Neglected Justices: Discounting For History

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INTRODUCTION

The category of "neglected Justices" presupposes meaningful baselines for evaluating judicial reputations. A Justice cannot be deemed "neglected" except against the backdrop of some purported consensus about that Justice's reputation and the reputations of other Justices. Moreover, when the category of "neglected Justices" encompasses the performance of Justices who served in different time periods, it also presupposes that evaluative baselines for Justices can retain their integrity in the face of historical change and historical contingency.

This Article argues that when one discounts for history in the process of evaluating judicial reputations, the effects of history are sufficiently powerful to throw into question the integrity of baselines for evaluating Justices, especially when comparing the performance of Justices across time.

The Article reaches three related conclusions. First, "neglected" Justices, considered in the flow of time, are not a small category of underappreciated or obscured Justices, but rather the norm. Second, the number of Justices who remain visible over time is quite small, and the visibility of those Justices is based on their association with
one or more of the comparatively few legal ideas that have remained resonant for long periods of American legal history. Third, the formidable historical difficulties that stand in the way of recovering judicial reputations, coupled with the implicit tendency of successive generations of commentators to equate visibility with familiarity, leave history as the chief determinant of whether a Justice is neglected.

In support of the Article’s general argument, three illustrations of the effects of history on judicial reputations are discussed. The illustrations are designed to show

—how the availability of evidence about a Justice’s career can obscure understandings of how that Justice’s contemporaries evaluated his performance;

—how changing cultures of information about Justices can distort those understandings; and

—how the twentieth- and twenty-first-century literature “ranking” Justices reveals the difficulty of formulating criteria for evaluating judicial performance that can be applied across time, as well as the tendency of those participating in the rankings process to “lose touch” with all but a very few Justices who served in remote time periods.

I. THOMAS TODD’S “INSIGNIFICANCE”

In the 1980s David Currie and Frank Easterbrook, in separate articles, labeled Thomas Todd, a member of the Marshall Court from 1807 to 1826, as the most “insignificant justice” in the Court’s history.¹ They drew their characterization of Todd from five features of his career. First, during the eighteen years of his tenure on the Court, he authored only fourteen opinions. Second, he was absent for the Court’s entire session in six Terms during his tenure. Third, he wrote only one dissenting opinion, in an indemnity bond case, of five lines. Fourth, he authored no constitutional opinions during his tenure.² Finally, of the eleven “opinions of the Court”³ that Todd wrote, ten involved “western

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² Currie, supra note 1, at 470; Easterbrook, supra note 1, at 491–94.

³ It is important, in discussing opinions issued by Justices on the Marshall Court, to distinguish between what was presented as an “opinion of the Court” and what we would now call a “majority” or a “unanimous” opinion. The latter terminology presupposes a Court protocol in which all the votes of the Justices, in all cases accompanied by opinions, are published in the U.S. Reports. That protocol did not exist during Marshall’s tenure; in fact, it did not exist until the 1940s. A quite different protocol about the issuance of opinions was in place between 1801 and 1835. Under that protocol the opinion of the Court was typically delivered by, and written by, one Justice (very commonly Chief Justice Marshall). Drafts of that opinion were not normally circulated among the other Justices before it was delivered, nor in the interval between its
lands" cases, typically title disputes over land in Kentucky, Tennessee, and Ohio that had once been within the western boundaries of Virginia or North Carolina. Title disputes involving those former Virginia and North Carolina "western lands" frequently involved nonresident claimants from those states filing against occupants of land in Kentucky, Tennessee, or Ohio. Because of diversity of citizenship, many western lands disputes could be brought in the federal courts and were regularly certified to the Supreme Court from those courts. On their faces, the cases decided only which party had a superior title to a particular tract of land.4

From a modern perspective, those features of Todd’s career would seem to qualify him for insignificance. But a closer look reveals that each of the features identified and assigned weight in labeling his performance is deceptive in its import. This deceptive quality is a product of the fact that some information about Todd’s career has not been easily available, and the significance of other information has been obscured over time.

issuance and its publication in the Court’s Reports. Moreover, opinions of the Court did not usually identify the number of Justices who had subscribed to their reasoning. This was because accompanying the opinion of the Court protocol was a practice known as “silent acquiescence,” in which Justices who had voted for a different disposition of the issues in a case agreed not to publicize their disagreements. Thus it was possible, for most of the years of Marshall’s tenure, for an opinion of the Court to have reflected the views of all the Justices, a bare majority, or some thing in between.

When one compiles authorship of opinions of the Court by Marshall Court Justices, then, it is generally not possible to know whether the reasoning of those opinions was subscribed to by the author’s fellow Justices. Indeed, in many cases, the other Justices on the Court would not have been aware of the contents of an opinion of the Court when it was delivered, or when it subsequently appeared in the Court’s Reports. Calling Marshall Court opinions “majority” or “unanimous” opinions, in all but a few cases where they were identified as such, is thus anachronistic.

4. Another stark contrast between the Marshall Court and modern Courts can be found in its jurisdictional requirements. During Marshall’s tenure, cases that met the requirements of Article III and the Judiciary Act of 1789 could come to the Court’s docket in two ways. One was through appeals from decisions of the highest courts of states, on constitutional questions, under section 25 of the Judiciary Act. The other, far more common way, was through the “certificate of division” procedure, under which questions in cases that qualified to be heard by lower federal courts, and could automatically be appealed to the federal circuit courts of appeal, were “certified” to the Court when the two circuit court judges (one of whom was the Supreme Court Justice assigned to the relevant circuit) stated that they disagreed on the disposition of the questions. In the early years of the Marshall Court, these divisions were often “pro forma,” indicating that the two judges were agreeing to disagree in order to have the questions resolved by the Supreme Court of the United States. The result of the certificate of division procedure was that a large number of “ordinary” common law disputes involving parties who were citizens of different states were placed on the Marshall Court’s docket. Disputes over titles to lands in Kentucky, Tennessee, and Ohio frequently involved competing claims by in-state residents occupying land and out-of-state persons asserting title to that land on the basis of a grant from a nonresident or the U.S. government. For a fuller discussion, see G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 157–81, 753–78 (1988).
Todd's output of opinions, and the fact that he wrote no constitutional opinions, needs to be evaluated in the context of the Marshall Court's assignment practices. Marshall did not assign opinions on an equal basis. Marshall wrote far more opinions than his colleagues, and he wrote nearly all of the opinions in constitutional cases (not writing only on the few occasions when he recused himself or differed from the majority). 5 Between the 1816 and 1823 Terms, all but one of which Todd attended, the Court issued 302 opinions. Marshall wrote 124 of those; two other Justices, Joseph Story and William Johnson, wrote 113, and the remaining four Justices, Bushrod Washington, Brockholst Livingston, Gabriel Duvall, and Todd, wrote sixty-five. 6 Marshall wrote the opinions in all but two of the constitutional cases. 7 Todd's output of opinions over the course of his career actually compared favorably with that of Duvall, who produced fifteen in his twenty-three years on the Court. 8

In addition, a facial comparison of Todd's opinions with his years of tenure as a Supreme Court Justice gives a misleading impression of his output. Although Todd was appointed to the Court in 1807 and remained until 1826, he actually participated in only ten Terms during that time span. His absence from several of the Court's Terms was a function of the barriers that geography and rudimentary transportation posed for travelers in early nineteenth-century Kentucky, Tennessee, Ohio, and western Virginia, the areas covered by his circuit.

