concurring opinions and 120 dissenting opinions. While the ranking between O'Connor and RBG is close, admittedly all but interchangeable, I rank RBG as the foremost female Justice due to the continuation of her gender equity dedication once on the Court. Many see RBG as the Thurgood Marshall of the women's movement.³⁶ The cases she argued before the Court in the 1970s helped open the door for women in the law and, ultimately, judiciary.

For now, I toast Notorious RBG as number 1.³⁷



³³ NYU law student, Shana Knizhnik, originated the term. Lithwick, *Justice LOLZ Grumpycat Notorious R.B.G.*, SLATE.com (March 16, 2015).

³⁴ Alter, *RBG Upends the Notion of the Silent Justice*, TIME (Feb. 18, 2015).

³⁵ Fuller, *RBG owns a surprisingly large number of 'Notorious RBG' t-shirts*, WASH. POST (Oct. 20, 2014).

³⁶ Lithwick, *supra* note 33 (RBG won five of six cases she argued before the Court).

³⁷ With a closing nod to her infamous "not 100 percent sober" comment. Alter, *supra* note 34.



A TOP TEN RANKING OF THE U.S. SUPREME COURT

SUPREME SOUP STRAINERS

TOP TEN SUPREME COURT MUSTACHES

Brian M. Stewart

OF ALL THE DECISIONS MADE by Supreme Court Justices over the centuries, one question has persisted among the large majority of them: how to wear their facial hair. It may be difficult to see how justice has been shaped by how the Justices shaped their whiskers, but the subject deserves more than mere lip service. This article pays homage to the Supreme mustache – a difficult look to pull off. While many Justices have sported beards¹ or other facial hair,² the mustache stands alone as a historic symbol of masculinity and virility. Although the mus-

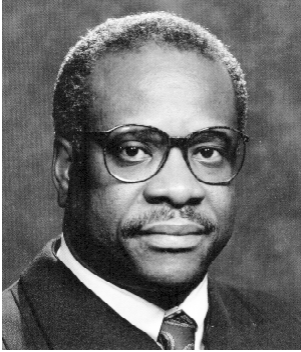
Brian M. Stewart owns Legal Mechanics, LLC and tweets @LawBlarg.

¹ Beards with mustaches: Stephen Johnson Field (1863-1897); William Burnham Woods (1880-1887); Stanley Matthews (1881-1889); Lucius Quintus Cincinnatus Lamar II (1888-1893); George Sutherland (1922-1938); Edward Terry Stanford (1923-1930); and Charles Evans Hughes (1930-1941) (goatee). Beards without mustaches: David Davis (1862-1877); Morrison Remick Waite (1874-1888); Howell Edmunds Jackson (1893-1895) (goatee); and Joseph McKenna (1898-1925).

² In the nineteenth century, numerous justices wore sideburns or chin whiskers without a mustache: Samuel Nelson (1845-1872); John Archibald Campbell (1853-1861); Noah Haynes Swayne (1862-1881); Horace Gray (1881-1902); Samuel Blatchford (1882-1893); and George Shiras, Jr. (1892-1903) (mutton chops).

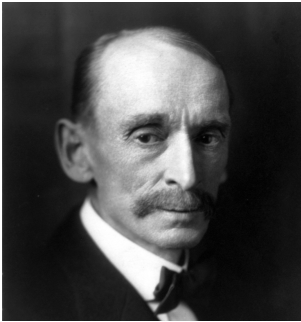
tache is currently out of style,³ some of the most important figures in Supreme Court history have had such nosy neighbors.

Judging the supremacy of Supreme Court mustaches is a purely subjective task. The mustaches below are judged based on the following criteria in some order: the prominence of the mustache, the size and scope of the mustache, and the mustache's role in the American legal system.



10. *Clarence Thomas* (1991-present): Justice Thomas is the last Justice to sport any facial hair, but his mustache has not always accompanied him during his tenure on the Court. The young Justice Thomas appointed in 1991 had dark, bristly lip whiskers, but as he has aged, he has sometimes been seen with a faint, wispy, gray mustache, or – gasp – no mustache at all. Furthermore, as Justice

Thomas lets his written opinions do his talking, his mustache has seen very little action in oral arguments. While Thomas's lip hair meets the textual definition of a mustache, it does not define Thomas, so it falls to the bottom of the list.



