A BOOK OF LEGAL LISTS

The Best and Worst in American Law

BERNARD SCHWARTZ

With 150 Court and Judge Trivia Questions

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BERNARD SCHWARTZ

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Preface

Irving Wallace, the novelist, begins his *Book of Lists* with a quote by H. Allen Smith: "The human animal differs from the lesser primates in his passion for lists of Ten Bests." Almost a hundred books of lists have been published—about motion pictures, the Bible, sports (both sports in general and individual sports: baseball, golf, tennis, soccer, rugby, and cricket), food, money, chess, women, music, and four books of general lists by Irving Wallace himself. As far as I have been able to determine, however, there has been no book of legal lists. I have tried to fill the gap with this book. It contains my lists of the best and worst in American law—from the greatest and worst Supreme Court Justices to the greatest legal motion pictures.

These lists are personal; experts in all the areas covered will disagree with many of my choices. They are, however, based on over half a century's experience in the law—as a student, professor, writer, and part-time counsel (in both government and private practice). I have tried to explain my choices in brief essays that follow each entry. At the least, they show that the lists are not my own ipse dixits, but are reasoned selections derived from a lifetime's work in law and legal history.

In addition, I have included 150 Trivia Questions on the Supreme Court and the ten greatest non-Supreme Court judges. Most of these have been published in the *Supreme Court Historical Society Quarterly*. I trust they will be of interest to a wider audience than the Court aficionados who normally read that publication.

Tulsa, Oklahoma B. S.
October 1996

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BOOK OF LEGAL LISTS

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TEN GREATEST SUPREME COURT JUSTICES

Who are the top ten Supreme Court Justices, and why does each deserve his place at the judicial apex?

To be sure, any such ranking is a personal matter, bound to be based on the lister's own subjective evaluation. After all, as Justice Felix Frankfurter pointed out, "Greatness in the law is not a standardized quality, nor are the elements that combine to attain it." There are no "objective" standards of comparison between Justices—no batting averages like those that distinguish the Ty Cobbses or Ted Williamses from their lesser counterparts.

Perhaps the most that can be done here is to apply Justice Potter Stewart's celebrated aphorism on pornography to Supreme Court greatness: "I could never succeed in [defining it]. But I know it when I see it." It may be impossible to say exactly what makes a great Justice. But we know greatness when we see it, and we *know* that the Justices on this list were great—in my opinion, the ten greatest in Supreme Court history.

What follows is a discussion of the selected Justices, with emphasis on the reasons for their apotheosis. Then, I will discuss some Justices included in other lists and why they are not on mine. I will conclude with an attempt to generalize from my list and determine what raises a Justice to the select pantheon.

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Ten Greatest Supreme Court Justices

1. John Marshall (1755–1835), Chief Justice of the United States, 1801–1835
2. Oliver Wendell Holmes (1841–1935), Justice, United States Supreme Court, 1902–1932
3. Earl Warren (1891–1974), Chief Justice of the United States, 1953–1969
4. Joseph Story (1779–1845), Justice, United States Supreme Court, 1811–1845
5. William J. Brennan, Jr. (b. 1906), Justice, United States Supreme Court, 1956–1990
6. Louis D. Brandeis (1856–1941), Justice, United States Supreme Court, 1916–1939
7. Charles Evans Hughes (1862–1948), Justice, United States Supreme Court, 1910–1916; Chief Justice of the United States, 1930–1941
8. Hugo Lafayette Black (1886–1971), Justice, United States Supreme Court, 1937–1971
9. Stephen J. Field (1816–1899), Justice, United States Supreme Court, 1863–1897
10. Roger Brooke Taney (1777–1864), Chief Justice of the United States, 1836–1864

1. John Marshall

John Marshall (1755–1835) is at the top of every list of Supreme Court greats. "If American law," Oliver Wendell Holmes once said, "were to be represented by a single figure, skeptic and worshipper alike would agree that the figure could be one alone, and that one, John Marshall." Certainly, more has been written about the great Chief Justice than about any other judge. He was not merely the expounder of our constitutional law, but was also its author, its creator. "Marshall found the Constitution paper; and he made it power," said James A. Garfield. "He found a skeleton, and he clothed it with flesh and blood."

For Marshall, the Constitution was not to be applied formalistically; it must be applied in light of the overriding purpose of the Framers—to establish a nation endowed with necessary governmental powers. His three most important decisions ensured that the federal government would possess those powers: *Marbury v. Madison* (1803), establishing the supremacy of the Constitution and judicial power to review the constitutionality of laws; *McCulloch v. Maryland* (1819), holding that federal authority was not limited to the powers enumerated in the Constitution; and *Gibbons v. Ogden* (1824), giving a broad interpretation to the federal power to regulate commerce.

