

Summer 1975

## Minor Supreme Court Justices: Their Characteristics and Importance

David N. Atkinson

*University of Missouri-Kansas City, Dept. of Political Science*

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the Supreme Court of the United States Commons

---

### Recommended Citation

David N. Atkinson, *Minor Supreme Court Justices: Their Characteristics and Importance*, 3 Fla. St. U. L. Rev. 348 (1975) .

<https://ir.law.fsu.edu/lr/vol3/iss3/2>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).

## MINOR SUPREME COURT JUSTICES: THEIR CHARACTERISTICS AND IMPORTANCE

DAVID N. ATKINSON\*

When President Cleveland appointed Melville W. Fuller Chief Justice of the United States in 1888, the latter found himself more than slightly awed by his associates on the Court. Shortly after his confirmation by the Senate, in a moment of candor and self-analysis, the Chief Justice regretfully concluded: “[n]o rising sun for me with these old luminaries blazing away with all their ancient fires.”<sup>1</sup> Fuller recognized that, as is natural with any collegial institution, some members will be denied the stature and preeminence attained by others.

The great majority of those appointed to the Supreme Court are minor Justices, leaving no special imprint on the public mind. They are nonetheless worthy of intensive study. This is especially true since the Court functions as a collective instrument of government, neither as centralized as the Presidency nor as diffused as Congress. Most Justices have been without distinguishing originality, but even the least eminent Justice has had the opportunity to participate in the development of judicially formulated public policy. As Justice Holmes observed: “what the world pays for is judgment, not the original mind.”<sup>2</sup>

Stature is an elusive concept, and it is admittedly a difficult task to rank Supreme Court Justices on a scale of accomplishment.<sup>3</sup> “Assessment of distinction in the realm of the mind and spirit cannot exclude subjective factors,” Justice Felix Frankfurter has reminded us. “Yet it is as true of judges as of poets or philosophers that whatever may be the fluctuations in what is called the verdict of history, varying and conflicting views finally come to rest and there arises a consensus

---

\* Professor of Political Science, University of Missouri—Kansas City. B.A., M.A., J.D., Ph.D., University of Iowa.

1. W. KING, MELVILLE WESTON FULLER 127 (1967).

2. THE MIND AND FAITH OF JUSTICE HOLMES 385 (M. Lerner ed. 1943).

3. See Blaustein & Mersky, *Rating Supreme Court Justices*, 58 A.B.A.J. 1183, 1187-89 (1972). Even with this obstacle, the idea of major and minor Justices continues to fascinate. A panel of 65 scholars selected by Professors Blaustein and Mersky picked John Marshall, Joseph Story, Roger B. Taney, John Marshall Harlan I, Oliver Wendell Holmes, Jr., Charles Evans Hughes, Louis D. Brandeis, Harlan F. Stone, Benjamin N. Cardozo, Hugo L. Black, Felix Frankfurter, and Earl Warren as the “greatest” Justices. *Id.* at 1183. James C. McReynolds, James F. Byrnes, and Charles F. Whittaker were at the bottom of the “failures” list. *Id.* at 1185-87.

of informed judgment."<sup>4</sup> Certain criteria have been traditionally recognized as aids in determining judicial accomplishment. Of course, universal agreement on these matters is not possible.<sup>5</sup> But even when legitimate variations in judgment are allowed, it is possible to distinguish those Justices who have earned special distinction on the bench from those whose accomplishments have been more modest.

One status criterion may be opinion output. Here longevity of service is apt to be signally important. Most would agree that Stephen J. Field, by virtue of the tenacity and force with which he held to his conclusions and pressed his point of view for 34 years, is entitled to a place of preeminence in Supreme Court history.<sup>6</sup> Not only did he participate in hundreds of major decisions, but he elaborated his views in the detail permitted only by long service. The duration of his tenure as well as his strength of mind made him influential. Justice Frankfurter named only one Justice (Benjamin N. Cardozo) who had served for less than one decade among the 12 members of the Court he imagined would be included by general consensus "in the roster of distinction."<sup>7</sup> James F. Byrnes, who stayed on the Supreme Court only one term before resigning to become the Director of Economic Stabilization, is one whose contribution was more negligible than most because of his brief tenure.<sup>8</sup>

For the vast majority of Justices whose tenures are neither overly long nor unduly short, signed opinions assume an added significance. The type of opinions which such Justices are assigned may have an important bearing on any evaluation of their contribution, since not all of the cases which come before the Supreme Court are equally signifi-

---

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

5. Chief Justice Taney's reputation is a classic illustration. Writing in 1937, Professor Frankfurter concluded: "The devastation of the Civil War for a long time obliterated the truth about Taney. And the blaze of Marshall's glory will permanently overshadow him. But the intellectual power of his opinions and their enduring contribution to a workable adjustment of the theoretical distribution of authority between two governments for a single people, place Taney second only to Marshall in the constitutional history of our country." F. FRANKFURTER, *THE COMMERCE CLAUSE* 72-73 (1937).

