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David P. Bryden

E. Christine Flaherty

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The "Human Resumes" of Great Supreme Court Justices*

David P. Bryden** and E. Christine Flaherty***

Compared to the bloody battle over Judge Robert Bork,¹ the nomination of Judge David Souter to serve on the Supreme Court generated little controversy. Yet in his own understated way, Souter also contributed to the perennial debate about the proper qualifications of Supreme Court nominees. Supporters usually emphasize the nominee's legal credentials. Somewhat less publicly, presidents, senators, and interested citizens have also studied the political balance sheet. From time to time questions have been raised about alleged lack of judicial temperament (Brandeis)² or ethical lapses (Haynsworth).³ The Souter nomination raised a different issue: Can a bachelor from a small town in New Hampshire be a good Supreme Court justice? More broadly, what kinds of experiences shape the character of the best justices?

This question was obliquely raised by Justice Thurgood Marshall, who consented to be interviewed by a television journalist about the Souter nomination. Noting that he had never heard of Souter, Justice Marshall implied strong doubts about his fitness. More explicit doubts were expressed by a distinguished law professor who contended, in an interesting "op-ed" essay in *The New York Times*, that the Senate should examine Souter's "human resume": it revealed, he said, little or no con-

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** Professor of Law, University of Minnesota.

*** Third-year student, University of Minnesota Law School.

1. For a discussion of some of the theories of judicial selection that were offered during the Bork hearings, see Bryden, *How to Select a Supreme Court Justice: The Case of Robert Bork*, 57 AM. SCHOLAR 201 (1988).

2. A. MASON, *BRANDEIS: LAWYER AND JUDGE IN THE MODERN STATE* 74 (1933).

3. H. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 15 (2d ed. 1985).

tact with the diverse races and classes of America.⁴ Traveling in a small circle in New Hampshire, this bookish and reclusive man had not acquired the deep understanding of our pluralist society that a justice should possess in 1990.

I. EVALUATING THE JUSTICES

After all these years, one might suppose, scholars should know what kind of background is conducive to excellence on the Court. Sure enough, that question has been systematically studied. In *The First One Hundred Justices*,⁵ Professors Albert Blaustein and Roy Mersky published⁶ several essays, including two evaluating the qualifications and performances of every justice from Chief Justice John Jay, the first appointee of President George Washington, up to and including Justice Thurgood Marshall. The study thus covered ninety-six justices.

To evaluate these justices, Blaustein and Mersky polled sixty-five experts: law school deans and professors of law, history, and political science specializing in constitutional law. In addition to many illustrious professors of constitutional law and history, the roster of experts included specialists in other areas with which the Court must deal — for example, criminal procedure.

The experts were polled in 1970. Each received a ballot that listed the ninety-six justices in chronological order. No criteria for evaluation were provided. Instead, the experts "were requested to grade all the justices in a continuum from A to E: A for great, B for near great, C for average, D for below average, and E for failure."⁷ The responses, when averaged out, indicated that twelve of the justices had been great, fifteen near great, fifty-five average, six below average, and eight failures. "In sum, [the experts] . . . gave passing grades to eighty-two of the ninety-six justices or more than eighty-five percent of those evaluated. Fourteen of the justices, about fifteen percent, were adjudged as something less than average."⁸

4. Brooks, *What About Souter's Human Resume?*, N.Y. Times, Aug. 1, 1990, at A21, col. 2. Although Professor Brooks deserves the credit for the idea, he was not alone in embracing it: other scholars, at the University of Minnesota Law School and elsewhere, responded enthusiastically to the concept.

5. A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* (1978).

6. Some of the essays were written by other scholars.

7. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 37.