The Court's session in Washington during Todd's tenure typically lasted only from early February to the middle of March, and to get to Washington from his home in Frankfort, Kentucky, Todd had to travel over 500 miles on various forms of horse-driven transportation, over roads that were often inaccessible in the winter months. His route, which took him through southeastern Ohio and what would become West Virginia, involved crossing several rivers,


6. WHITE, supra note 4, at 184 (citing vols. 14–21 (1–8 Wheat.) of the U.S. Reports (1816–23)).


8. WHITE, supra note 4, at 191.
and there is evidence that in one year, 1809, he set out for Washington only to find that accumulated snow and rain had washed out roads and bridges, forcing him to abandon the effort in Chillicothe, Ohio, one of the courthouse locations on his circuit. Since there is no evidence that Todd had problems with his health during the first decade of his tenure, one can surmise that travel difficulties also may have prevented him from traveling to Washington for the 1813, 1815, and 1819 sessions. He was too ill to attend the 1823 and 1825 Terms, and he died in the midst of the 1826 Term. He also did not attend the 1807 Term, having been appointed after the Court's session closed. Thus, a more precise calibration of Todd's output yields fourteen opinions in ten working Terms over the course of his career.

It was no accident that most of Todd's opinions for the Court came in western lands cases; those cases were more important to Todd's contemporaries than they might appear to modern observers. The ownership and use of land was a foundational activity in early nineteenth-century America: land was both a potentially profitable speculative commodity and a means of achieving self-sufficiency and prosperity through agricultural householding. Todd had been a specialist in the law of land disputes and land titles for his entire career as a lawyer in western Virginia and Kentucky and as a judge, and then Chief Judge, of the Kentucky Court of Appeals. Understanding the intricacies of land title disputes in trans-Appalachian states was a valuable skill in early nineteenth-century America, and Todd's appointment to the Court came when Congress was creating a new circuit that would encompass three of those states. In fact, most of Todd's opinions as a Kentucky high court judge and a federal circuit judge were about land title disputes. However, none of them has survived; the Kentucky opinions were

9. Letter from Thomas Todd to Charles Todd (May 15, 1809), quoted in Letters of Judge Thomas Todd, of Kentucky, to His Son at College, 22 WM. & MARY Q. 20, 28 (1913). The distance between Lexington, Kentucky, and Wheeling, Virginia (now West Virginia), would have been approximately 275 miles, and would have required the crossing of about seventeen rivers, including the massive Ohio River twice. One can only imagine how long it took Todd to get from Frankfort to Chillicothe in the winter of 1809, let alone how long it would have taken him to get to Wheeling, which was still at least 250 miles from Washington. Thus even under the best conditions, and allowing for the most direct routes, Todd was required to travel more than 500 miles just to attend the Marshall Court's sessions.

10. Very little has been written on Todd's career. His private papers and many of his Circuit Court opinions have not survived. The most extensive overview of his career remains Fred L. Israel's entry in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 407-12 (Leon Friedman & Fred L. Israel eds., 1969); see also WHITE, supra note 4, at 318-21.

11. Supra note 10.
destroyed in a fire in 1804 and the reporting of lower federal court opinions was haphazard in the early nineteenth century.\textsuperscript{12}

The constitutional case of \textit{Green v. Biddle}\textsuperscript{13} illustrates the larger implications of western lands cases for Todd’s contemporaries. Although it originated in a title dispute in Kentucky, it raised the question of whether the original seaboard states, in ceding trans-Appalachian lands to new states coming into the Union, could in the process control the rules for determining title to land in those states. When Kentucky joined the Union, its boundaries were composed of “western lands” in the Virginia colony’s original grant. In a “compact” between Virginia and Kentucky formalizing the cession of those lands, the two states agreed that “all private rights and interests in lands” in Kentucky that were originally part of the Virginia grant should remain valid, and title to those lands should be determined by the law of Virginia.\textsuperscript{14} As part of the process by which Kentucky joined the Union in 1792, Congress ratified the compact. This meant in effect that all title claims to Kentucky land by Virginia residents could be upheld in Kentucky courts and that Virginia law would govern those claims. Any Kentucky resident occupying land in Kentucky, regardless of how the land had been used, could face eviction and a suit for rents and profits under Virginia law. This was the case even though many of the title claims of Virginia residents to western lands, which arose out of land warrants issued by the state treasury or as bounties for service in the Seven Years’ or Revolutionary wars, were to land that had not even been surveyed.\textsuperscript{15}

To protect Kentucky residents who, in the process of moving to the new state, had bought land from speculators, surveyed it, occupied it, and begun to improve it, the Kentucky legislature passed two statutes between 1797 and 1812 providing that where an occupying claimant to land in Kentucky could establish a “clear and connected” title, that claimant would not be exposed to a suit for rents and

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\item[12.] A great many western land claims disputes qualified after Kentucky, Tennessee, and Ohio joined the Union, since they pitted in-state occupants of land against out-of-state claimants whose alleged titles derived from Virginia warrants, and since the value of disputed lands often met jurisdictional thresholds. For more detail, see WHITE, \textit{supra} note 4, at 761–77. Details of Todd’s career are drawn from Israel, \textit{supra} note 10, at 407–09. On the reporting of federal cases in the early nineteenth century, see WHITE, \textit{supra} note 4, at 385–91; Craig Joyce, \textit{The Rise of the Supreme Court Reporter}, 83 \textit{Mich. L. Rev.} 1291 (1985).
\item[13.] 21 U.S. (8 Wheat.) 1 (1823).
\item[14.] The compact language is set forth in \textit{Green}, 21 U.S. at 3.
\item[15.] For a discussion of Virginia’s system of disposing of western lands, see WHITE, \textit{supra} note 4, at 755–63.
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profits. They also required nonresidents with superior titles to pay occupants the value of any improvements to the land.¹⁶

When, in *Green v. Biddle*, both the statutes were challenged as impairments of the obligation of contracts and interferences by a state with Congress’s power to ratify compacts between states, the political ramifications for Todd and his contemporaries were obvious. Invalidating the statutes would render the title to vast tracts of Kentucky land insecure and would impede incentives to develop land in the state. Upholding the statutes would contravene constitutional language preventing state legislatures from upsetting preexisting contractual obligations and would invite states to challenge congressionally sanctioned interstate agreements that, in retrospect, they disliked. When *Green v. Biddle*, originally brought in federal district court in Kentucky, was appealed to Todd’s circuit court, he promptly certified it to the Supreme Court, where it was heard in the 1821 Term.¹⁷

Todd was a symbolic figure in *Green v. Biddle*. He had been born in Virginia, educated there, and begun his career as a lawyer there. He moved to Kentucky before it joined the Union and was a pivotal figure in that process, having served as clerk to the Kentucky state convention in 1792 and as secretary of the Kentucky legislature between 1792 and 1801. Before his appointment to the Marshall Court, he had been the acknowledged expert on land law in Kentucky, in his capacity as lawyer, clerk to the legislature, and judge, for fifteen years. He was a landowner in Kentucky. He was also committed to the view that the Kentucky legislature could not change the terms of the law that would govern title disputes to former Virginia western lands in Kentucky. When Story delivered an 1821 opinion in *Green v. Biddle* declaring that the Kentucky statutes materially impaired the “rights and interests” of Virginia claimants to Kentucky land, Todd joined it.¹⁸

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¹⁶. For reference to the statutes, see *Green*, 21 U.S. at 4–7.
¹⁷. *Id.* at 10. The staffing of the federal circuit courts, and the certificate of division procedure, anticipated that Justices who had participated in the certification of cases from their circuits would pass on the issues certified to the Court. The great majority of cases certified to the Court from circuit courts were not accompanied by opinions at the circuit court level. In many cases, in fact, the “division” of the circuit judges was “pro forma,” which meant that they agreed to disagree in order to allow the Supreme Court to rule on the issues on which they professed division. The practice anticipated that the Supreme Court Justice, in his capacity as circuit judge, had the privilege of seeking a pro forma division if he chose. Thus, Todd had a hand in facilitating the Court’s decision of the issues raised in *Green v. Biddle*. For more on the certification of division practice as it was employed by Marshall Court Justices, see WHITE, *supra* note 4, at 173–80.
¹⁸. For a discussion of Story’s opinion, see WHITE, *supra* note 4, at 642–45.
His vote signaled that he favored the sanctity of contracts over the interests of his fellow residents.