6. As Robert G. McCloskey observed: "From John Marshall to Hugo Black the judges who have played the primary creative parts in building our constitutional law have been more like Field than like the Mephistophelean model Holmes recommended. . . . For better or worse, it is judges like Field who have left the deepest imprint on the history of the nation." McCloskey, *Introduction to C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW* at xix (1969).

7. Frankfurter, *supra* note 4, at 783. Although his tenure was short, Justice Cardozo served during an especially crucial period in Court history. See Atkinson, *Mr. Justice Cardozo and the New Deal: An Appraisal*, 15 VILL. L. REV. 68 (1969).

8. See J. BYRNES, *ALL IN ONE LIFETIME* (1956). But see *Edwards v. California*, 314 U.S. 160 (1941) (Court's opinion written by Byrnes, J.).

cant at the time of decision or thereafter, even though a Justice may accord all cases which come before him equal respect and attention.<sup>9</sup>

Not all opinions are of equal precedential importance in the subsequent resolution of social conflict. An interpretation of a tax statute, for example, is likely to settle the specific issue raised by the litigants, until Congress enacts a change in the Internal Revenue Code.<sup>10</sup> The interpretation will affect all parties whose financial decisions or tax returns involve issues identical to the one litigated. But the scope of the opinion wherein the interpretative decision is made is decidedly limited. It affects only those persons who encounter an extremely circumscribed set of circumstances; as a precedent the opinion is without wide social importance inasmuch as it has limited application to one relatively narrow tax issue.

Conversely, an opinion elaborating the protection against unreasonable searches and seizures guaranteed by the fourth amendment has broad social implications. There is a uniqueness about each constitutional case; significant legal distinctions may rest on small differences in factual patterns.<sup>11</sup> The circumstances of the search, the behavior of the police, and the conduct of the accused offer interminable variations which may, in turn, provide a basis for distinguishing the case from others raising approximately the same questions. Nonetheless, an opinion involving searches and seizures is distinguishable from an opinion involving the interpretation of a tax statute. The former will be examined repeatedly for precedential value, whereas the latter, a nonconstitutional matter, will not likely be attributed significance beyond the specific circumstances of the case.

Hence the subject matter of a Justice's opinions is exceedingly important; posterity will, in part, judge him by the broad social significance of the issues to which his opinions speak. It is, however, important to note the limited control individual Justices have over the assignment of majority opinions.<sup>12</sup> Assignments are the prerogative of the Chief Justice whenever he is in the majority. When the Chief Justice is in the minority, this choice falls to the senior Justice in the majority. A Chief Justice may, therefore, maintain his control

---

9. In a letter of May 11, 1951, Justice Harold H. Burton wrote to Justice Sherman Minton: "When I referred to having sent in all the 'big circulations' before I left on Wednesday, I was not referring to circulations of opinions. They are all big to me. I was referring to the big circulated records in the capital cases which came to me on Wednesday P.M." Letter from Justice Harold Burton to Justice Sherman Minton, May 11, 1951, on file in Harry S. Truman Library.

10. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 6-8 (1968).

11. See KORT, *Quantitative Analysis of Fact-Patterns in Cases and Their Impact on Judicial Decisions*, 79 HARV. L. REV. 1595 (1966).

12. See H. ABRAHAM, *THE JUDICIAL PROCESS* 200-19 (2d ed. 1968).

over the opinion-writing function by remaining within the majority bloc.<sup>13</sup> He may assign relatively few socially significant cases to a Justice because of the Justice's infirmity,<sup>14</sup> general indolence,<sup>15</sup> or failure to perform within the time limitations imposed by the Court's schedule.<sup>16</sup> Thus a Chief Justice's assessment of a Justice's performance will affect the types of opinions assigned to the Justice.