The key to the Marshall jurisprudence is his seminal dictum: "[W]e must never forget that it is a *constitution* that we are expounding." Justice Frankfurter termed this the "most important, single sentence in American Constitutional Law." It set the theme for constitutional construction—that the Constitution, in Frankfurter's words, is not to be read as "an insurance clause in small type, but a scheme of government . . . intended for the undefined and unlimited future."

Marshall read the Constitution to lay the legal foundation of an effective national government. More than any other jurist, he employed the law as a means to attain the political and economic ends that he favored. In this sense, he was the very paradigm, during our law's formative era, of the result-oriented judge.

Marshall was undoubtedly one of the greatest of legal reasoners. His opinions were based on supposedly timeless first principles that, once accepted, were led, by unassailable logic, to the conclusions that he favored. As Benjamin N. Cardozo put it, "The movement from premise to conclusion is put before the observer as something more impersonal than the working of the individual mind. It is the inevitable progress of an inexorable force."

Even Marshall's strongest critics were affected by the illusion. "All wrong, all wrong," we are told was the despairing comment of one critic, "but no man in the United States can tell why or wherein."

Marshall was described by a contemporary as "disposed to govern the world according to rules of logic." Marshall the logician is, of course, best seen in his magisterial opinions, which, to an age still under the sway of the syllogism, built up in broad strokes a body so logical that it baffled criticism from contemporaries. To Marshall, however, logic, like law, was only a tool. Indeed, the great Chief Justice's opinions may be taken as a prime judicial example of the famous Holmes aphorism: "The life of the law has not been logic: it has been experience." Marshall, more than any judge, molded his decisions to accord with what Holmes called "the felt necessities of the time." For Marshall, the Constitution was a tool; and the same was true of law in general. Both public law and private law were to be employed to lay down the doctrinal foundations of the polity and economy that served his nationalistic vision of the new nation.

Compared with Thomas Jefferson's, Marshall's vision may have been a conservative one. But the men had different conceptions of the American polity. Marshall himself saw all too acutely that the Jeffersonian theme was sweeping all before it. "In democracies," he noted in an 1815 letter, "which all the world confirms to be the most perfect work of political wisdom, equality is the pivot on which the grand machine turns." As he grew older, Marshall fought the spread of the equality principle, notably in the Virginia Convention of 1829/1830. For, as he wrote in the same letter, "equality demands that he who has a surplus of anything in general demand should parcel it out among his needy fellow citizens."

Yet, if Marshall's last effort—against the triumph of Jeffersonian and Jacksonian democracy—was doomed to failure, his broader battle for his conception of law was triumphantly vindicated. Even the least conversant with American law knows that it is the Marshall conception of the Constitution that has dominated Supreme Court jurisprudence. In addition, the Marshall Court decisions adapting the common law to the needs of the expanding market economy led the way to the remaking of private law in the entrepreneurial image. Free individual action and decision became the ultimate end of law, as it became that of the society itself. The law became a prime instrument for the conquest of the continent and the opening of the economy to people of all social strata. Paradoxically perhaps, it was Marshall, opponent of Jefferson–Jackson democracy though he may have been, whose conception of law laid the constitutional cornerstone for a

legal system that furthered opportunity and equality in the marketplace to an extent never before seen.

2. Oliver Wendell Holmes

Oliver Wendell Holmes (1841–1935) was the most influential Associate Justice ever to sit on the Supreme Court. I have already quoted Holmes's statement that if American law were to be represented by a single figure, that figure would be John Marshall. If our law were to be represented by a second figure, most would say that it should be Holmes himself. It was Holmes, more than any other legal thinker, who set the agenda for modern jurisprudence. In doing so, he became as much a part of legend as law: the Yankee from Olympus—the patrician from Boston who made his mark on his own age and on ages still unborn as few men have done. Indeed, a major part of twentieth-century Supreme Court doctrine is a product of the Holmes handiwork.

In constitutional law, the two great Holmes contributions were the theory of judicial self-restraint and the expansive view of free speech.

Judicial self-restraint was a constant theme in Holmes's opinions. Holmes reiterated that, as a judge, he was not concerned with the wisdom of a challenged legislative act. The responsibility for determining what measures were necessary to deal with economic and other problems lay with the people and their elected representatives, not with judges.

But the theme of judicial restraint was overridden by another Holmes theme in cases involving freedom of expression. The governing criterion here was the "clear and present danger" test, which Holmes developed just after World War I. Under this test, speech may be restricted only if there is a real threat—a danger, both clear and present—that the speech will lead to an evil that the legislature has the power to prevent.