8. *Id.*

In chronological order, the twelve "greats" were:⁹

John Marshall	1801-1835
Joseph Story	1811-1845
Roger B. Taney	1836-1864
John M. Harlan	1877-1911
Oliver W. Holmes, Jr.	1902-1932
Charles E. Hughes	1910-1916 and 1930-1941
Louis D. Brandeis	1916-1939
Harlan F. Stone	1925-1946
Benjamin N. Cardozo	1932-1938
Hugo L. Black	1937-1971
Felix Frankfurter	1939-1962
Earl Warren	1953-1969

The eight "failures," again in chronological order, were:¹⁰

Willis Van Devanter	1911-1937
James C. McReynolds	1914-1941
Pierce Butler	1922-1939
James F. Byrnes	1941-1942
Harold H. Burton	1945-1958
Fred M. Vinson	1946-1953
Sherman Minton	1949-1956
Charles Whittaker	1957-1962

Having obtained the experts' evaluations of the justices, Blaustein and Mersky, along with two political scientists — Thomas G. Walker and William Hulbery,¹¹ analyzed biographical data about the same justices in order to determine the correlations between personal characteristics and judicial performance. For this purpose, Walker and Hulbery gave a numerical score to each of the justices who had been rated by the experts: "greats" were assigned the score of five, "near greats," four, and so on down to "failures," who got a one. Using the average "ability score" for the ninety-six justices (3.18)¹² as a standard of comparison, the authors were able to determine whether justices with any particular background trait had been above average or below. They suggested that their study might enable us "to predict with greater confidence how well a person will perform if he is appointed to the nation's highest bench."¹³

9. *Id.*

10. *Id.* at 40.

11. Identified, respectively, as of the Department of Political Science at Emory University and of the Department of Political Science at the University of South Florida. *Id.* at 52.

12. *Id.* at 54.

13. *Id.* at 53.

A. CLASS ORIGINS

A logical place to begin is with the justices' class origins. Souter's family was middle class. His father was an assistant bank manager, and his mother worked in a gift shop.¹⁴ Most of Souter's predecessors on the Court also came from at least moderately well-to-do families. Although few would object to middle-class nominees, one might surmise that an extremely privileged background is a handicap in achieving the understanding of disadvantaged people that some believe is a prerequisite to greatness. If the experts' ratings are correct, however, this has not been so: the 81 justices from families with "high" family socio-economic status had an average ability score of 3.22; the fifteen with "low-status" families had a slightly lower average score of 2.93.¹⁵

Several of the great justices came from much more privileged families than Souter. Roger B. Taney was the second son of a Maryland tobacco planter,¹⁶ who had "always lived on the same plantation, amid his slaves and material comforts."¹⁷ When, in 1799, Taney was first elected to the Maryland legislature, it was primarily due to his father's prominence.¹⁸

Born into the Southern aristocracy, John Marshall Harlan was the son of an attorney who was, "successively, Secretary of State, Attorney General of Kentucky, and a Congressman."¹⁹ He too grew up in the Southern manorial tradition, with household slaves.²⁰

Oliver Wendell Holmes, Jr. was a descendant of prominent Boston Brahmin families. His father, a nationally-known physician and literary figure, was the first dean of Harvard Medical School, author of important analyses of *Homeopathy and Its Kindred Delusions* and *The Contagiousness of Puerperal Fever*. His poem, *Old Ironsides*, was credited with saving the historic frigate *Constitution*. He helped found the *Atlantic Monthly* and for many years was its leading contributor. His wife, Holmes, Jr.'s mother, was the daughter of a justice of the

14. Carlson, *An 18th Century Man*, TIME, Aug. 6, 1990, at 19-22.

15. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 55.

16. Gatell, *Roger B. Taney*, in 1 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 635 (1969). Except as otherwise attributed, we derived our biographical data about the justices from the Friedman and Israel volumes.

17. S. ASCH, THE SUPREME COURT AND ITS GREAT JUSTICES 41 (1971).

18. G. WHITE, THE AMERICAN JUDICIAL TRADITION 66 (1976).

19. S. ASCH, *supra* note 17, at 75.

20. *Id.*

state's highest court.²¹

John Marshall's mother, the daughter of a minister, was a descendant of "a family that could trace its ancestry back several hundred years and also trace its numerous progeny in succeeding generations of American history through such names as . . . Thomas Jefferson, Edmund Randolph, and the Lees of Virginia."²² Marshall's father, Thomas, although not rich, was a man of substance, connections, and responsibility: A boyhood chum of young George Washington, the first American agent for Lord Fairfax (who owned much of northern Virginia), a tax-collector, a sheriff, a justice of the peace, a small but landed Virginia farmer, the owner of twenty slaves (far fewer than the Madison family's 118, but enough to make him one of the largest slaveowners in his county), and a man who frequently was elected to the Virginia House of Burgesses, where his wife's distant relationship to Thomas Jefferson and his own continuing friendship with Washington — he often dined at Mount Vernon — must have augmented his stature.²³