Of course, a Justice, if denied the opportunity to speak for the majority, may always concur in a separate opinion. Justice Frankfurter's inclination to concur separately in majority opinions (stemming from his long held belief in the desirability of *seriatim* opinions, the practice of English judges) put him in fundamental disagreement with those who favor institutional unanimity whenever possible.<sup>17</sup> Dissenting opinions may also be written at will and can

13. Chief Justice Marshall, according to W. W. Crosskey, "did not carry on a continual frontal assault, uniformly successful, upon the subversive principles of Jeffersonianism. Instead, he fought a long and stubborn rearguard action to defend the Constitution against those principles. And it was, on the whole, a losing fight." Even though he retained control over the power of assignment, the Chief Justice frequently was "forced into compromise or defeat." Crosskey, *Mr. Chief Justice Marshall*, in *MR. JUSTICE 3*, 24-25 (rev. ed. A. Dunham & P. Kurland 1964).

14. For a discussion of the last days of Justice Field, see W. KING, *supra* note 1, at 222-23. Justice Joseph McKenna's retirement is poignantly described in Danelski, *A Supreme Court Justice Steps Down*, 54 *YALE REV.* 411 (1965). See also Fairman, *The Retirement of Federal Judges*, 51 *HARV. L. REV.* 397 (1938).

15. See Letter from Justice William Johnson to Thomas Jefferson, Dec. 10, 1822, in D. MORGAN, *JUSTICE WILLIAM JOHNSON 181-82* (1954). Justice Johnson's rationalization of why Chief Justice Marshall wrote most of the opinions of the Court was not flattering: "Cushing was incompetent. Chase could not be got to think or write—Patterson [sic] was a slow man and willingly declined the trouble, and the other two judges you know are commonly estimated as one judge." *Id.* at 182. Justice Johnson's explanation of the situation, however, may not be entirely accurate. See J. SCHMIDHAUSER, *THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES* 111 (1960).

16. According to Chief Justice Hughes, Justice Van Devanter "was slow in getting out his opinions, having what one of his most intimate friends in the Court (Justice Sutherland) described as 'pen paralysis.' This difficulty increased with the years. But his careful and elaborate statements in conference, with his accurate review of authorities, were of the greatest value." *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 171 (D. Danelski & J. Tulchin eds. 1973). Between 1930 and 1936 Justice Van Devanter wrote "only twenty-two opinions, while during the same period the Court wrote a total of 963 opinions, and Brandeis, Hughes, Roberts, Stone and Cardozo averaged about twenty each, every year." D. PEARSON & R. ALLEN, *THE NINE OLD MEN* 187 (1937). Justice Van Devanter wrote five opinions in 1930, one each in 1931 and 1932, nine in 1933, three in 1934, none in 1935, and three in 1936. *Id.*

17. A revealing exchange of correspondence occurred between Chief Justice Fred Vinson and Justice Frankfurter on the desirability of institutional unanimity. On December 1, 1948, Chief Justice Vinson wrote:

[I]t is hard to believe that multiple opinions in the early days of this Court, or the English practice, are our controlling precedents, nor is there anything in what I said or what I think that should or could convey to you any impression that "conscientious opinions courteously expressed, whether for the Court, in

enhance a Justice's reputation, as in the case of Justice Oliver Wendell Holmes.<sup>18</sup> More commonly, however, a dissenting role is, as Justice Jackson suggested, an admission of defeat.<sup>19</sup>

A Justice must usually have the opportunity to write opinions for the Court's majority in significant cases if his work is to acquire special distinction. Beyond this primary requirement, he must be able to deal with constitutional issues with imagination and with a sense of their current importance to the public. There must be an awareness, partly intuitive, partly a product of education, of the larger values sometimes only implicitly suggested in litigation.<sup>20</sup> There is

concurrence, or in dissent" should not be the order of the day. But, I do feel that the Bench, the Bar and the public generally have a right to be critical of the many opinions that sometimes appear in the disposition of cases. I know that the Bench and Bar have great difficulty, at times, in knowing what to do when we get through with some cases.

Letter from Chief Justice Fred Vinson to Justice Felix Frankfurter, Dec. 1, 1948, on file in Library of Congress.