Marshall, whose family had claims to large tracts of land in Kentucky, and Washington, who had missed the 1821 Term, did not join Story's opinion, but Johnson, Livingston, and Duvall supported it along with Todd. Yet the opinion was withdrawn a mere week after it was delivered. This was because Henry Clay, who represented Kentucky in the Senate, appeared before the Court and pointed out that no counsel representing Biddle, the Kentucky occupant, had appeared to argue the case. Clay also contended that invalidating the Kentucky statutes would have a devastating effect on the security of land titles in Kentucky. Clay moved that the case be reargued in the Court's 1822 Term, and that motion was granted.20

The Court did not decide _Green v. Biddle_ until the 1823 Term, however, and Todd missed that Term because of illness. Story wrote Todd, in March 1823, that there had been "many struggles" within the Court until _Green v. Biddle_ was "definitely settled." He noted that his 1821 opinion had been replaced with an opinion written by Washington, although Story saw "no reason to take [it] back," and that the Justices "wanted [Todd's] firm vote on many occasions" during the Term.21 He also told Todd that "many of the Kentucky causes," other western lands disputes that had come before the Court, had been "continued, solely on account of your absence."22 Washington's opinion in _Green v. Biddle_, formally joined only by Story and Duvall (Livingston was too ill to attend the 1823 Term and Johnson concurred separately), invalidated the Kentucky statutes but noted that Kentucky could use its eminent domain power to take title to vacant land within its borders, provided that it compensated the landowners.23

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19. Relatives of Marshall had made claims of ownership to over 400,000 acres of land in Kentucky. Paul W. Gates, _Tenants of the Log Cabin_, 49 MISS. VALLEY HIST. REV. 1, 4-6 (1962).
20. _Green_, 21 U.S. at 17-18. Story had apparently waited three weeks for a lawyer for Biddle to present himself before delivering the opinion. _Id._ at 10-11.
22. _Id._ at 422.
23. _Green_, 21 U.S. at 87, 92-93. Henry Clay, in a March 9, 1823 letter, stated that Livingston's absence meant that Washington's opinion actually represented "a minority of the whole Court." Letter from Henry Clay to Francis Brooke (Mar. 9, 1823), quoted in _THE PRIVATE CORRESPONDENCE OF HENRY CLAY_ 75 (Calvin Colton ed., 1856). In 1826 Congressman Charles Mercer, in the course of defending the Court's decision, declared that although Livingston had been unable to join Washington's opinion, he had, in prior deliberations, "concurred in the sentence of the Court." CONG. REC., 19th Cong., 1st Sess. (1826).
The *Green v. Biddle* sequence illustrates the potential momentousness of land title disputes in early nineteenth-century America, particularly in the states governed by Todd’s circuit; how important Todd’s expertise in land law, as well as the symbolic pattern of his career, was for his judicial colleagues; and how, but for his consistent absence from the Court and the fact that none of his state or federal circuit opinions has survived, his importance for land law cases might have been recognized by modern commentators.

Thus, Todd’s characterization as “insignificant” by modern commentators can be seen as largely resting on the scarcity of sources pertaining to his judicial career and a failure on the part of those commentators to recognize the importance of factors such as travel from the Justices’ residences to Washington, the length of the Court’s session, the assignment of opinions, and the political and economic importance of land title disputes, that distinguish the Court on which Todd served from its modern counterpart. Todd can therefore be seen as a proxy for a host of nineteenth-century judges who may be regarded as “insignificant” simply because of difficulties in retrieving information about their careers and the historical setting in which those careers took place.

II. THE NINETEENTH-CENTURY CULTURE OF INFORMATION ABOUT JUSTICES: ASSESSING WILLIAM JOHNSON’S 1822 COMMENTS ON SOME OF HIS COLLEAGUES

In addition to the distorting effects of scanty information about Justices who served in previous eras, there are difficulties in making sense of the information that has surfaced. In particular, we now operate in a quite different culture of information about public figures, even judges. For the nineteenth century and the first decades of the twentieth, there were no searching biographies of Supreme Court Justices, and very few articles focusing on their individual perspectives or contributions. The labeling of individual Justices as “liberals,” “conservatives,” or “centrists” did not appear until the 1930s.\(^24\) Prior to the early twentieth century, works on the lives of Justices were either autobiographical or written by members of the Justices’ families.\(^25\) And when Justices made candid assessments of

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\(^{25}\) For examples, see JOHN MARSHALL, AN AUTOBIOGRAPHICAL SKETCH (John S. Adams ed., 1937): 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS 212–29 (Benjamin R. Curtis ed., 1879); Joseph Story, Autobiography, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 1, 1–39
their colleagues to others, those comments, for the most part, did not appear in print during the nineteenth century.

In short, there was a nineteenth-century culture of information about Supreme Court Justices that functioned to limit public access to comments about their individual tendencies and perspectives. That culture has been replaced by one in which judicial biographies, many of them based on private papers, are common, and in which commentators are increasingly interested in the roles of personality, ideology, and collegial relations in judging. This shift creates a potential difficulty for modern commentators when they come upon nineteenth-century Justices' observations about their colleagues.

The problem lies in determining whether the comments can be treated as an accurate index of a Justice's reputation, or simply the idiosyncratic reactions of a colleague. Very few comments of this sort have survived, and most of them have appeared in print only during the modern culture of information about Justices. Therefore, it is hard to establish a baseline for evaluating the significance of the comments. There is a risk that in an information culture inclined to give weight to the personal dimensions of judging, such comments, despite their rarity may be attributed undue importance as indices of a Justice's reputation.

An example of the difficulty in extrapolating from such comments is provided by a letter Justice William Johnson wrote to Thomas Jefferson in December 1822, recalling his impressions of the other Justices of the Court with whom he first served in the 1805 Term. Johnson wrote that he soon perceived that:

[William] Cushing was incompetent, [Samuel] Chase could not be got to think or write, [William] Paterson was a slow man and willingly declined the trouble [of writing opinions], and the other two judges [John Marshall and Bushrod Washington] you know are commonly estimated as one judge.27

(William W. Story ed., 1852); Roger Taney, Early Life and Education, in Samuel Tyler, Memoir of Roger Brooke Taney 17, 17–95 (1872).

26. The first extensive biography of a Supreme Court Justice to discuss the extrajudicial features of that Justice's life was Albert J. Beveridge, The Life of John Marshall (1916–19).

27. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), quoted in White, supra note 4, at 344. The combination of Johnson's less than clear handwriting and early nineteenth-century calligraphy, plus the letter's length, may have been a deterrent to prospective typesetters. I might note, however, that the handwriting of both John Marshall and Oliver Wendell Holmes, Jr. is no easier to decipher than that of Johnson, yet numerous handwritten letters of those Justices have been typeset.
The letter in which Johnson's comments on his colleagues appeared was twenty-one handwritten pages.\(^{28}\) As far as I have been able to determine, its full text has not yet appeared in print. It was a response to an October 27, 1822 letter Jefferson had written to Johnson, which was first made public in an 1899 collection of Jefferson’s writings.\(^{29}\) The first scholarly work to quote the above passage was Charles Warren’s three-volume history of the Supreme Court, published in 1922.\(^{30}\) Since then, Johnson’s comments have been quoted or referred to in biographies of Johnson\(^ {31}\) and Marshall,\(^ {32}\) and in studies of the Marshall Court.\(^ {33}\) Johnson’s memory of his reaction to his colleagues during his first Term represents one of the very few publicly available assessments of Cushing, Chase, Paterson, and Washington by one of their judicial contemporaries.\(^ {34}\)

The context of Johnson’s comments, however, reveals that they formed part of an explanation for why, during his tenure on the Court, the Justices had abandoned an earlier practice of writing and delivering separate opinions, issuing instead an “opinion of the Court” that was typically delivered, and often written, by Marshall, with no indication about whether the remaining Justices subscribed to all its language.\(^ {35}\)

The ostensible purpose of Jefferson’s October 1822 letter to Johnson had been to offer congratulations on the publication of Johnson’s biography of Revolutionary War general Nathanael Greene, who had subsequently become a supporter of the Republican party.\(^ {36}\) Most of Jefferson’s letter, however, was devoted to complaining about the practices of the Court during the years of Johnson’s service.\(^ {37}\) By the 1820s, Jefferson, in retirement, had become especially agitated by the Court. He opposed the Court’s decisions in *Martin v. Hunter's Lessee*, *McCulloch v. Maryland*, and *Cohens v. Virginia*, which had

\(^{28}\) *Id.*

\(^{29}\) 10 *THE WRITINGS OF THOMAS JEFFERSON* 222 (Paul Leicester Ford ed., 1899).