Brandeis spent his early years in a Louisville, Kentucky, home of comfort, culture, servants, and social concern.²⁴ His parents, German Jews, had fled to America after the failure of the German revolution in 1848. His maternal grandfather had led a revolution in Poland in the early nineteenth century, and his uncle was a delegate to the Republican convention in 1860, where he helped to nominate Lincoln. "Brandeis's father was a grain merchant who made a substantial income but never permitted the subject of money to be discussed in his home."²⁵ Brandeis was on social terms with the influential people of Louisville and later, from the time he enrolled at Harvard and during his practice, he met a succession of Boston bluebloods²⁶ — Holmes, for instance, was an early friend. Brandeis's early legal practice was primarily corporate,²⁷ although as the famed "people's lawyer" of Boston he dealt with many issues of con-

21. G. WHITE, *supra* note 18, at 156; ATLANTIC BRIEF LIVES: A BIOGRAPHICAL COMPANION TO THE ARTS 372 (L. Kronenberger ed. 1965) [hereinafter ATLANTIC BRIEF LIVES].

22. L. BAKER, JOHN MARSHALL: A LIFE IN LAW 6-7 (1974). The rest of our description of Marshall's parents is derived from L. BAKER, *supra*, at 7-15.

23. *Id.* at 7-15.

24. Mason, *Louis D. Brandeis*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2043.

25. D. PEARSON & R. ALLEN, THE NINE OLD MEN 167 (1936).

26. S. ASCH, *supra* note 17, at 107.

27. D. PEARSON & R. ALLEN, *supra* note 25, at 170.

cern to the working class.²⁸

Cardozo's father was a judge of the Supreme Court of New York, connected to the notorious Tweed Ring, who resigned to avoid impeachment for improprieties.²⁹ "His ancestors were . . . successful businessmen, educators and patriots (who) generally carried out the rituals of New York's upper class . . ." ³⁰ On his mother's side, Cardozo's forbears came from Portugal to America in 1654. A maternal great-grandfather was a captain in Washington's army; a great-great uncle was a rabbi who took his congregation to Philadelphia after the British occupied New York, and later officiated as rabbi at Washington's inauguration.³¹ Other ancestors included one of the first trustees of Columbia University, and the author of the famous inscription on the base of the Statute of Liberty.³²

Charles Evans Hughes, born to "a poor Baptist preacher"³³ and a former school teacher, grew up without material advantages, but in an intensely intellectual environment.³⁴

Joseph Story was born at Marblehead, Massachusetts, the oldest of eleven children of his father's second marriage. His father was a physician who participated in the Boston Tea Party.³⁵

Harlan Fiske Stone was two when his family moved from New Hampshire to Amherst, Massachusetts. The elder Stone "had come to Amherst a landless trader" but this shrewd Yankee amassed a fortune "through horse swapping, cattle buying, farming, and doing anything by which he could turn a dollar, including the employment of young Calvin Coolidge as his lawyer."³⁶

Hugo Black was born in the scrubby-pine, hill country of east-central Alabama, the eighth child of a Confederate veteran turned storekeeper, "a familiar-enough rural type, secret drinker, rack-renting landlord, and usurious moneylender (rates running to 50%) as well as a merchant."³⁷ Black's

28. Mason, *supra* note 24, at 2045.

29. D. PEARSON & R. ALLEN, *supra* note 25, at 211.

30. G. WHITE, *supra* note 18, at 254.

31. D. PEARSON & R. ALLEN, *supra* note 25, at 210.

32. Kaufman, *Benjamin Cardozo*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2287-88.

33. D. PEARSON & R. ALLEN, *supra* note 25, at 75.

34. *Id.* at 76.