Holmes's contribution was, however, greater than these constitutional doctrines. It was Holmes, more than any other Justice, who, as stated, pointed the way to a whole new era of jurisprudence. For Holmes, the law should be consciously made to give effect to the policies that would best serve the society. Instead of a system based on logical deduction from a priori principles, the Holmes concept was one of law fashioned to meet the needs of the community. In the Holmes jurisprudence, the law was a utilitarian instrument for the satisfaction of social needs.

Thus it was Holmes who set legal thought on its coming course. As early as his book *The Common Law* (1881), in which he asserted, "The life of the law has not been logic," he was sounding the clarion of twentieth-

century jurisprudence. If the law reflected the "felt necessities of the time," then those needs rather than any theory should determine what the law should be. These were not, to be sure, the views followed by American judges and lawyers at the beginning of this century—or even by the majority during Holmes's Supreme Court tenure. But the good that men do also lives after them. If the nineteenth century was dominated by the formalist jurisprudence of the day, the twentieth was, ultimately, to be that of Mr. Justice Holmes.

3. Earl Warren

The period during which Earl Warren (1891–1974) served as Chief Justice was the second formative era in our legal history, in which the law underwent changes as profound as those occurring in the country. The Warren Court led the movement to remake the law in the image of the evolving society. In terms of creative impact on the law, the Warren tenure can be compared only with that of John Marshall.

Warren's leadership abilities and skill as a statesman enabled him to rank as second only to Marshall among our Chief Justices. Those Justices who served with him stressed Warren's leadership abilities, particularly his skill in leading the conferences at which cases were discussed. As the *Washington Post* noted, "Warren helped steer cases from the moment they were first discussed simply by the way he framed the issues."

In his first conference on *Brown v. Board of Education* (1954), Warren presented the question before the Court in terms of racial inferiority. He told the Justices that segregation could be justified only by belief in the inherent inferiority of blacks, and if segregation was upheld, it had to be on that basis. A scholar such as Justice Frankfurter would certainly not have presented the case that way. But Warren went straight to the ultimate human values involved. In the face of such an approach, arguments based on legal scholarship would have seemed inappropriate, almost pettifoggery.

There is an antinomy inherent in every system of law: the law must be stable, yet it cannot stand still. It is the task of the judge to balance these two conflicting elements. Chief Justice Warren came down firmly on the side of change, leading the effort to enable the law to cope with societal change. Warren rejected judicial restraint because he believed that it thwarted effective performance of the Court's constitutional role. In Warren's view, the Court functioned to ensure fairness and equity, particularly in cases where they had not been secured by other governmental processes. Where a constitutional requirement remained unenforced due

to governmental default, the Court had to act. The alternative, as Warren saw it, was an empty Constitution, with essential provisions unenforced.

The *Brown* desegregation decision was a direct consequence of the failure of political processes to enforce the guarantee of racial equality. Before *Brown,* it had become constitutional cliché that the guarantee had not succeeded in securing equality for African-Americans; that situation largely resulted from governmental default. For Warren, the years of legislative inaction made it imperative for the Court to intervene. The alternative would leave untouched a practice that flagrantly violated both the Constitution and the ultimate human values involved.

The bases of the major Warren decisions were fairness and equality. For the Chief Justice, the technical issues traditionally fought over in constitutional cases always seemed to merge into larger questions of fairness. His concern was expressed in the question he so often asked at argument: "But was it fair?" When Warren concluded that an individual had been treated unfairly, he would not let rules or precedents stand in the way.

Even more important was the notion of equality. If one great theme recurred in the Warren decisions, it was equality before the law—equality of races, of citizens, of rich and poor, of prosecutor and defendant. The result was that seeming oxymoron: "a revolution made by judges." Without the Warren Court decisions giving ever-wider effect to the right to equality, most of the movements for equality that have permeated American society might never have gotten started.

Perhaps Warren as a judge will never rank with the consummate legal craftsmen who have fashioned the structure of Anglo-American law over the generations. But Warren was never content to deem himself a mere vicar of the common-law tradition. He was the epitome of the "result-oriented" judge, who used his power to secure the result he deemed right. Employing judicial authority to the utmost, he never hesitated to do whatever he thought necessary to translate his conceptions of fairness and equality into the law of the land.

For Warren, principle was more compelling than precedent. The key decisions of the Warren Court overruled decisions of earlier Courts. Those precedents had left the enforcement of constitutional rights to the political branches. Yet the latter had failed to act. In Warren's view, this situation left the Court with the choice either to follow the precedent or to vindicate the right. For the Chief Justice, there was never any question as to the correct alternative.