Justice Frankfurter offered his rebuttal on the following day:

Somehow or other all the other English-speaking nations seem to survive with the expression of individual views in almost every case. And I adhere to the view which Jefferson so convincingly expressed that were it possible to dispose of the business of the Court and to express individual views on constitutional issues that would be most desirable. But, in any event, bench and bar and the public generally have "a right to be critical" but their criticism is well-founded only if the quality of opinions is below the appropriate standard for this Court, whether in substance or in temper, or if opinions are merely repetitive.

If there is one thing that the history of this Court proves, it is that very little attention should be paid to the ephemeral griping of an uninformed laity and, too often, of an unlearned or narrowly preoccupied bar.

Letter from Justice Felix Frankfurter to Chief Justice Fred Vinson, Dec. 2, 1948, on file in Library of Congress.

18. See *THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES* (A. Lief ed. 1929). Greatness has been found to be highly correlated with frequent dissent. "The reason for the strength of the relation partly lies in the fact that those judges who are most remembered as dissenters are those who had the foresight or fortune to have their dissenting positions eventually become majority positions." Nagel, *Characteristics of Supreme Court Greatness*, 56 A.B.A.J. 957, 959 (1970).

19. "Each dissenting opinion is a confession of failure to convince the writer's colleagues, and the true test of a judge is his influence in leading, not in opposing, his court." R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 19 (1963).

20. Judge Learned Hand expressed this need with his customary eloquence: I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited

no doctrinal or ideological point of view more serviceable in this respect than another. In the nineteenth century Justices Samuel F. Miller and Stephen J. Field disagreed with an intellectual intensity similar to contemporary disagreements between Justices Felix Frankfurter and Hugo L. Black.<sup>21</sup> Few would deny that all four are among the greatest Justices. These Justices possessed consciously developed sets of values that they sought to implement within the framework of constitutional adjudication. Their philosophical and systematic approaches to constitutional issues were beyond the capability or inclination of most of their colleagues. The great majority of Supreme Court Justices—the minor Justices—have contented themselves with ad hoc adjudications of constitutional issues.

Fortuitous circumstances may influence a Justice's status in constitutional history. One who, like Chief Justice Marshall, serves during a period of national growth or judicial activism has maximum opportunity to formulate doctrines of lasting social significance.<sup>22</sup> The Supreme Court has known periods of consolidation and of cautious reinterpretation, as old themes become less urgent or even extinct and new kinds of questions begin to attract the Court's attention.<sup>23</sup> Those who sit during these periods of judicial weakness have less opportunity to influence the nation's course.

Another criterion for judging members of the Court is style; that is, the manner in which views are conveyed.<sup>24</sup> Forceful expression, felicitous phrasing, and cogent, logical analysis, as well as occasional studied understatement, may contribute to the impact of the final product.<sup>25</sup> Most Justices are without the force of John Marshall or

---

by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 81 (I. Dilliard ed. 1960).

21. Compare C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890 (1939) (discussing issues that divided Justices Miller and Field), with W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (2d ed. 1966) (discussing issues that divided Justices Black and Frankfurter).

22. As Justice Holmes trenchantly put it: "A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*." THE MIND AND FAITH OF JUSTICE HOLMES 383 (M. Lerner ed. 1943).

23. See, e.g., C. PRITCHETT, THE ROOSEVELT COURT (1948).

24. For a discussion of judicial style, see J. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 130-43, 295-302 (1968).

25. Chief Justice Earl Warren was particularly sensitive to considerations of style in segregation cases. On May 7, 1954, the Chief Justice circulated a memorandum among the Justices in which he indicated his belief as to how the final opinions should be

Robert H. Jackson, the mastery of language of Oliver Wendell Holmes or Benjamin N. Cardozo, or the analytic facility of Joseph Story or the second John Marshall Harlan. A Justice's style may set him apart from his associates and add distinction to his point of view, since style affects the efficacy of communication.

A final criterion in assessing a Justice's performance relates to intra-Court socialization patterns, particularly those affecting internal work patterns.<sup>26</sup> Because the Supreme Court is a collegial institution, some Justices are certain to have more influence on their associates than others. The available evidence indicates that Chief Justice Marshall was acutely sensitive to the potential advantages of amiable intra-Court relationships.<sup>27</sup> While Chief Justice Marshall was concerned with consolidating and maintaining an influential position within his Court, other Justices' intra-Court influence has saved them from the opprobrium of near uselessness. A striking example drawn from the present century is Willis Van Devanter, who wrote very few opinions for the Court.<sup>28</sup> Yet his performance in conference, where he was invariably well-informed and verbal, added a needed dimension to the Taft Court. Other Justices frequently relied upon his leadership in performing the tasks of the Court. His expertise in federal jurisdiction and procedure, along with his general acumen, permitted him to contribute significantly to the Supreme Court despite his seeming inability to fashion opinions.