9. *William Rufus Day* (1903-1922): Some mustaches make their wearers appear distinguished or debonair. Others make their wearers appear sketchy. Day's mustache fell in the latter category. While Day had a distinguished career as Secretary of State and Supreme Court Justice, he is perhaps best known for his opinion striking down child labor restrictions in

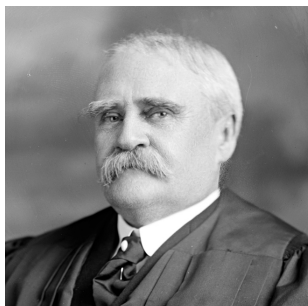
Hammer v. Dagenhart.⁴ Also, he may have taken advantage of a gypsy

³ See Alex Williams, *A Mustache Comeback? Not so Fast*, N.Y. TIMES, Nov. 12, 2014, www.nytimes.com/2014/11/13/fashion/a-mustache-comeback-not-so-fast.html.

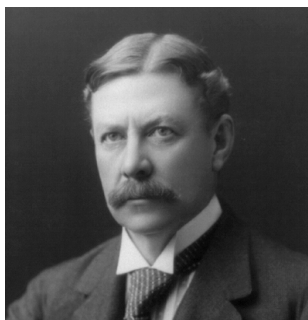
⁴ 247 U.S. 251 (1918).

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curse to get his non-lawyer son a clerkship with the Chief Justice.⁵ Did Day's mustache hide something sinister? We may never know.



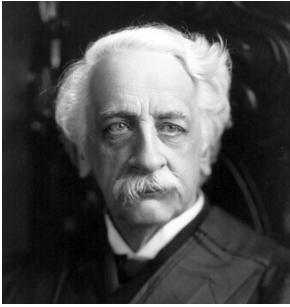
8. *Horace Harmon Lurton* (1910-1914): Lurton had a giant white fuzzy caterpillar resting on his upper lip. A former Confederate soldier, Lurton was the oldest justice ever appointed to the Court at age 65. Lurton's mustache – standing alone – is a fine example of a walrus mustache, but he served only four years on the bench before suffering a fatal heart attack. Because of the brevity of Lurton's time on the Court, his bushy lip whiskers did not make a significant mark on Supreme Court history.



7. *William Henry Moody* (1906-1910): Moody was appointed to the Court by Teddy Roosevelt, and like Roosevelt, had a thick, rugged mustache. Moody's mustache served in all three branches of the federal government as Moody ascended from four-term Representative to Secretary of Navy to U.S. Attorney General to the high court. Although Moody was highly regarded by his peers, his tenure as a Supreme Court justice was cut short due to illness. The years 1909-1910 saw the disappearance of three Supreme mustaches,⁶ clearly the darkest period for Supreme American facial hair.

⁵ See Todd C. Peppers, *The Supreme Court and the Curse of the Gypsy*, 13 GREEN BAG 2d 173, 182 (2010).

⁶ Justice Peckham died on October 24, 1909. Chief Justice Fuller died on July 4, 1910. Moody retired on November 20, 1910.



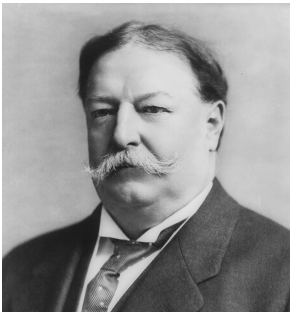
6. *Rufus Wheeler Peckham* (1895-1909): The early twentieth century was the premier time to be a mustachioed Supreme Court Justice. It was not the premier time to be a baker, though, thanks in part to Peckham's opinion in *Lochner v. New York*.⁷ Peckham may have spent his working hours twirling his bushy white crumb catcher, but the *Lochner* era marked a

terrible time for workers' rights – aside from the dubious right of freedom of contract. Because of his lack of empathy for the mustachioed masses, Peckham falls to the bottom half of the list.



5. *Cass Gilbert*: The architect of the Supreme Court building, Gilbert's influence on the American legal system may outlast that of any individual Justice. Prior to 1935, the Justices had no true home, meeting in a section of the Capitol. Gilbert, one of America's greatest architects with one of America's greatest mustaches, was tasked with designing

something permanent for the Supremes. Gilbert's elegant, waxed mustache gave him an air of dignity. His magnificent design did the same for the Court itself.