When all is said and done, Warren's place rests not on his opinions, but on his decisions. In terms of impact on the law, few occupants of the

bench have been more outstanding. To criticize Warren, as some have done, for lack of scholarship or judicial craftsmanship seems petty when we consider the contributions he made as leader in the greatest judicial transformation of the law since Marshall.

4. Joseph Story

Joseph Story (1779–1845), at thirty-two, was the youngest Justice ever appointed as well as the most learned scholar to sit on the Supreme Court. He also enjoyed a reputation as a minor poet. He had composed a lengthy poem, "The Power of Solitude," referring to it in a letter as "the sweet employment of my leisure hours." Story rewrote the poem, with additions and alterations, and published it with other poems. One who reads the extracts contained in his son's biography quickly realizes that it was no great loss to literature when Story decided to devote his life to the law. Story himself apparently recognized this, for he later bought up and burned all copies of the work he could find.

On the Marshall Court, Story supplied the one thing the great Chief Justice lacked—legal scholarship. Story's scholarship was, indeed, prodigious. "Brother Story here . . . can give us the cases from the Twelve Tables down to the latest reports," Marshall once said. Story reveled in legal research. His opinions were long and learned and relied heavily on prior cases and writers.

Not only that; Story was a leading writer on whom judges and lawyers relied. By the end of his career, he had published nine treatises (in thirteen volumes) on subjects ranging from constitutional to commercial law. They confirmed the victory of the common law in the United States and presented the courts with authoritative guides.

Story's best-known work—his three-volume *Commentaries on the Constitution of the United States* (1833)—was a restatement of the Marshall constitutional doctrines in textual form. The Story volumes showed through virtual clause-by-clause analysis that the Marshall jurisprudence was the "correct" constitutional doctrine. With the Story work, the national view of governmental power was firmly established. It could now serve as the basis for the harmonization of the law with the newly emerging economic forces.

In the Supreme Court also, Justice Story became the principal supporter of Marshall's constitutional doctrines. But it was not as a junior Marshall that Story left his main imprint. If Marshall was the prime molder of early American public law, Story was his Supreme Court counterpart for

private law. Our commercial and admiralty law were largely the creation of Story's decisions. Important Story opinions blended the law of trusts with the rudimentary law of corporations that had developed in England to produce the modern business corporation and enable it to conduct its affairs. The Story jurisprudence played a vital part in the development of the business corporation, which (as James Kent noted) was beginning to "increase in a rapid manner and to a most astonishing extent." By permitting corporations to operate as freely as individuals, Story played a crucial part in accommodating the corporate form to the demands of the expanding economy.

Economic progress, to Story, depended on the creation of a *uniform* commercial law on which businessmen could rely. Some of the most important Story opinions contributed to the establishment of such a law. Uniform commercial law, made by the federal judges without the interference of juries (merchants, as Story noted, "are not fond of juries") and according to accepted mercantile custom and convenience, was what the commercial community wanted.

Despite his Republican (Jeffersonian) origins, Story is usually considered a paradigm of the conservative judge. But his approach to private law—particularly in relation to commercial development—was a transforming one. "It is obvious," Story wrote, "that the law must fashion itself to the wants, and in some sort to the spirit of the age." It was Story, more than any Justice, who helped ensure that our private law would have a common-law foundation and one that would be adapted to the conditions of the new nation. With his work, the law was now so clearly presented that the energies of the courts could be devoted to applying the new principles to concrete cases.

5. William J. Brennan, Jr.

Oliver Wendell Holmes is usually considered the most influential Justice to have sat on the Supreme Court. As we saw, it was Holmes, more than any other legal thinker, who set the agenda for modern constitutional jurisprudence.

Nevertheless, as Judge Richard A. Posner points out, "the primary vehicles of Holmes's innovations were dissenting opinions that, often after his death, became and have remained the majority position." The Holmes dissents may have sounded the theme of the coming era. But they did not really influence our law until after his death.

If we look at Justices for their role in the decision process, William J.

Brennan, Jr. (b. 1906), was the most influential. He was the catalyst for some of the most significant decisions during his tenure. More important, the Brennan jurisprudence set the pattern for American legal thought toward the end of this century. So pervasive was Brennan's influence that the English periodical the *Economist* headed its story on his retirement, "A lawgiver goes."

The *Economist*'s characterization is not an exaggeration. Dennis J. Hutchinson, an editor of the *Supreme Court Review*, in a review of my Warren biography, declared that to call it the "Warren Court" is a misnomer: "it was 'the Brennan Court.'" This assertion unduly denigrates Warren's leadership. Still, it is hard to argue with Hutchinson's conclusion, in another portion of his review that "[W]hen the public record is added to Schwartz's behind-the-scenes examples, Brennan emerges clearly as the most important justice of the period."