\(^{30}\) 2 *CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY* 115 n.1 (1922).


\(^{33}\) *GEORGE LEE HASKINS & HEBERT A. JOHNSON, FOUNDATIONS OF POWER* 94 (1981); WHITE, *supra* note 4, at 186.

\(^{34}\) A few other descriptions of Cushing, Chase, Paterson, and Washington appear in HASKINS & JOHNSON, *supra* note 33, at 86–100, but only one was made by a fellow Justice, and that was written by Joseph Story on Washington’s death in 1829, *id.* at 100.

\(^{35}\) *See supra* note 3 (discussing “opinions of the Court”).


\(^{37}\) *Id.* at 222–26.
been attacked in pseudonymous essays in the Richmond *Enquirer*, whose editor was in close touch with Jefferson. Jefferson described the decisions to Johnson as efforts to “break down the rights reserved by the constitution [sic] to the states as a bulwark against [the] consolidation [of federal power].”

But the main concern about the Court that Jefferson addressed to Johnson was its “habitual mode of making up and delivering” its opinions. Its practice was that of “making up opinions in secret & delivering them as the Oracles of the court, in mass.” As a result, no one could tell “what opinion any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself.” If an opinion of the Court were “impeachable,” having “been done in the dark it can be proved on no one.” The practice was “certainly convenient,” Jefferson believed, for “the lazy, the modest & the incompetent” among the Justices, for it shielded individual Justices from having to “develop[] their opinion[s] methodically” or even, in many cases, from having to “mak[e] up an opinion at all.” Since 1807 three of the Court’s seven Justices, including Johnson, had been Jefferson’s own nominees, and since 1811 the Court had been composed of only two Federalist appointees. Jefferson implied that he found it hard to believe that every member of the Court, including Johnson, endorsed its “consolidationist” tendencies.

Johnson replied that he had actually been responsible for originating the “opinion of the Court” practice, which was accompanied by a practice that gave individual Justices, when they disagreed with a majority’s disposition of a case, discretion “to record their opinions or not.” In order to understand how those practices originated, Johnson told Jefferson that it was necessary to understand

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38. *Id.* at 225. For more detail on the essays criticizing the Court’s *Martin, McCulloch,* and *Cohens* decisions, see *White*, *supra* note 4, at 506–10, 552–55.


40. *Id.* at 224.

41. *Id.* at 225.

42. *Id.*

43. *Id.*

44. Jefferson had nominated Johnson, Livingston and Todd, and Jefferson’s Republican successor, James Madison, had appointed Duvall and Story. The Court’s composition remained constant from 1811 to 1823. Washington and Marshall had each been appointed by John Adams.


46. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), quoted in *White*, *supra* note 4, at 186 n.126.
the situation Johnson found himself in when he first joined the Court in 1805. Upon arriving, he found Chief Justice Marshall delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment & vote. . . . [When I asked why], the answer was [Marshall] is willing to take the trouble, & [the practice] is a mark of respect to him [as Chief Justice].

The practice of having the Chief Justice deliver all the Court’s opinions preceded Marshall’s tenure. On the Jay and Ellsworth Courts, seriatim opinions, when written, were published in reverse order of seniority, with the Chief Justice’s opinion appearing last. Those opinions were accompanied by a brief per curiam opinion, invariably delivered by the Chief Justice if he was present, disposing of the issues before the Court. In the latter years of the Ellsworth Court, seriatim opinions occurred less frequently, especially when Ellsworth was present, and Ellsworth, when present, always delivered what was called the “opinion of the Court.” So, Johnson’s characterization of the practice as “a mark of respect” to Marshall as Chief Justice was accurate. Johnson, however, went on to tell Jefferson that “the real cause[s]” of the practice were the incompetence or laziness of Cushing, Chase, and Paterson, and the fact that Washington and Marshall held identical views on issues.

In the same letter, however, Johnson provided an alternative explanation that was unrelated to the competence of Cushing, Chase, and Paterson. “Some case soon occurred” during his first Term, he recalled in which I disagreed from my brethren & I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, & the loss of reputation which the Virginia appellate court had sustained by pursuing such a course etc. At length I found I must either submit to circumstances or become such a cypher in our consultations as to effect no good at all. I therefore bent to the current, [and eventually] got them to adopt the course they now pursue, which is to appoint someone to deliver the opinion of the majority, but leave it to the discretion of the rest of the judges to record their opinions or not.

Two features of this excerpt are noteworthy. First, it was clear that the practice of having Marshall deliver all the Court’s opinions was also serving to minimize public conflict among Justices. Johnson’s questions about the practice had been followed by his expressed interest in publicly dissenting from an opinion of the Court. At that

47. Id.
48. WHITE, supra note 5, at 402–05.
49. Supra note 27 and accompanying text.
50. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), quoted in WHITE, supra note 4, at 186 n.126, 189.
point, he advanced another rationale for the practice: it discouraged Justices from airing public disagreements, which some members of the Court felt was "indecent" and would lower the Court's reputation. It seems apparent that Marshall and Washington were among those members; as residents of and legal practitioners in Virginia, they would have been familiar with the practices and reputation of the Virginia Court of Appeals.

Second, Johnson described himself as having been influential in getting the Court to change from a practice of having Marshall deliver all, and write most, of the opinions to one in which an individual Justice would be appointed to "deliver the opinion of the majority," and the "rest of the judges" could "record their opinions or not."51 If one surmises that the "they" who agreed to the change were Marshall and Washington—Cushing, Chase, and Paterson were no longer on the Court in 1811, having been replaced by Livingston, Todd, Duvall, and Story—Johnson was essentially proposing that in all cases in which Marshall was in the majority, he would assign the responsibility for writing an opinion of the Court to some Justice in that majority, and those who had voted against the majority's position would be free to acquiesce silently in that opinion or write a dissent.

Between 1812 and the year of Jefferson's letter to Johnson, it is clear that the opinion of the Court and silent acquiescence practices were in effect; that Marshall remained with the majority in most of the Court's decisions; and that all the Justices, including Johnson, were mainly electing to acquiesce silently in an opinion they had disagreed with.52 Though the number of opinions delivered and written by Marshall declined in comparison to other Justices, as Chief Justice, he retained the prerogative of assigning most opinions. In addition, the number of dissents, even in contested cases of great public interest, remained minuscule. In short, the result of the changes Johnson took credit for instituting produced the very "mode of making up and delivering opinions" of which Jefferson complained.53

Johnson, for his part, defended the practice of collegial opinions in a subsequent letter to Jefferson in April 1823:

51. Id. at 186 n.126.
52. For evidence of the practice of silent acquiescence in place between at least 1814 and 1827, see the comments in dissenting opinions by Story, Marshall, and Washington, written in that time period. These comments indicate their ordinary practice, when they had "the misfortune to differ from this Court," was to "acquiesce silently in its opinion." The comments are quoted in White, supra note 4, at 187 n.131.
It will be impossible . . . to avoid . . . conducting the most of our business in conclave; for I do verily believe that there is no body of men . . . who could preserve the public respect for a single year, if the public eye were permitted always to look behind the curtain.\textsuperscript{54} Johnson "had never met but one man who could absolutely leave his vanity and weaknesses at home" and was "often absolutely astonished at the predominance of little passions over men in the most elevated stations."\textsuperscript{55} He believed that a mandatory return to seriatim opinions, which Jefferson had urged, would lower the Court's reputation.