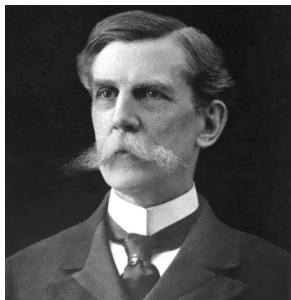


4. *William Howard Taft* (1921-1930): We have now reached the upper echelon of Supreme lip foliage. Taft holds the distinction of being the last President ever to wear facial hair. But after losing the election of 1912 to the clean-shaven Woodrow Wilson, Taft was appointed Chief Justice in 1921 by the clean-shaven Warren G. Harding. Taft and his great

⁷ 198 U.S. 45 (1905).

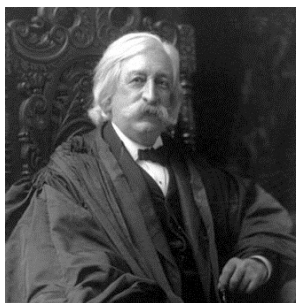
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handlebar mustache transformed both the role of the Chief Justice and the Court itself, as Taft persuaded Congress – and Gilbert – to build the modern Supreme Court building. For Taft, the Chief Justice position was his dream job and he was highly regarded in that role. Future Chief Justices can learn much from Taft's leadership; everyone can learn much from his historic mustache.



3. *Oliver Wendell Holmes, Jr.* (1902-1932): There is not enough space in this article to extol the virtues of the “Yankee from Olympus” or his magnificent mouth-brow. Holmes’s distinctive white military mustache curved down and out and extended past the edges of his face. When asked about how he could grow such a thick mustache, Holmes – refer-

encing his service as a Union soldier – coolly asserted, “Mine was nourished in blood.”⁸ Nicknamed “The Great Dissenter,” Holmes was never afraid to distinguish himself either in his opinions or his appearance. His wisdom helped end the *Lochner* era and advance the right of free speech, but his views on eugenics might best be described as imbecilic.⁹



2. *Melville Fuller* (1888-1910): “It is delicious to be full. But it is heavenly to be Fuller.” So penned Mark Twain when mistaken for Chief Justice Fuller and asked for his autograph.¹⁰ With his long white hair and bushy handlebar mustache, Fuller greatly resembled Twain. Like Twain, Fuller’s mustache gave him a distinctive, iconic look. The first Jus-

⁸ ROBERT W. GORDON, *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 167 (1992).

⁹ See *Buck v. Bell*, 274 U.S. 200 (1927) (defending forced sterilization by declaring, “Three generations of imbeciles are enough.”)

¹⁰ See *Chief Justice Melville Fuller Dies Suddenly*, L.A. HERALD, July 5, 1910, at 2.

tice to dare to wear a flavor saver, Fuller ushered in a golden age of Supreme Court mustaches that would last until 1932. Highly regarded at the time of his appointment¹¹ and the time of his death, his Chief Justache is stained by the Fuller court decisions in *Lochner* and *Plessy v. Ferguson*.¹²



1. *Thurgood Marshall* (1967-1991): Modest and unassuming, Marshall's mustache accompanied him from Lincoln University to Howard Law to the Supreme Court. Together with his mustache, Marshall argued thirty-two cases before the Court, winning twenty-nine of them. Marshall's mustache was on his lips when he successfully argued *Brown v. Board of Education* before the all-white, clean-shaven Warren Court. When Marshall

was appointed in 1967, he not only broke the Court's color barrier, he ended a twenty-six year lull in Supreme facial hair that began with the retirement of Charles Evans Hughes's goatee in 1941. Marshall sat on the Court for twenty-four years, never abandoning his furry friend. In all, Marshall's mustache spanned eight decades. Would Marshall have accomplished all he did without his wondrous whiskers? The world will never know, as the two were inseparable. The portraits and statues and busts and stamps that honor Marshall's legacy all bear his trademark "mo." Marshall's simple chevron mustache was connected not merely to his lip; it was connected to history. And the history witnessed by Marshall's mustache makes it the most Supreme 'stache of them all.



¹¹ See, e.g., *Chief Justice Fuller*, 1 GREEN BAG 1 (1889).

¹² 163 U.S. 537 (1896).