After Chief Justice Warren's retirement, Brennan was no longer the trusted insider. Yet even under Chief Justice Warren E. Burger, Brennan was able to lead a majority in important cases. In the Rehnquist Court, too, Brennan secured notable victories, particularly in the areas of abortion, separation of church and state, freedom of expression, and affirmative action. He was primarily responsible for the decisions toward the end of his tenure that the First Amendment protected flag burning and that congressional authority in the field of affirmative action should be upheld.

Before his 1956 appointment, Brennan had been a judge in New Jersey, rising from the state trial court to its highest bench. On the Supreme Court, Brennan proved a surprise to those who regarded him as a moderate, since he became a firm adherent of the activist philosophy. Brennan had been Justice Frankfurter's student at Harvard Law School; yet if Frankfurter expected the new Justice to continue his pupilage, he was soon disillusioned. After Brennan had joined the Court's activist wing, Frankfurter quipped, "I always encourage my students to think for themselves, but Brennan goes too far!"

Brennan's forte was his ability to lead the Justices to the decisions he favored, even at the cost of compromising his own position. More than any Justice, Brennan was the strategist behind Supreme Court jurisprudence—the most active lobbyist (in the nonpejorative sense) in the Court, always willing to take the lead in trying to mold a majority for the decisions that he favored. "In case after case," Hutchinson writes about my Warren biography, "Schwartz documents . . . how Brennan would accommodate his own drafts and views in order to preserve an opinion of the Court that was tumbling toward a plurality or worse."

With the retirement of Chief Justice Warren, many expected the Court to tilt away from its activist posture. If the Warren Court had made a legal revolution, a counter-revolution was seemingly at hand. It did not turn out that way. If anything, the intended counter-revolution served only as a confirmation of Warren Court jurisprudence. The Warren concept of the Court continued unabated under Brennan's leadership. Indeed, as Anthony Lewis summed it up, "We are all activists now."

In the end, of course, the underlying question comes down to how we resolve the already stated antinomy: the law must be stable, yet it cannot stand still. Justice Brennan is a prime example of the judge who has not taken stability as his polestar. He has been the leading opponent of the view that constitutional construction must be governed only by the Framers' original intention. Throughout his tenure, Brennan rejected "original intention" jurisprudence. To him, the meaning of the Constitution is to be found in today's needs, not in a search for what was intended by its eighteenth-century draftsmen.

To Justice Brennan, then, the outstanding feature of the Constitution is its plastic nature: rules and doctrines are malleable and must be construed to meet the changing needs of different periods. Brennan's tenure bears ample witness to his success in giving effect to the concept of a flexible law constantly adapted to contemporary needs. Above all, Brennan's jurisprudence was based on what he termed "the constitutional ideal of human dignity." This is what led him to his battle against the death penalty, which he considered a cruel and unusual punishment. The battle to outlaw capital punishment was a losing one for Brennan, but it was the only major one he did lose in his effort to ensure what he said was "the ceaseless pursuit of the constitutional ideal." The ultimate Brennan legacy was that no important decision of the Warren Court was overruled while the Justice sat on the Burger and Rehnquist Courts.

6. Louis D. Brandeis

Louis D. Brandeis (1856–1941), like Holmes, added a new dimension to legal thought—one that emphasized the facts to which the law applied, "In the past," Brandeis wrote, "the courts have reached their conclusions largely deductively from preconceived notions and precedents. The method I have tried to employ . . . has been inductive, reasoning from the facts."

Brandeis's method was inaugurated by his brief in *Muller v. Oregon* (1908)—the generic type of a new form of legal argument, ever since referred to as the Brandeis Brief. To persuade the Court to uphold an

Oregon law prohibiting women from working in factories for more than ten hours a day, Brandeis marshaled an impressive mass of statistics to demonstrate, in the brief's words, "that there is reasonable ground for holding that to permit women in Oregon to work . . . more than ten hours in one day is dangerous." The Brandeis Brief in *Muller* was devoted almost entirely to the facts: it contains 113 pages. Only 2 contain argument on the law.