Thus, the more Johnson's comments about Cushing, Chase, Paterson, Marshall, and Washington are placed in context, the more they can be linked to Johnson's effort to defend the "opinion of the Court" practice to Jefferson. Johnson indicated that he might have liked to dissent publicly more often, and might do so in the future. He indicated, however, that given the strong opposition to "judges cutting at each other" and the reputational costs of requiring all Justices to write opinions in all cases, he believed in the retaining the opinion of the Court practice.\textsuperscript{56} He also implicitly reminded Jefferson that both that practice and silent acquiescence were engaged in by his other appointees to the Court. As Johnson sought to defend the opinion of the Court, he provided evidence that "the real cause" of Marshall's delivering all the Court's opinions was not the dilatory performances of three of his colleagues. It was the reputational advantages of treating opinions as collective products and not requiring Justices to issue opinions in all cases.

So, one might conclude, at a minimum, that Johnson's comments about Cushing, Chase, and Paterson in his letter cannot be taken as strong evidence about how contemporary observers perceived the performance of those Justices. The problem, however, is that the judicial information culture of the nineteenth century discouraged any public comments about the individual performance of Justices, except those of the ceremonial variety. One might contrast Johnson's comments, which were obviously not intended for public circulation, with two made by Joseph Story in the same time period. In an 1812 letter, later published in \textit{Life and Letters of Joseph Story} by his son in 1851, Story wrote a friend that "[m]y brethren are very interesting men, with whom I live in the most frank and unaffected intimacy," and that "we are all united as one, with a mutual esteem which makes

\textsuperscript{54} Letter from William Johnson to Thomas Jefferson (Apr. 11, 1823), \textit{quoted in White}, \textit{supra} note 4, at 340.

\textsuperscript{55} Id.

\textsuperscript{56} Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), \textit{quoted in White}, \textit{supra} note 4, at 189.
even the labors of Jurisprudence light." That was the sort of observation by a nineteenth-century judge about his colleagues that might eventually be made public by family members. Six years after that letter, however, Story made some observations about Johnson to his close friend Henry Wheaton, the Court's Reporter. He wrote Wheaton that "some of Judge Johnson's opinions are very uncourteous to his brethren," and that Johnson "errs most strikingly . . . in respect to a tenderness for the judgment of others." As in the case of Johnson's letter to Jefferson, Story did not intend those comments for publication. They remain in archival sources, and neither found its way into print until the late twentieth century.

In short, changes in the information culture about Justices have had two potentially distorting effects on the assessment of judicial reputations. First, the nineteenth-century culture of discouraging public evaluations of the individual performance of Justices has resulted in candid comments coming into the public domain in a scattered fashion and making the context of those comments difficult to replicate. Second, the altered twentieth-century judicial information culture, with its keen attention to the role of individual personality in judging, may incline commentators to attach too much significance to the scattered material from the earlier culture that turns up. The result is that establishing baselines against which the reputations of nineteenth-century Justices can be evaluated is treacherous: what might seem to be a "baseline" may in actuality be a later commentator's effort to construct a reputation out of comparatively flimsy evidence.

III. THE LITERATURE RANKING JUSTICES

The previous two illustrations of difficulties in establishing baselines for evaluating the performance of Justices have been drawn from the nineteenth century, where the problems of retrieving and assessing information about judicial subjects might seem more acute than in more recent time periods. One might argue, in fact, that from the first third of the twentieth century on, concrete evidence of

59. Story made the comments about Johnson in an August 12, 1818 letter to Henry Wheaton. The letter is quoted in WHITE, supra note 4, at 360 n.341.
baselines for judicial performance has surfaced. Beginning in 1928, commentators began to assemble lists of “great” or “outstanding” judges in American history, lists which implicitly compared the performance of Justices who served in different eras. In the 1950s, the process of ranking judges expanded to include some Justices whose contributions were deemed less distinguished than those deemed “great.”

The rankings literature also began to put forth some common criteria for evaluating Supreme Court Justices. In the 1970s, a survey asked participants to rate the performance of all the Justices who had served on the Court from its origins through 1969, and the authors of the survey used its findings to label Justices as “great,” “near-great,” “average,” “below average,” and “failure.”

The appearance of that survey stimulated additional efforts, in the late 1970s and 1980s, to produce lists of “great” judges, and in 1989 another survey was taken, of a more diverse group of persons, that produced not only a composite list of great Justices but the evaluative criteria the survey participants employed in making their rankings. That survey continues to be noted in publications stretching into the twenty-first century.

All of this might suggest that although retrieving information about Justices, and establishing baselines to evaluate their performance, might pose some difficulties for nineteenth-century subjects, a whole industry of commentators has proceeded since the 1920s as if those difficulties can be surmounted. Moreover, the rankings literature produced by those commentators has compared the performance of Justices not only against their age contemporaries, but against Justices who served in other time periods, and has developed a set of criteria for evaluating the careers of judicial subjects. At first blush, then, it would seem as if the rankings literature supplies a set of evaluative baselines against which to study the careers of ostensibly “neglected” Justices.

The problem is that history has affected the rankings literature as well. After one discounts for history in the process of exploring that literature, both the integrity of judicial rankings and the general applicability of the evaluative criteria used to assemble them begin to crumble. When one considers the literature of successive efforts to rank judges over time, two themes emerge. The rankings have an endemically presentist bias, with commentators incrementally adding more recent judges to their lists of “greats,” and using remoteness

60. The work briefly described in the next two paragraphs will be subsequently identified and discussed in more detail.
from the tenure of judicial subjects as a proxy for devaluing those subjects' contributions. In addition, even when the literature supplies evaluative criteria for ranking Justices, historical factors undermine the general applicability and even the coherence of those criteria. In the end, all one can say about the rankings literature is that it demonstrates that a handful of Justices have consistently been regarded as having visible and significant careers, and that all the other Justices have become, or will in the flow of time become, candidates for neglect.

The rankings literature spans a period from the 1920s to the present. The first two lists of "outstanding" judges were compiled by Charles Evans Hughes in his 1928 book The Supreme Court of the United States61 and Roscoe Pound in his 1938 book The Formative Era of American Law.62 Hughes ranked eight Justices as "outstanding," and Pound gave ten examples of judges "who must be ranked first in American judicial history."63 Neither Hughes nor Pound gave any reasons for their rankings. The only two Justices who appeared on both lists were Marshall and Story, and the lists were overwhelmingly composed of nineteenth-century figures. Hughes did not evaluate any Justices who were still active in the 1920s, and Pound, whose book argued that the "formative era of American law" came in the first three decades of the nineteenth century, disproportionately included judges who served in that time period and who had lengthy judicial careers.64 Hughes included only one Justice, David Brewer, who had served after 1900, and Pound included only two, Oliver Wendell Holmes and Benjamin Cardozo, who had both left the Court by 1938.

Although the basis on which Hughes and Pound singled out the judges they listed was not set forth, the fact that they identified individual judges as having eminent careers was a signal that the emphasis of studies on American law or the Supreme Court was beginning to change. Individual judges were beginning to play a role in those studies. They were being viewed as distinctive contributors to a body of American jurisprudence, rather than simply members of a

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61. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928).
63. HUGHES, supra note 61, at 58. The Justices Hughes ranked as outstanding were, in chronological order of service, Marshall, Story, Benjamin Curtis, Samuel Miller, Stephen Field, Joseph Bradley, Horace Gray, and David Brewer. Id.
64. POUND, supra note 62, at 4–5. The judges and Justices Pound singled out were Marshall, Story, James Kent of New York, John Bannister Gibson of Pennsylvania, Lemuel Shaw of Massachusetts, Thomas Ruffin of North Carolina, Thomas McIntyre Cooley of Michigan, Charles Doe of New Hampshire, Holmes, and Benjamin Cardozo. Id. at 30–31 n.2.
65. POUND, supra note 62, at 3–5.
collegial institution that rendered decisions. Moreover, some judges were being regarded as superior to their colleagues, and superior performance was being regarded as a quality that could be recognized at any point in time.