35. Dunne, *Joseph Story*, in 1 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 435.

36. D. PEARSON & R. ALLEN, *supra* note 25, at 104-05.

37. G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 88 (1977).

mother, a postmaster, came from a more socially-distinguished family that could trace its roots to Thomas Addis Emmet and the great days of the Irish bar. More recently, the family could boast of a prominent California attorney and an actor who had shared the stage with Lillian Russell.³⁸ Although he was born in a "good old-fashioned log cabin covered over with clapboard,"³⁹ and didn't get accustomed to inside plumbing until he was twenty years old, Black was not poor. Soon after his birth in 1886, his family moved to the county seat where his father's business prospered, and the family lived comfortably.⁴⁰

Felix Frankfurter was born to Jewish parents in Vienna in 1882. "His family had been socially prominent within the isolated Jewish community; for centuries members of his father's family had been rabbis," and his uncle, a well-known scholar, became the head librarian of the University of Vienna.⁴¹ Frankfurter's father prepared for the rabbinate but abandoned the seminary, became a businessman, and brought his family to America in 1894, when Felix was twelve.⁴²

[T]he Frankfurters were materially poor. Because they were German, they settled first in a German neighborhood on the Lower East Side of Manhattan. In time they accumulated enough money to move uptown to Park Avenue, which was a somewhat better neighborhood but was not yet the fashionable section it later became. Frankfurter's father sold linens from a shop in his home and summers peddled door to door among estates outside the city. But he was not much of a businessman and was remembered as a man of "frail health, a dreamy, charitable soul who enjoyed giving baskets of food to poor neighbors."⁴³

Of all the greats, Earl Warren had the least advantaged upbringing. He was born in Los Angeles, the son of a Norwegian immigrant who worked for the Southern Pacific Railroad.⁴⁴ When his father was laid off without notice, the family's financial situation became precarious. Warren could receive no financial help from his family and put himself through college.

Warren's egalitarian zeal might plausibly be attributed to his father's financial difficulties. But other self-made men have

38. *Id.* at 89-90.

39. Frank, *Hugo L. Black*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2322.

40. *Id.*

41. H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 12-13 (1981).

42. L. BAKER, *FELIX FRANKFURTER* 19 (1969).

43. *Id.* (quoting Josephson, *Jurist*, *NEW YORKER*, Dec. 7, 1940, at 34-44).

44. Lewis, *Earl Warren*, in 4 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2727.

been conservative justices, so the causal chain is unclear.⁴⁵

Several of the great justices had, for want of a better term, relatively aristocratic backgrounds by American standards. Some of the failures also came from unusually prominent families. James McReynolds was born and raised on a Kentucky plantation, in an antebellum environment.⁴⁶ Justice Van Devanter's great-grandfather had been a gunpowder manufacturer in the American Revolution. His father was a prosperous lawyer and abolitionist.⁴⁷ Harold Burton's father was dean of the Massachusetts Institute of Technology.⁴⁸

Being less famous, the mediocre justices have been studied less extensively than the great ones. We must therefore be cautious in comparing their biographies. Subject to this caveat, the failures' origins seem to have been at least slightly more common than those of the greats. Three of the failures — Minton,⁴⁹ Butler,⁵⁰ and Whittaker — were farmboys. "Perhaps no other justice of the past fifty years had more modest origins" than Charles Whittaker.⁵¹ He was born on a farm in Kansas in 1901 and trapped small animals in order to sell their hides and supplement the family income. He rode a pony six miles to school each day until, at age sixteen, when his mother died, he quit school. For the next three years he continued to trap animals on his father's farm, saving the money from the hides in the hope of continuing his education.⁵²

Pierce Butler was born to poor Irish parents in southern Minnesota just one year after the Civil War. "His father, Patrick Butler, was forced to migrate from Ireland because of the potato famines, but he came from a well-educated, aristocratic family which traces its forebears back to 1172, when the LeBoutilliers first came from France."⁵³ Despite this ancestry, Pierce's boyhood was spent "pulling stumps, working in the

45. See, e.g., *infra* notes 53-63 and accompanying text.

46. Burner, *James C. McReynolds*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2024 [hereafter Burner, *McReynolds*].