Brandeis was appointed to the Supreme Court in 1916 and was confirmed over bitter opposition. On the bench, Brandeis continued to use the new approach he had developed in *Muller*—emphasizing the facts, particularly those underlying regulatory legislation. For him, the search of the legal authorities was the beginning, not the end, of research. The Brandeis emphasis on facts created what Justice Frankfurter called "a new technique" in jurisprudence. Until Brandeis, said Frankfurter, "social legislation was supported before the courts largely *in vacuo*—as an abstract dialectic between 'liberty' and 'police power,' unrelated to a world of trusts and unions, of large-scale industry and all its implications." With Brandeis, all this changed. In Brandeis's briefs and opinions, Frankfurter summed it up, "the facts of modern industry which provoke regulatory legislation were, for the first time, adequately marshaled before the Court."

The Brandeis method was used for a particular purpose. The Justice completely rejected the prevailing notion that the law was to be equated with laissez-faire. Brandeis urged that regulation was a necessary aspect of modern law: "We have long curbed the physically strong, to protect those physically weaker. More recently we have extended such prohibitions to business. . . . [T]he right to competition must be limited in order to preserve it."

If twentieth-century law has enabled the society to move from laissez-faire to the welfare state, that has been true because it has accepted the Brandeis approach. Emphasis on the facts has led to increasing understanding of the reality that led to interventions in the economy. "The small man," wrote Brandeis, "needs the protection of the law"; but, under the laissez-faire conception, "the law becomes the instrument by which he is destroyed."

To prevent that result, Brandeis urged, "business must yield to the paramount needs of the community." The Brandeis jurisprudence was a major factor in leading the law to adopt a more benign attitude to economic regulation. The Brandeis technique helped persuade jurists that the legal conception of "liberty" should no longer be synonymous with

immunity from regulation. Instead, the law has come to believe with Brandeis that "[r]egulation . . . is necessary to the preservation and best development of liberty." That in turn has led to the rejection of laissez-faire as the foundation of our constitutional law.

7. Charles Evans Hughes

When Chief Justice William Howard Taft resigned in 1930, Charles Evans Hughes (1862–1948) was appointed to succeed him. Hughes was almost sixty-eight—the oldest man chosen until then to head the Court. However, he undertook his new duties with the vigor of a much younger person. In addition, his distinguished career endowed him with prestige that few in the highest judicial office had had.

As a leader of the Court, Hughes must be ranked with the great Chief Justices. "To see [Hughes] preside," Justice Frankfurter was to write, "was like witnessing Toscanini lead an orchestra." The Hughes leadership abilities were precisely what the Court needed to confront its most serious crisis in a century. Before Hughes's appointment, the Court's conservative core had carried its laissez-faire interpretation of the Constitution to the point where there was, in the famous Holmes phrase, "hardly any limit but the sky to the invalidating of [laws] if they happen to strike a majority of the Court as for any reason undesirable."

When Chief Justice Hughes ascended the bench in early 1930, the country was deep in our most serious economic crisis. The crisis only became worse as the Hughes term went on—putting the country and the Court to a severe test. The new Chief Justice had to meet the test with a Court composed almost entirely of Justices who had served under his predecessor. Despite this, Hughes was able to persuade a bare majority that the Constitution should no longer be treated as a legal sanction for laissez-faire. Writing in 1941, Justice Robert H. Jackson asserted, "The older world of *laissez-faire* was recognized everywhere outside the Court to be dead." It was Hughes who ensured that the recognition penetrated the Marble Palace.

Justice Frankfurter once said that Chief Justice Hughes "was, in fact, the head of two courts, so different . . . was the supreme bench in the two periods of the decade during which Hughes presided over it." The first Hughes Court sat from the Chief Justice's appointment to 1937. The period was dominated by decisions that both nullified the most important New Deal legislation and restricted state regulatory power. In both respects, the Court confirmed the laissez-faire jurisprudence of its predecessors.

The grim economic background, however, indicated how unrealistic reliance on laissez-faire was. Giant industries prostrate, nationwide crises in production and consumption, the economy in virtual collapse—the choice was between government action and chaos. A system of constitutional law that required the latter could hardly endure.

Hughes was responsible for the reversal in jurisprudence that occurred in 1937—a reversal so great that its effects justify the characterization of "constitutional revolution." In March 1937, Hughes announced a decision upholding a minimum-wage law, similar to one the Court had previously held beyond governmental power. The Chief Justice himself led the Court to repudiate the earlier case. The Court to which Hughes came contained four of the conservative Justices who had decided that case. It also contained three liberal Justices who were strongly in favor of overruling it. The remaining members were the Chief Justice and Justice Owen J. Roberts, who had taken his seat at the same time as Hughes. Roberts played the crucial "swing man" role in the Hughes Court.

It was Hughes who persuaded Roberts to vote with the new majority. Hughes himself fully realized the critical importance of Roberts's vote. He later recounted how, when the Justice told him that he would vote to sustain the minimum-wage law, he almost hugged him—which, coming from one with so great a reputation for icy demeanor, says a great deal.