Thus, the first two defining elements of the rankings literature, as it emerged, were its assumption that assessing individual judicial performance was possible, and worthwhile, and its related assumption that the enterprise of evaluating individual judges could include comparisons of judges who served in different time periods. The next two elements would appear in efforts to identify outstanding Justices in the 1950s. In a 1957 article, *The Supreme Court in the Mirror of Justices*, 66 and a 1958 book, *Marble Palace: The Supreme Court in American Life*, 67 Justice Felix Frankfurter and John Frank identified various Supreme Court Justices as “distinguished,”68 “preeminent,”69 or “the very best”70 in the history of the Court, and claimed that their ratings rested on what Frankfurter called “a consensus of informed judgment,”71 and what Frank called “generally accepted” indicia of judicial performance.72 Moreover, although both Frankfurter and Frank acknowledged that the attribution of “greatness” to a Justice was subjective,73 they specified criteria that they associated with distinction in a judicial career. Frankfurter mentioned a “coherent judicial philosophy,” an “originating mind,” technical legal skills, and a capacity for “penetrating analysis.”74 Frank listed “clarity of reasoning,” “creativeness,” “industry,” and “scholarship.”75

With the addition of those elements, the rankings literature offered itself as a distinct genre of commentary about judges in American history. Contributors to that literature assumed that the work of individual judges could be separated from the work of the courts on which they sat and evaluated, that such evaluations could compare performance across the span of American history, and that the performance ratings of individual judges could be said to reflect a “consensus of informed judgment” and to rest on common evaluative

68. Frankfurter, *supra* note 66, at 784.
69. Id.
70. FRANK, *supra* note 67, at 43.
71. Frankfurter, *supra* note 66, at 783.
72. FRANK, *supra* note 67, at 60.
73. Id.; Frankfurter, *supra* note 66, at 783.
74. Frankfurter, *supra* note 66, at 784, 794.
75. FRANK, *supra* note 67, at 60–64.
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criteria. The next step for the rankings literature would be to
demeanphasize the subjective features of judicial rankings by surveying
a large enough community of persons of “informed judgment” to reach
a “consensus” about the performance of individual judges.

Such a survey was undertaken in 1970 by two legal academics,
Albert Blaustein and Roy Mersky.76 They assembled a group of sixty-
five academic “experts” on the Supreme Court, drawing from “leading
professors of constitutional law, American history, and politics,” who
were “grounded in the proceedings of the Supreme Court from its
beginnings” and “specialists in many of the areas with which the
Court must deal.”77 They sent ballots to each of the “experts,” listing
the ninety-six Justices that had served on the Supreme Court from its
beginnings through 1969, and asked them to “grade” the performance
of each of those Justices from “A” through “E,” with A being “great,” B
Although they did not ask respondents to supply criteria for their
rankings, the ballots included “explanatory spaces” in which
respondents could comment about ratings.78

Blaustein and Mersky published the results of their survey in
two separate journals in 1971 and 1972, and a chapter in a 1978
book.79 They used the responses of the survey to establish performance
ratings for all the Justices who had served from the Jay Court through
the last years of the Warren Court. They categorized twelve Justices
as “great,” fifteen as “near-great,” fifty-five as “average,” six as “below
average,” and eight as “failures.”80 They also gave a brief description,

76. The results of the survey were first published in Albert P. Blaustein & Roy M. Mersky,
Rating Supreme Court Justices, LIFE, Oct. 15, 1971. Another version appeared, with the same
title, in 58 A.B.A. J. 1183 (1972). A more extended version was published as a chapter, Rating
the Justices: The Best and the Worst, in ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE
HUNDRED JUSTICES 32–51 (1978). In that version, Blaustein and Mersky indicated that the
survey was conducted in 1970. Id. at 34. Subsequent citations are to the 1978 version.

77. BLAUSTEIN & MERSKY, supra note 76, at 34. In an Appendix to the 1978 version,
Blaustein and Mersky listed the names of the persons they had polled. Id. at 118–19.

78. Id. at 35–37.

79. Supra note 76.

80. BLAUSTEIN & MERSKY, supra note 76 at 37–40. In presenting the data from their
survey, Blaustein and Mersky deemphasized the quantitative basis for their rankings. Although
they had obviously placed Justices into categories based on the aggregate grades the Justices
had received, the authors did not discuss how they had translated grades into categories. They
alluded to the number of votes individual Justices had received on only two occasions. One was a
statement that Marshall, Brandeis, Holmes, and Black, each of whom were listed as “greats,”
had received sixty-five (of sixty-five), sixty-three, sixty-two, and forty-two “A” grades
respectively. Id. at 40. The other was that James McReynolds and Charles E. Whittaker “share
the dubious distinction of being voted at the bottom of the list of failures.” Id. at 48. In a survey
in which almost all Justices received a mix of “grades” from the participants, this failure to
provide an explicit linkage between grades and categories was noteworthy. Far more Justices
apparently based on “the supplementary remarks of the raters,” of “standards which were invoked” in the rating process.\textsuperscript{81} Their description alluded to some evaluative criteria, such as “legal scholarship,” “analysis,” “legal craftsmanship,” “legal statesmanship,” and “output,” that the experts had equated with “success on the Supreme Court.”\textsuperscript{82} But they gave only a cursory, and at times conclusory, explanation of the relationship of those criteria to the placement of Justices in categories.

“All of the justices categorized as great,” Blaustein and Mersky said, “had made important... seminal contributions to the development of the law.”\textsuperscript{83} The “near-greats” were “outstanding justices who had some one flaw or limitation.”\textsuperscript{84} The “average” Justices “were usually well versed in legal craftsmanship and legal statesmanship, but that was all.”\textsuperscript{85} Those Justices “failed... to make their presence felt either in their own time or later.”\textsuperscript{86} The “below average” category “seemed designed for the Justices deficient either in legal scholarship, analysis, output, statesmanship, or in two or more of these qualities.”\textsuperscript{87} The “failures” were “either unproductive or somehow constituted a disturbing element on the Court.”\textsuperscript{88}

Those statements revealed, first, that few respondents to Blaustein and Mersky’s survey had systematically matched up the qualities they identified with judicial success to their ratings. They had simply placed Justices in one category or another, and then in the process of making explanatory remarks had alluded to some of those qualities. The statements also revealed that when Blaustein and Mersky sought to explain the differences between their categories, they had little to go on and gave conclusory or implausible reasons. Characterizing “great” Justices as those who “had made important seminal contributions to the development of law” did not invoke any of the qualities Blaustein and Mersky’s respondents had supplied. Nor did Blaustein and Mersky identify any “flaw or limitation” mentioned by respondents as keeping “near-great” Justices from being rated...
"great." Blaustein and Mersky also gave no reasons for why they characterized "average" Justices as being "usually well versed in legal craftsmanship and legal statesmanship." Although they suggested that "below average" Justices were "deficient" in a variety of qualities associated with judicial success, they did not say that their respondents had equated the category of "below average" with those deficiencies.

In fact, when Blaustein and Mersky discussed individual Justices in each category, they noted other reasons for their placement. Roger Taney, listed as "great," had, despite being "a strong believer in states' rights," proved "willing to deny the states the power to obstruct federal processes, thus enhancing the stature [of the] Court."89 Samuel Miller, Stephen Field, and Joseph Bradley, "near-greats," "might have been rated as great if they had served in a more active judicial era."90 All of the "below average" Justices "served in the nineteenth century and their tenures on the Court were all relatively brief."91 And Charles Whittaker, one of the "failures," "cast the deciding vote in forty-one crucial decisions" during his five years on the Court, "each time standing on the side that would deny civil rights or the extension of personal liberty."92

It was apparent from those comments that Blaustein and Mersky had totaled up the grades each Justice had received, drawn lines between aggregate grades at various points, placed Justices in categories based on those lines, and then attempted, without much help from their respondents, to explain what their categories signified about judicial performance. The categories had not signified much. Blaustein and Mersky could not match up the qualities their respondents had identified with judicial success in any systematic fashion, so they either assumed that the qualities had come into play or gave reasons of their own supporting the categories. But they had created the categories themselves with the grading system of their survey.