A TOP TEN RANKING OF THE U.S. SUPREME COURT

EXTRACURRICULAR SCRIVENING

TOP TEN SUPREME COURT BIBLIOGRAPHIES

Patric M. Verrone

SINCE JOHN JAY CO-AUTHORED *The Federalist Papers* in 1788,¹ there have been almost as many books published by Supreme Court justices as there have been justices. But the distribution is far from even. While the majority of the 112 justices in the Court's history published nothing (besides judicial opinions), almost a third produced at least one book. A handful managed a second bite of the publisher's apple and an even smaller number have danced with the printer's devil thrice or more.

Patric M. Verrone is a California attorney and TV writer whose credits include The Tonight Show Starring Johnny Carson, The Simpsons, and Futurama. Copyright 2015 by Patric M. Verrone.

¹ This is the date of the "book" version of the work (written with Alexander Hamilton and James Madison). Two long pamphlets written by James Wilson predated this appearance — *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774) and *Considerations on the Bank of North America* (1785), but neither appeared in book form until the posthumous *Collected Works of James Wilson* in 1804.

Justices have shown a clear predilection for writing. Several had pre-Court careers as newspaper publishers or editors.² Others fancied themselves biographers³ and, although a recent trend, many justices have written their memoirs.⁴ There has even been dabbling in poetry.⁵

Overwhelmingly, the subject matter of these works has been the law, including the workings of the Supreme Court itself.⁶ Some justices wrote volumes of laws.⁷ Others collected opinions for reports and case books.⁸ Still others have published collections of speeches or lectures. The first of these was Oliver Wendell Holmes's classic *The Common Law* (1881).

The ranking of the top ten literary justices did not dare assess the quality of these works; merely the quantity. Because of a tenth place tie, like the famous Spinal Tap amplifier, this list "goes to eleven" and it is herein presented in a Lettermanic countdown of reverse prolificness:

² Newspaper publishers included Henry Baldwin (*The Tree of Liberty*), John McLean (*The Western Star*), and John H. Clarke (*The Youngstown Vindicator*) while Stanley Mathews (*Tennessee Democrat*) and Melville Fuller (*The Augusta Age*) were editors. Oliver Wendell Holmes was an editor of *American Law Review*, Louis Brandeis helped found *The Harvard Law Review*, and Ruth Bader Ginsburg was a co-founder of *Women's Rights Law Reporter*.

³ John Marshall wrote *Life of George Washington* (1805-07) while William Johnson wrote *Sketches of the Life and Correspondence of Nathanael Greene* (1822).

⁴ James F. Byrnes wrote the first (*Speaking Frankly*, 1947) and the most recent was Sonia Sotomayor's, published in both English (*My Beloved World*) and Spanish (*Mi mundo adorado*) in 2013.

⁵ Brockholst Livingston wrote *Democracy: an Epic Poem* under the pseudonym Aquiline Nimblechops in 1794.

⁶ See, e.g. Owen Roberts's *The Court and the Constitution* (1951) and Robert H. Jackson's *The Supreme Court in the American System of Government* (1955).

⁷ James Iredell codified the laws of North Carolina in 1787; Oliver Ellsworth wrote the Judiciary Act of 1789; Stephen J. Field drafted California's first state criminal and civil codes in 1851; and Horace H. Lurton wrote the Federal Equity Rules in 1912.

⁸ Bushrod Washington compiled an edition of cases from the Virginia Court of Appeals in 1796; Samuel Blatchford published Circuit Court reports in the 1850s and '60s; Benjamin R. Curtis issued Circuit Court and Supreme Court digests around the same time; and Henry B. Brown published two admiralty case volumes (in 1876 and 1896).

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10. (Tie) *Arthur Goldberg* published three works, none during his term on the Court. He wrote *AFL-CIO, Labor United* (1956) before he served, and *The Defenses of Freedom* (with Daniel Patrick Moynihan, 1966) and *Equal Justice: The Warren Era of the Supreme Court* (1972) after he resigned.

10. (Tie) *Antonin Scalia* published *A Matter of Interpretation: Federal Courts and the Law* in 1998. He has written two other books (with Bryan A. Garner): *Making Your Case: The Art of Persuading Judges* (2008) and *Reading Law: The Interpretation of Legal Texts* (2012). It's certainly possible that he could bump Goldberg off the list before he's finished.

9. *David J. Brewer* was the first of three justices with four published works but, unlike the others, all of his appeared during his tenure on the Court. He published three collections of speeches: *The Pew to the Pulpit* (1897), *American Citizenship* (1905), and *The Mission of the United States in the Cause of Peace* (1909). His fourth title, *The United States: A Christian Nation* (1905) was original.