Hughes's lead and his successful persuasion of Roberts made possible the decision upholding the minimum-wage law. Hughes also wrote the landmark opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937)—the seminal decision in which the National Labor Relations Act was upheld. The act applied to industries throughout the nation, to those engaged in production and manufacture as well as to those engaged in commerce, literally speaking. This appeared to bring it directly in conflict with prior decisions limiting the scope of federal authority over interstate commerce, including some of the decisions of the 1934 to 1936 period on which the ink was scarcely dry. In *Jones & Laughlin,* these precedents were not followed. Instead, the Hughes opinion gave the federal commerce power its maximum sweep. Mines, mills, and factories—whose activities had formerly been decided to be "local" and hence immune from federal regulation—were now held to affect interstate commerce directly enough to justify congressional control.

Once again, there is no doubt that Hughes was primarily responsible for the *Jones & Laughlin* decision. The leading Hughes biography emphasizes the vigor and thoroughness with which the Chief Justice presented *Jones & Laughlin* at the conference. The biographer also states that Hughes

told him that he had not "pleaded with Roberts to save the NLRB." The Hughes disclaimer should be taken with a grain of salt. Strong Chief Justices such as Hughes are noted for their success in persuading colleagues to follow their views. Hughes never denied that he had influenced Justice Roberts's vote. All he states in his *Autobiographical Notes* is, "I am able to say with definiteness that [Roberts's] view in favor of [*Jones & Laughlin*] would have been the same if [President Roosevelt's Court-packing] bill had never been proposed." Of course, it would, since it was the Chief Justice's persuasion, not the president's threat, that led to the Roberts vote.

8. Hugo Lafayette Black

During the second third of this century, two members of the Court were the paradigms of the new constitutional approach: Hugo Lafayette Black (1886–1971) and Earl Warren. Neither had a defined philosophy of law; neither was a founder, leader, or even follower of any school of jurisprudence. Yet each had an influence on legal thought greater than that of other judges. Their forte was one peculiar to the demands of the emerging society—not so much adaptation of the law to deal with changing conditions as a virtual transformation of the law to meet a quantum acceleration in societal change.

Chief Justice William H. Rehnquist has called Justice Black the "most influential of the many strong figures who have sat during . . . his Justiceship." During Black's tenure, he and Justice Felix Frankfurter were the polar opposites on the Court. A recent book about the two is titled *The Antagonists*. Yet the issue between them was more basic than personal antagonism. At the core, there was a fundamental disagreement over the proper role of the law in a period of unprecedented development. Frankfurter remained true to the Holmes rule of restraint. Black considered the restraint approach a repudiation of the judge's duty. As Black saw it, judicial abnegation came down to abdication by the Court of its essential role. To Black, the judicial function meant that the judge was to decide on the basis of his own independent judgment, however much it differed from that of the legislature or prior law on the matter.

The Black approach was the basis for the two positions that the Justice most forcefully advocated: the absolutist view of the First Amendment; and the incorporation of the Bill of Rights in the due process clause of the Fourteenth Amendment.

To students of the Court, Black stands primarily for the absolutist literal interpretation of the First Amendment. When the amendment says

that no laws abridging speech or press shall be made, it means flatly that *no* such laws shall, under any circumstances, be made.

Black's absolutist view has never been accepted by the Court. Countless cases hold that the fact that speech is protected by the First Amendment does not necessarily mean that it is wholly immune from governmental regulation. That did not, however, deter Black from following the view of law that he deemed correct. The same was true of the Black assertion that the framers of the Fourteenth Amendment sought to change the rule limiting application of the Bill of Rights to federal action alone. The Bill of Rights, Black urged, was incorporated in the due process clause of the Fourteenth Amendment. This meant that all the Bill of Rights guarantees were binding on the states as well as on the federal government.

Black had been a populist senator and on the bench he employed judicial power to make social policy that would favor individuals and protect them against the governmental and corporate interests that the law had fostered. From this point of view, a Frankfurter satiric portrayal of Justice Black acting as though he were "back in the Senate" contained some truth.

In the end, however, it was Black, not his great rival, who ranks as a prime molder of twentieth-century legal thought. History has vindicated the Black approach, for it has helped protect personal liberties in an era of encroaching public power.

Black's absolutist advocacy was a prime mover in First Amendment jurisprudence. The absolutist view may not have been accepted; but the "firstness" of the First Amendment has been firmly established. If today, as Black stated in an opinion, "[f]reedom to speak and write about public questions . . . is the heart" of the constitutional scheme, that has in large part been due to his own evangelism on the matter.