There is also some evidence that Blaustein and Mersky's respondents, as well as the authors, implicitly used other grounds for placing a Justice in a category. Of the ninety-six Justices surveyed, fifty-five were rated "average."93 Blaustein and Mersky found this

89. Id. at 42.
90. Id. at 46.
91. Id. at 48.
92. Id.
93. Id. at 47.
“perhaps disturbing,” but it appears that respondents used “average” as a default category for two sorts of Justices: those with whose careers they were familiar, but found unremarkable, and Justices about whom they knew little. Of the fifty-five average Justices, thirty-eight had served in the eighteenth or nineteenth centuries, and of the remaining seventeen whose careers had been mainly in the twentieth century, only six served on the Court for ten years or more. The use of a category as a proxy for lack of knowledge about a Justice was even more pronounced with “below average” Justices, only two of whom served after 1841, and none of whom had served for more than six Terms. Finally, the Justices listed as “failures” (Willis Van Devanter, James McReynolds, Pierce Butler, James Byrnes, Harold Burton, Fred Vinson, Sherman Minton, and Charles Whittaker) were all twentieth-century figures, and all associated by respondents with “anti-progressive” postures toward economic regulation, civil rights, or other forms of Warren Court activism.

Finally, Blaustein and Mersky’s survey, when compared with Hughes’s and Pound’s lists, revealed some interesting changes in the composition of Justices who were rated “great.” Only Marshall and Story, who had been ranked “outstanding” or in the “first” rank of American judges on the Hughes and Pound lists, remained in the “great” category in Blaustein and Mersky’s survey. Of the other nineteenth-century Justices on Hughes’s list, Curtis, Miller, Field, and Bradley had slipped to the “near-great” category and Horace Gray and David Brewer to the “average” category. Meanwhile, Holmes and Cardozo, both twentieth-century Justices who appeared on Pound’s list, remained on Blaustein and Mersky’s list of greats, and John Harlan the Elder, who had dissented in *Plessy v. Ferguson*, was also listed as “great,” even though neither Hughes nor Pound had mentioned him. Of Hughes’s eight “outstanding” Justices, only one had served in the twentieth century; of Pound’s ten judges, only two; but of Blaustein and Mersky’s twelve great Justices, eight had served entirely in the twentieth century, and a ninth, Harlan, had served on the Court until 1911.

Blaustein and Mersky’s survey thus reveals that the common assumptions of the rankings literature might be less plausible than contributors to that literature imagined. Although Blaustein and Mersky’s respondents had proceeded to compare the performance of Justices who served in different time periods, they had not been able to disengage themselves from their own time frame in making that

94. Id.
95. Id. at 48.
comparison. They had used the categories of “average” and “below average” to place Justices about whom they knew little; listed Justices as “failures” whose careers had been recent enough to offend the sensibilities of late 1960s progressives and civil libertarians; replaced several nineteenth-century Justices treated as outstanding in earlier rankings with twentieth-century figures; and added a nineteenth-century Justice to the list of “greats” whose view that legally enforced racial segregation was unconstitutional, communicated in dissent in 1896, had been vindicated by the Court in the 1950s.

Despite their efforts to identify criteria that their respondents had identified with judicial success, Blaustein and Mersky were unable to demonstrate that those criteria, as opposed to a simple tabulation of categories they had created, had determined the rankings of Justices. They conceded, in fact, that “there are really no accepted criteria for measuring Supreme Court competence,” and there was no “established touchstone for gauging the attributes” that resulted in Justices being given “the highest accolade, or the lowest rank, or an in-between standing.” The survey failed in its apparent goal of showing that the performance of Justices could be meaningfully compared across time based on commonly held performance standards.

The troubling assumptions of Blaustein and Mersky have been replicated in more recent studies seeking to compile lists of “great” Justices through surveys. A 1989 survey by the political scientist Robert Bradley sought to update Blaustein and Mersky’s effort and also to undertake a more systematic exploration of the evaluative criteria used by respondents. That survey has been included in publications stretching from 1993 to 2003. It differed from the Blaustein and Mersky survey in asking respondents only to identify ten “great” Justices, to rank-order the individuals they listed, to indicate the criteria they had used in choosing “great” Justices, and in

96. Id. at 36.
rank-ordering the ones they had chosen. 98 It also replaced Blaustein and Mersky’s sixty-five academic “experts” with four groups of persons “who could be characterized as interested Court observers.” 99 Those were a group of “judicial scholars,” culled from members of the American Political Science Association and the Law and Society Association; a group of Illinois state judges; a group of attorneys practicing in the area surrounding Normal, Illinois, where Illinois State University, Bradley’s home institution, was located; and undergraduate and graduate students who were either enrolled in three law courses or had attended an event sponsored by an undergraduate law society. 100 Two hundred and twenty-six persons, composed of ninety-six scholars, fourteen judges, twenty-seven attorneys, and eighty-nine students, responded to the survey. 101

Bradley’s sample was considerably larger than that of Blaustein and Mersky’s earlier survey. Despite this, and the fact that a large number of the respondents specified their ranking criteria, enabling Bradley to present tables identifying and rank-ordering the criteria employed by the respective groups, the same tendencies that tended to undermine the coherence of Blaustein and Mersky’s rankings appeared in Bradley’s survey. The evaluative criteria applied by respondents remained elusive, and the tendency of evaluators to equate prominence in a Justice with familiarity with that Justice’s career resurfaced.

Bradley listed thirteen factors that his respondents said they had used in identifying Justices as “great” and rank-ordering the ones they identified. 102 He described the respondents’ criteria as having a “wide range.” 103 A better description might be that the criteria introduced performance elements that were of such different levels of generality as to be virtually incomparable. Some criteria, such as

99. Id. at 8.
100. Bradley’s “scholar” respondents were drawn exclusively from members of the American Political Science Association and the Law and Society Association. His “student” respondents consisted of persons enrolled in three undergraduate and graduate courses on legal topics at Illinois State University, and a student audience attending a mock trial jointly sponsored by a law fraternity and university law club at that institution. His “attorneys” were persons practicing in Illinois; their names had been garnered from a local telephone directory. His judicial group consisted of “state and local judges” in Illinois whose names and addresses appeared in a 1988 list compiled by the Bureau of National Affairs of Illinois. Id. Thus, few of Bradley’s scholars had legal training; his student sample included no law students and was confined to one academic institution; and one might well question the representativeness of his groups of attorneys and judges, all of whom came from one state.
101. Id. at 9–11.
102. Id. at 13, tbl. 6.
103. Id. at 12.
“writing ability,” “length of service,” and “intellectual/legal ability,” seemed connected to the functions of a Justice at any point in the Court’s history, and thus capable of being applied across time. Other criteria, such as “leadership,” “impact on law,” “impact on society,” and “personal attributes,” also seemed to be of general applicability, but more difficult than “writing ability” or “intellectual/legal ability” to apply in an objective fashion. The remaining criteria Bradley listed, “judicial restraint,” “judicial activism,” “enhance Court’s power,” “protection of individual rights,” “protection of societal rights,” and “dissent behavior,” appeared to be Bradley’s attempt to translate a respondent’s idiosyncratic reasons for giving a Justice a high ranking into more general categories. For instance, the respondent might have applauded the Justice’s “activist” or “restrained” stance, approved of the Justice’s dedication to certain classes of “rights,” or liked the Justice’s body of dissents.