8. *Louis Brandeis* had all his publications appear before he served on the Court. His most famous work, *The Right to Privacy* was co-written with Samuel Warren for the *Harvard Law Review* in 1890 (reprinted in book form many times since). His three other works were *Scientific Management and Railroads* (1912), *Other People's Money: And How the Bankers Use It* (1914), and *Business – A Profession* (1914).

7. *Felix Frankfurter* wrote chiefly during his time as a Harvard Law School professor. *The Business of the Supreme Court: A Study in the Federal Judicial System* (with fellow professor James M. Landis) and *The Case of Sacco and Vanzetti* (initially an *Atlantic Monthly* article) both appeared in 1927 while *Mr. Justice Holmes and the Supreme Court* came out in 1938. The autobiographical *Felix Frankfurter Reminisces* was published near the end of his term in 1960.

6. *Benjamin Cardozo*, the earliest of three justices to produce five books, published *The Altruist in Politics* years after delivering it as his commencement address at Columbia in 1889. He released *The Nature of the Judicial Process* (1921), *The Growth of the Law* (1924), and *The Paradoxes of Legal Science* (1928) while on the New York Court of Appeals. His only edition published while on the Court was *Law and*

Literature and Other Essays and Addresses (1931).

5. William Rehnquist, the only Chief Justice on the list, wrote all five of his books (all with Supreme Court themes) during his tenure as Chief: *The Supreme Court* (1987); *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (written in 1992, years before he served as judge for President Bill Clinton's impeachment trial); *All the Laws but One: Civil Liberties in Wartime* (1998); and *Centennial Crisis: The Disputed Election of 1876* (written in 2004 after the similarly disputed 2000 presidential election).

4. Sandra Day O'Connor spent her entire Court career with Stanford Law classmate William Rehnquist and, like him, she also published five works. Two were autobiographical, released during her tenure: *Lazy B: Growing up on a Cattle Ranch in the American Southwest* (written with her brother H. Alan Day in 2002) and *The Majesty of the Law: Reflections of a Supreme Court Justice* (2003). Two others were books for children (both semi-autobiographical): *Chico* (2005) and *Finding Susie* (with Tom Pohrt, 2009). Her latest, *Out of Order: Stories from the History of the Supreme Court* came out in 2013.

3. Stephen Breyer has the most works of any member of the current Court. Before his tenure, he wrote *Energy Regulation by the Federal Power Commission* (with Paul W. MacAvoy, 1974) and *Regulation and Its Reform* (1984). Since taking office, he has penned *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1995), *Active Liberty: Interpreting Our Democratic Constitution* (2006), *America's Supreme Court: Making Democracy Work* (2010), *Making Our Democracy Work: A Judge's View* (2011), and *The Court and the World: American Law and the New Global Realities* (2015). He also has the lead credit on a casebook currently in its seventh edition called *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (with Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule, and Michael Herz, 2011).

2. Joseph Story was a longtime professor at Harvard Law School who was responsible for several legal "Commentaries" between 1832 and 1835 (including bailments, conflicts of law, and equity jurisprudence); early law textbooks written from 1838 through 1845 (on agency, partnership, and promissory notes); as well as three different volumes on the U.S. Constitution (published in 1833, 1834,

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and 1847). He also wrote an epic poem *The Power of Solitude* (1804); drafted and edited numerous entries for the *Encyclopedia Americana* (1830); and published a volume of *Miscellaneous Writings* (1835).

1. *William O. Douglas* was by far the most prolific writer among Supreme Court justices. He published almost as many works as the rest of this list combined, nearly all of them while he was a sitting justice. His first of over thirty volumes was *Democracy and Finance* (1940) and the last was the second part of his best-selling autobiography *The Court Years: 1939 to 1975*, published just after his death in 1980. His works include political commentary (*Democracy's Manifesto*, 1962); international diplomacy (*International Dissent: Six Steps towards World Peace*, 1971); environmental and conservation writings (*My Wilderness: The Pacific West*, 1960); travelogues (*Strange Lands and Friendly People*, 1951); memoirs (*Go East, Young Man*, 1974); and even legal analysis (*A Living Bill of Rights*, 1961). As the longest serving justice ever and with the decline of the printed word, Douglas has likely written his way to the top of this list forever.