Although no one of them is necessarily conclusive, the foregoing criteria may assist in determining a Supreme Court Justice's place or status in Court history. Those Justices who write few opinions, who do not speak often for the Court in landmark decisions, who do not deal systematically with constitutional theory, who are not fortunate in their period of service, who are not gifted in their capacity to express themselves, and who make no special unseen contribution to the Court's work may properly be considered minor Justices. By these criteria most of the Justices of the Supreme Court have been minor Justices. Such a conclusion is not meant as a disparagement. Judicial accomplishment is a relative and intangible concept, meaningful only

---

written. "The memos were prepared on the theory that the opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory." Memorandum from Chief Justice Earl Warren to the Members of the United States Supreme Court, May 7, 1954.

26. See, e.g., C. MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 251-75 (1963); Danelski, *The Influence of the Chief Justice*, in *THE DECISIONAL PROCESS IN COURTS, JUDGES, AND POLITICS* (2d ed. W. Murphy & C. Pritchett 1974).

27. See 4 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 59-116 (1916).

28. See note 16 *supra*.



in intra-Court comparisons. Anyone who sits on the Court has achieved a distinction far beyond the grasp of most people.

Because Supreme Court Justices, like Presidents, constitute a very select elite, even minor Justices should be studied. There are several reasons for the importance of minor Justices. In the first place, each Justice has one vote. While Justices vary in ability or energy, each has equal power to affect short-term public policy with his ballot.<sup>29</sup>

The institution of judicial review has permitted the Supreme Court to achieve power unparalleled by any traditional court in the modern world. Indeed, an appreciation of the Court's past exercise of judicial review has caused one commentator<sup>30</sup> to suggest that this exercise should be abandoned by overruling *Marbury v. Madison*.<sup>31</sup> Even Professor Robert A. Dahl, who has contended that the Supreme Court inevitably reflects the dominant decisionmaking coalition in the United States "except for short lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions," has conceded:

It follows that within the somewhat narrow limits set by the basic policy goals of the dominant alliance, the Court can sometimes make national policy. Its discretion, then, is not unlike that of a powerful committee chairman in Congress who cannot, generally speaking, nullify the basic policies substantially agreed on by the rest of the dominant leadership, but who can, within these limits, often determine important questions of timing, effectiveness, and subordinate policy. Thus the Court is least effective against a current law-making majority—and evidently least inclined to act. It is most effective when it sets the bounds of policy for officials, agencies, state governments, or even regions, a task that has come to occupy a very large part of the Court's business.<sup>32</sup>

Thus one reason why minor Justices are important is that each Justice has an equal vote in the resolution of the important questions presented to the Supreme Court. The number and kind of opinions written, as well as the manner in which constitutional issues are treated and the rationale used to justify conclusions, are considerations of vast future importance in constitutional development. But at the time

29. The use to which voting data has been put is summarized, along with other research trends, in W. MURPHY & J. TANENHAUS, *THE STUDY OF PUBLIC LAW* (1972).

30. T. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS* 385 (1970).

31. 5 U.S. (1 Cranch) 137 (1803).

32. R. DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE* 207 (2d ed. 1972).

of decision Supreme Court Justices are neither distinguished nor minor; they are equal participants in an important decisionmaking process. Votes count most, at least in the short run. Accordingly, minor Justices merit study because they are directly involved in the creation of national public policy.<sup>33</sup>

A better understanding of the dynamics of group decisionmaking within the Supreme Court may depend on learning more about minor Justices. To ignore minor Justices is to risk getting a very partial view of institutional behavior patterns. Research efforts focusing on what in fact occurs inside the Court are still much needed. It would be helpful to know more about (1) the professional and social interaction of Court members, (2) the Justices' attitudes toward the Supreme Court bar, (3) the Justices' reaction to criticism, (4) their self-images, and (5) the work patterns followed at the Court, including each Justice's use of law clerks.<sup>34</sup>

Moreover, biographies of minor Justices may provide a source of valuable raw data for more systematic efforts to correlate background characteristics of the Justices with the decisionmaking process.<sup>35</sup> For example, assuming objectivity is a goal toward which a Justice should strive, that goal is thwarted when members of the Court are shackled with past commitments from which they are unable to free themselves.<sup>36</sup> Justice Miller expressed an intuitive awareness of an association between past experiences and present attitudes affecting judicial decisionmaking when he wrote:

---

33. For a discussion of the public policy formulating role of the Supreme Court, see M. SHAPIRO, *THE SUPREME COURT AND PUBLIC POLICY* (1969); J. SIGLER, *COURTS AND PUBLIC POLICY* (1970).