The elusiveness of the evaluative criteria was enhanced by Bradley’s findings about how frequently his various groups mentioned them. As he put it: “Dissimilarities in criteria for selection of great justices among the respondent groups are evident . . . .” Attorneys and students placed an emphasis on “personal attributes” and “protection of individual rights.” Judges and scholars did not mention those criteria frequently. “Writing ability” was given prominence by attorneys, scholars, and students, but less so by judges. “Length of service” was treated as important by judges, but by none of the other groups. “Intellectual ability” was treated as more important by judges and scholars than attorneys and students.

Thus, even when evaluative baselines for Justices were built into an effort to rank them, and an attempt was made to discern which evaluative criteria were used most frequently, the baselines lacked integrity because the criteria turned out to function at quite different levels of generality, and their importance tended to vary with the class of persons being sampled. Bradley concluded, as had Blaustein and Mersky, that “consensus is not present as to . . . what

104. Id. at 13, tbl. 6.
105. Id.
106. Id.
107. Id. at 13.
108. Id. at 14.
111. Id. at 13–14.
criteria identify greatness . . . . [G]reatness on the Supreme Court is in the eye of the beholder.”

The most striking aspect of Bradley’s survey, however, when one compares it with previous contributions to the rankings literature, was the shift in the composition of “great” Justices. As noted above, Hughes’s 1928 list contained only one Justice of the first rank who had served in the twentieth century; Pound’s list two; and Blaustein and Mersky’s somewhat larger list, nine. Bradley presented the individual rankings of each of his groups and a composite ranking by all the respondents. Other than John Marshall, whose name appeared first on all of the lists, only three nineteenth-century Justices were included on Bradley’s list of “greats”: Harlan the Elder on the scholars’ list and Story and Taney on the attorneys’. Only five twentieth-century Justices whose careers concluded before the Warren Court—Holmes, William Howard Taft, Benjamin Cardozo, and Louis Brandeis—appeared on any of the lists, with Taft’s name being on only one.

In contrast, six Warren Court Justices were listed in the scholars’ list of greats, five on the judges’ list, five on the attorneys’ list, and four on the students’ list. The students’ list was particularly noteworthy, given that the polling took place in 1989, three years after William Rehnquist had replaced Warren Burger as Chief Justice. The students ranked Rehnquist second in their list of great Justices. They ranked Sandra Day O’Connor third and Warren Burger fourth. They ranked Harry Blackmun eighth and Thurgood Marshall ninth. Holmes, ranked seventh, was the only twentieth-century pre-Warren Court Justice listed by students as “great.” Seven of the Justices they listed had served on the Warren or Burger Courts. And although Rehnquist had been ranked (along with Story and John Harlan the Younger) in tenth place on the attorneys’ list, O’Connor, Burger, Blackmun, and Marshall had not appeared on any other group’s list.

The tendency of persons ranking Justices to equate greatness with familiarity had become even more pronounced in Bradley’s 1989 survey. If Blaustein and Mersky’s list of greats is compared with Bradley’s composite list, in a period of approximately twenty years the number of nineteenth-century Justices rated “great” had been reduced from four to one, and the number of early twentieth-century Justices from five to two. The number of Warren Court Justices had increased from three to five, and one post-Warren Court Justice, Rehnquist, who was ranked tenth in Bradley’s composite, had been added to the list of

greats. Over a time interval of sixty-one years, a list of eight “outstanding” Justices who spent all but ten years of their joint careers in the nineteenth century had been supplanted by a list of ten Justices, only one of whom was a nineteenth-century figure.

Thus, the very defining characteristics of the rankings literature form the problematic quality of three of its four guiding assumptions. The assumption that the performance of Justices could be profitably compared over time was undermined by the recurrent tendency of evaluators to allow their more charged reactions to judicial subjects closer to their time frame to affect their reactions to more remote subjects. By 1989 only John Marshall, among his nineteenth-century counterparts, had not been affected by that tendency. Likewise, the assumptions that a coherent set of evaluative criteria existed for comparing the performance of Justices over time, and that such criteria would be commonly held among evaluators, did not survive the Blaustein and Mersky and the Bradley surveys. Those authors conceded that no consensus existed about what criteria to use, and Bradley demonstrated in addition that different groups of persons employed different criteria.

CONCLUSION

In the end, the process of retrieving and assessing information about Justices, and efforts to evaluate their performances and compare them over time, only demonstrate that once one discounts for history, the idea of intelligible baselines against which a judge’s career can be deemed “neglected” lacks coherence. What follows from this conclusion? Does it suggest that, in the flow of time, all Justices are bound eventually to be neglected? And does it further suggest that efforts to revive the reputations of hitherto obscured Justices are quixotic enterprises?

Answering “yes” to both questions might well seem something of a downer for a conference on “neglected” Justices, so prudence alone might deter me from giving that answer. But I think there are other reasons for stopping short of the answer. The data I have presented to critique the blithe assumption that the performance of judges can comfortably be compared across time are also capable of yielding more hopeful conclusions for the enterprise of restoring “neglected” judicial reputations.

One conclusion is that not all the Justices in American history have had their reputations obscured over time. If, instead of looking at the changes in lists of “great” Justices from the 1920s to the present, one looks at continuities on those lists, three figures, Marshall,
Holmes, and Cardozo, have been identified as “greats” each time a rankings project has been undertaken. This suggests that there are a handful of figures, even ones from remote time periods, whose performance continues to resonate across the years, so that they are not obscured by Justices whose careers are closer in time to evaluators. When one then thinks about the contributions for which such Justices are known, they appear linked to issues that have been, and remain, fundamental to law in America. The ideas of judicial review, separation of governmental powers, and the relationship between federal and state power in the Constitution; the meaning of free speech in America; the appropriate stance for the judiciary in reviewing the constitutionality of legislation; the relationship between tradition and change in legal doctrine; the more general relationship between law and its social and historical contexts—those are issues that Marshall, Holmes, and Cardozo had occasion to address in the course of their careers. Those issues are still with us, still central concerns of American jurisprudence. If judges can address those issues with sufficient breadth and depth, as Marshall, Holmes, and Cardozo did, they are not likely to be neglected. The list should remind us that there are enough central and recurrent issues in our law to offer judges the opportunity to speak to them in an enduring way and thereby save themselves from neglect. So the normal flow of judicial reputations over time need not result, in all cases, in oblivion or even obscurity.

In addition, the data I have presented suggest that the same techniques employed to demonstrate the difficulties in retrieving and assessing information about judicial careers can be used to at least partially retrieve those careers from obscurity. When considering the question of Todd's insignificance, one can not only learn that the basis for that characterization lies in part in scanty data, one can also make more extended use of those data to conclude that Todd was more important to his contemporaries than the bare outlines of his career might suggest. Once one recognizes that the confidential characterizations of Cushing, Chase, Paterson, and Washington by one of their colleagues are extremely rare for early nineteenth-century Justices, the context of the characterizations can be seen as vitally important. The result may be that once the characterizations are decoded, Cushing, Chase, Paterson, and Washington can be seen to have been as “neglected” as Todd, and for comparably trivial reasons. The fact that it is difficult for Justices to avoid being neglected over time does not mean that there are no degrees of judicial obscurity. Understanding the ways in which commentators have “neglected” a
Justice may be the first step in approaching that Justice's career from more fruitful perspectives.

In the end, all of us who seek to carve out occasional spaces of edification from the past, and aspire for shelf life for our own work, confront the obscuring forces of historical change. In the face of those forces, it is as if we were Sherlock Holmes scrambling for a foothold on the rocky cliffs of the Reichenbach Falls, fearing that any moment the rush of water would sweep him down to join Professor Moriarity in the abyss. Holmes managed to survive, continued his exceptional adventures, and has thus far, like his judicial namesake, escaped historical oblivion. We may not be comparable talents, but we can still strive, through our work, to perch for a while on a ledge.