47. Burner, *Willis Van Devanter*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2894 [hereinafter Burner, *Van Devanter*].

48. CURRENT BIOGRAPHY: WHO'S NEWS AND WHY 81 (A. Rothe ed. 1945).

49. Kirkendall, *Sherman Minton*, in 4 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2699 [hereinafter Kirkendall, *Minton*].

50. Burner, *Pierce Butler*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2183 [hereinafter Burner, *Butler*].

51. Friedman, *Charles Whittaker*, in 4 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2517.

52. *Id.*

53. D. PEARSON & R. ALLEN, *supra* note 25, at 116, 126.

fields, and milking cows."⁵⁴ He "worked his way through Carleton College by washing milk cans in a dairy"⁵⁵ He eventually became a belligerent railroad lawyer⁵⁶ and a reactionary millionaire.⁵⁷

James Byrnes's father died before he was born, and his mother took up dressmaking to feed her family.⁵⁸ Similarly, Frederick Vinson's father died when he was young, and his mother took in boarders to support the family.⁵⁹

Like Souter, most justices have had fathers who were in business or a profession.⁶⁰ This sort of background has, in general, produced justices who were rated above-average.⁶¹

Father's Occupation	Number of Justices	Average Ability Score
Farming	29	2.90
Business	16	3.47
Professional	41	3.22
Labor	5	3.80
Other/Unknown	2	2.50

Most of the justices raised in farming families were appointed, the authors report, "during the earlier years of the nation's history when farming was the country's primary occupation."⁶² *A priori*, one might suppose that a farm childhood would have been an ideal component of a nominee's "human resume" during the nineteenth century. Yet as the table shows, farm families tended to produce the worst-rated justices. In contrast, the five justices from a working class ("labor") background had the highest average ratings. The authors caution, however, that "their number is small and any generalization should be viewed as extremely tentative."⁶³

B. POLITICAL AND JUDICIAL BACKGROUND

Souter's parents were not active politically.⁶⁴ It would be

54. *Id.*

55. *Id.*

56. *Id.* at 127-28.

57. *Id.* at 137.

58. Murphy, *James F. Byrnes*, in 4 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2517.

59. CURRENT BIOGRAPHY: WHO'S NEWS AND WHY 793 (M. Black ed. 1943).

60. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 56.

61. *Id.*

62. *Id.*

63. *Id.*

64. Interview with William D'Gregorio, author of *The Complete Book of U.S. Presidents* and author of profiles of political and world leaders for *Current Biography*, Sept. 18, 1990.

plausible to suppose that a political family provides an ideal environment for a prospective justice. In such a family, the young justice-to-be might be expected to meet a more diverse class of people than the average child of his economic class, or at least to pick up some of the practical wisdom that a "judicial statesman" requires. In fact, however, the fifty-five justices with "politically active families" had an average ability score of only 3.07, slightly below the 3.32 score of the 41 justices from politically inactive families.⁶⁵

Notwithstanding the customary statements to the contrary by beaming presidents, Supreme Court nominations are never the result of impartial searches for the "best qualified person." To anyone of even modest political sophistication, it is obvious that political connections have been extremely important in determining who is elevated to the Court. One sees this in the biographies of great justices as well as of failures. On the whole, however, the justices who were failures had been more politically active — at least in the formal sense of running for office — than the great justices. Burton was mayor of Cleveland for several years, served in a state legislature and also held a seat in Congress and then in the Senate (1941-1945).⁶⁶ Byrnes and Minton were both United States Senators — Byrnes for ten years (1931-1941)⁶⁷ and Minton for six (1935-1941).⁶⁸ Byrnes also had served in the House of Representatives from 1911 to 1925,⁶⁹ as did Vinson, in 1924-1929 and 1931-1938.⁷⁰ Vinson held a number of appointive positions in the federal government: Director of the Office of Economic Stabilization (1943-1945), Administrator of the Federal Loan Agency (1945), Director of the Office of War Mobilization and Reconversion (1945) and Secretary of the Treasury (1945-1946).⁷¹

Butler and Whittaker (a Kansas City politician)⁷² were active in their local bar associations,⁷³ and Butler served as a hyper-political regent for the University of Minnesota from

65. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 57.