34. See, e.g., Atkinson, *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 69 NW. U.L. REV. 716 (1974).

One possible avenue of study would rely on private Court papers and interview data when available; many of the ablest studies to date have relied on these. For a discussion of the roll of private papers in judicial biography, see W. MURPHY & J. TANENHAUS, *supra* note 29, at 121-23. See also notes 44-46 and accompanying text *infra*.

35. See Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1959). A less optimistic view of the ultimate utility of employing socio-economic variables is expressed in T. BECKER, *supra* note 30, at 75-79.

36. "Judicial biographies of recent years—particularly those written by political scientists—are based on two assumptions: that the social philosophy of the judge will be reflected in his judicial opinions; and that his early life and experiences had a controlling effect on the molding of the philosophy which he read into the law as a judge." Lardner, *Judges As Students of American Society*, 24 IND. L.J. 386 (1949). Judicial biographers have scarcely begun to develop psychological variables which could be used "to provide case histories exploring the relationship between personality and decisions." Peltason, *Supreme Court Biography and the Study of Public Law*, in *ESSAYS ON THE AMERICAN CONSTITUTION* 215, 220 (G. Dietze ed. 1964).

It is vain to contend with judges who have been at the bar the advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence.<sup>37</sup>

Justice Holmes, to offer a contrasting illustration, often spoke to Harold Laski with disaffection about the probable effects of economic reforms in the United States;<sup>38</sup> nonetheless, his open-mindedness and lack of dogmatism permitted him to view legislative innovations tolerantly, even though he personally might have disagreed with them.<sup>39</sup> He was, by his own admission, prepared to entertain conclusions which differed from his own preferences, thereby generally abiding by the principle of unfettered majority rule. Detailed biographies of minor Justices might encourage further study of the psychological and socio-economic variables which influence their attitudes and judicial decisions. Whether Justice Miller's characterization of some of his colleagues or Justice Holmes' self-restraint is more representative of Court behavior is a question ripe for future research.

Thus far it has been suggested that the study of minor Justices is important because of their impact on public policy, and because of the need to appreciate the internal dynamics of Court decisionmaking. Additionally, studies of minor Justices are likely to disclose information about other, better known Justices.<sup>40</sup> Many of the ablest

37. C. FAIRMAN, *supra* note 21.

38. As Justice Holmes wrote to Mr. Laski on December 9, 1921:

I read your article on Christian Socialism with the pleasure I always get from your writing, but with a touch of regret at the tone that you hint from time to time that the existing order is wicked. The inevitable is not wicked. If you can improve upon it all right, but it is not necessary to damn the stem because you are the flower. As it seems to me that all society has rested on the death of men and must rest on that or on the prevention of the lives of a good many, I naturally shrink from the moral tone.

1 HOLMES-LASKI LETTERS 385 (M. Howe ed. 1953) (footnote omitted).

39. "[Justice Holmes'] scepticism and even hostility, as a matter of private judgment, toward legislation which he was ready to sustain as a judge only serve to add cubits to his judicial stature. For he thereby transcended personal predilections and private notions of social policy, and became truly the impersonal voice of the Constitution." F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 44-45 (1938). See also THE HOLMES READER (2d ed. J. Marke 1964).

40. There are, of course, many other valuable functions fulfilled by judicial biography. Walter F. Murphy has enumerated some of the more important functions:

- (1) to supply the lay reader with general knowledge about the judiciary and its surrounding political system and to increase the knowledge of the professional,
- (2) to analyze the character of the Justice and to outline the nature of the office

biographies currently available reveal much about those with whom the subject came frequently into association. Professor Alpheus T. Mason's biography of Chief Justice Harlan Fiske Stone shows that Justice Frankfurter endlessly engaged in the most uninhibited flattery in his correspondence with the Chief Justice; it is also clear that Chief Justice Stone did not have a very high regard for Justice Black's legal capabilities.<sup>41</sup> Almost incidentally, Chief Justice Stone's biography yields valuable insights into Justice Frankfurter's style of lobbying and Justice Black's attitude toward *stare decisis*.