Similarly, Black's incorporation position may never have commanded a Court majority. Under Black's prodding, nevertheless, the Justices increasingly expanded the scope of the Fourteenth Amendment's due process clause. Although the Court continued to hold that only those rights deemed "fundamental" are included in due process, the meaning of "fundamental" became flexible enough to absorb one by one almost all the guarantees of the Bill of Rights. By the end of Black's tenure, the rights that had been held binding on the states under the Fourteenth Amendment included all the rights guaranteed by the Bill of Rights, except the rights to a grand jury indictment and to a civil jury trial. Black may have appeared to lose the Bill of Rights incorporation battle, but he really won the due process war.

It was Justice Black as much as anyone who changed the very way we think about constitutional law. If the focus of judicial inquiry has shifted from duties to rights, if personal rights have been elevated to the preferred plane, that has in large part been the result of Black's jurisprudence. Nor has his impact been limited to the Black positions that the Court has accepted. It is found in the totality of today's judicial awareness of the Bill of Rights and the law's new-found sensitivity to liberty and equality.

9. Stephen J. Field

If influence on the law is a criterion of judicial greatness, there were few Justices who deserve inclusion in this list more than Stephen J. Field (1816–1899). Toward the end of the nineteenth century, Justice Frankfurter tells us, the Justices "wrote Mr. Justice Field's dissents into the opinions of the Court." It was Field who was largely responsible for the expansion of substantive due process, which became the major theme of constitutional jurisprudence during the Gilded Age.

Field himself was one of the most colorful men ever to sit on the Court. He began his legal career in his brother's New York office. A few years later, he joined the gold rush to California, becoming a frontier lawyer and carrying a pistol and bowie knife. He was involved in a quarrel with a judge, during which he was disbarred, sent to jail, fined, and embroiled in a duel. His feud with another judge, David Terry, Chief Justice of the California Supreme Court, led to a threat to shoot Field. Years later, in 1889, when Field had long been a Supreme Court Justice, Terry assaulted him and was shot by a federal marshal. The marshal was indicted for murder, but the Supreme Court held the killing justified.

Field's years on the Court saw the law responding to the demands of burgeoning capitalism by insulating business from governmental interference. Field was the leader in inducing the Court to employ the due process clause to protect property rights. He served in an influential capacity on the Court for more than thirty-four years—the longest tenure before that of Justice William O. Douglas. While on the Court, Field wrote 620 opinions, then a record.

Field's most important opinions were dissents, but as Frankfurter tells us, they were ultimately written into Supreme Court jurisprudence. In *Allgeyer v. Louisiana* (1897), to quote Frankfurter again, the Court "wrote Mr. Justice Field's dissents into the opinions of the Court." In *Allgeyer*, for the first time, a regulatory law was set aside because it infringed on the

"liberty" guaranteed by due process. Thenceforth, all governmental action—whether federal or state—would have to run the gantlet of substantive due process.

For Field and the Court that adopted his approach, substantive due process was used for a particular purpose—to invalidate legislation that conflicted with the laissez-faire doctrine that then dominated thinking. Due process became the rallying point for judicial resistance to efforts to control the excesses of the rising industrial economy.

A century later, the Field laissez-faire approach appears too extreme. But it set the tone for constitutional law for over half a century. Justice Field's own view on the matter is shown by his opinion in the Income Tax Case (*Pollock v. Farmers' Loan & Trust Co.*, 1895), in which the Court struck down a federal income tax law. Counsel opposing the statute argued that the income tax was "a doctrine worthy of a Jacobin Club," the "new doctrine of this army of 60,000,000—this triumphant and tyrannical majority—who want to punish men who are rich and confiscate their property."

Such an attack on the income tax (though, technically speaking, irrelevant) found a receptive ear. "The present assault upon capital," declared Justice Field, "is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness." If the Court were to sanction the income tax law, "it will mark the hour when the sure decadence of our present government will commence."

A judge who felt this way about a tax of 2 percent on annual incomes above $4000 was the Justice who furnished the newly fashioned tool of substantive due process by which the law was made into an instrument for judicial protection of private enterprise.

10. Roger Brooke Taney

How can the Chief Justice who presided over the most discredited decision in Supreme Court history be placed on a list of the greatest Justices? The answer is that one judicial blunder, however great it may be, should not destroy the accomplishments of the judge who, apart from the decision in *Dred Scott v. Sandford* (1857), infra p.70, was second only to Marshall in laying our constitutional law foundation.

Roger Brooke Taney (1777–1864) was the first Chief Justice to wear trousers; his predecessors had always given judgment in knee breeches. There was something of portent in his wearing democratic garb beneath