If the thesis of this article is persuasive—that most Supreme Court Justices are minor but still worthy of intensive study—one wonders why more biographies than are presently available have not been written. There are several reasons.<sup>42</sup> First, there have been formidable problems surrounding the raw materials of judicial biography. Justices, more so than other political elites, are shrouded in privacy.<sup>43</sup> Court papers have sometimes been destroyed, neglected, or culled for improprieties in a manner calculated to distort the evidence in the subject's favor.<sup>44</sup> Curiously enough, some scholars have even taken the position that there is something unethical or faintly improper about the practice of judicial biographers availing themselves of the best evidence, including Court papers when available.<sup>45</sup> Professor Mason's response surely represents the better view:

Assuming that papers have been placed by responsible persons in the hands of a responsible scholar, certain considerations governing their selection may perhaps meet the demands of both privacy and history, *viz*: (a) exclusion of everything that descends to the level of mere gossip; (b) inclusion of whatever contributes to an under-

---

he held and the uses to which he put that office, (3) to reconstruct the values that influenced the Justice in his decisionmaking, that is, to illuminate his jurisprudence, (4) to place the man and the institution in the context of their times, (5) to throw light on the group phase of the Court's decisional processes, (6) to describe at least some of the various sets of roles that the Court can play in the political system, and (7) to provide useful data for scholars whose interest in a particular Justice or even in the Supreme Court is only incidental.

Murphy, *Book Review*, 78 *YALE L.J.* 725, 728-29 (1969).

41. See generally A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 467-720 (1968).

42. See Spector, *Judicial Biography and the United States Supreme Court: A Bibliographical Appraisal*, 11 *AM. J. LEGAL HIST.* 1, 2-3 (1967).

43. One commentator suggests that this shroud is thinner than commonly supposed. Becker, *Surveys and Judiciaries, or Who's Afraid of the Purple Curtain*, 1 *LAW & SOC'Y REV.* 133 (1966).

44. The historical papers available for each Justice and their archival location can be found in *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* (L. Friedman & F. Israel eds. 1969).

45. See, e.g., Cahn, *Eavesdropping on Justice*, 184 *THE NATION* 14 (1957).

standing of the judging process and everything of possible help in the Court's future deliberations; (c) inclusion of such material as appears meaningful in terms of biography. If judicial procedures, the give and take of the conference room, the compromises that a collective judgment inevitably entails, and the incidental revelations of human frailties and strength, are so peculiarly immune to the claims of history as to preclude the spadework necessary to an understanding of the Supreme Court, the Court itself would be among the losers.<sup>46</sup>

Secondly, judicial biography has always been an underpopulated subfield in social science.<sup>47</sup> The subject matter makes formidable demands on the scholar. Expertise is, at the minimum, required in law, political science, history, and possibly psychology. Moreover, biography is a literary genre, and the best judicial biographies have always qualified as literary achievements. Unfortunately, judicial biography requires a combination of skills not easily commanded by any one researcher.

And finally, there has been a lack of interest by the general public and some academics in judicial biography. This indifference has been apparently bolstered by a belief in the obscurity of the subject matter. But is such indifference justified? "American legal history," Justice Frankfurter once warned, "has done very little to rescue the Court from the limbo of impersonality."<sup>48</sup> Until there is a fuller awareness of the interplay between individual personalities and decisionmaking, it is unlikely there will be "an adequate history of the Supreme Court, and, therefore, of the United States."<sup>49</sup>

---

46. A. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 221 (1968).

47. Writing in 1967, Robert M. Spector concluded: "Full-length biographies of the ninety-five separate justices of the highest United States tribunal have been slow a-borning. Marshall, Taney, White, Taft, Holmes, Stone, and Brandeis have been the main centers of attraction thus far." Spector, *supra* note 42, at 1.

48. F. FRANKFURTER, *supra* note 5, at 6. A contrary conclusion about the "limbo of impersonality" is expressed by Peltason, *supra* note 36, at 219.

49. F. FRANKFURTER, *supra* note 5, at 6.