66. THE SUPREME COURT AT WORK 177 (C. Goldinger ed. 1990) [hereinafter SUPREME COURT].

67. *Id.* at 192.

68. *Id.* at 196.

69. *Id.* at 192.

70. *Id.* at 195.

71. *Id.*

72. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 48.

73. SUPREME COURT, *supra* note 66, at 200; Burner, *Butler*, *supra* note 50, at 2184.

1907 to 1924.⁷⁴

Willis Van Devanter, at twenty-four, left his father's law firm in Indiana and headed west to seek his fortune in the wild Territory of Wyoming,⁷⁵ where "[r]edmen fought with land-grabbing whites, claim stakers with claim jumpers, cattlemen with rustlers, sheepmen with cattlemen, while the Union Pacific Railroad laid its hands on everything in sight."⁷⁶ A resourceful criminal lawyer, Van Devanter secured acquittals for some colorful gun-slingers.⁷⁷ In a place with few lawyers and little law, he soon made connections with a wealthy cattle rancher who was the territorial governor, later a United States senator.⁷⁸ This patron, backed in turn by the all-powerful Union Pacific, "boosted Van Devanter up the political ladder with a speed only possible in those reckless, carefree days of the frontier."⁷⁹ After two years in Wyoming, at twenty-six, he was appointed a commissioner to revise the territorial statutes. A year later he became city attorney of Cheyenne. The following year he was elected to the territorial legislature, and at thirty he became chief justice of the Wyoming Supreme Court.⁸⁰ Resigning from the court, he re-entered private practice and later became chairman of the Republican State Committee, then Wyoming Representative on the Republican National Committee, then Assistant Attorney General handling cases for the Public Lands Division of the United States Justice Department.⁸¹

James Clark McReynolds ran for Congress in 1896, but lost and never ran for another office, though he did serve as Attorney General in the Wilson Administration, and as a trust-bust-

74. Burner, *Butler*, *supra* note 50, at 2185. Some commentators described Butler's tenure at Minnesota as

eighteen years of hell for any professor who dared express a liberal viewpoint or teach anything save old-fashioned fundamentalism. The University of Minnesota became his university With [his] usual bulldozing tenacity, he wanted to monopolize it. Officials of the university he treated as office boys. No instructor was too insignificant for Butler to pry into his social and economic views.

D. PEARSON & R. ALLEN, *supra* note 25, at 134.

75. D. PEARSON & R. ALLEN, *supra* note 25, at 188.

76. *Id.* at 189.

77. *Id.* at 193.

78. *Id.* at 189.

79. *Id.*

80. *Id.* at 189-90.

81. *Id.* at 190.

ing Assistant Attorney General under Teddy Roosevelt.⁸²

Among the great justices, Marshall,⁸³ Story,⁸⁴ and Taney⁸⁵ all served in their state legislatures. Marshall⁸⁶ and Story⁸⁷ also were United States congressmen. Marshall was Minister to France and Secretary of State.⁸⁸ Black was a United States Senator from Alabama for ten years.⁸⁹ Hughes was Governor of New York⁹⁰ and Warren was Attorney General (1939-1943) and then Governor of California (1943-1953),⁹¹ as well as a vice-presidential candidate (1948). Hughes was also a nationally recognized leader of the New York bar, Secretary of State, and a candidate for president.⁹²

On the other hand, half of the great justices (Harlan, Holmes, Brandeis, Stone, Cardozo and Frankfurter) held no political offices except of a legal nature. Yet they were not devoid of political instincts and talents. Stone, for example, had been a law school dean and United States Attorney General. Frankfurter was supremely gifted, both at courting men of power like Franklin Roosevelt and Henry Stimson, and at inspiring the students and young lawyers who became his devoted proteges. In certain circles, and in certain senses, Frankfurter was a far more gifted politician than most of those who win electoral victories.⁹³

Not only is Souter's lack of a "political family" not a handicap, his somewhat reclusive personality does not — on the slight historical evidence — give cause for concern. McReynolds was a somewhat reclusive (or perhaps just misanthropic) failure,⁹⁴ but Holmes and especially Cardozo seem to have been more or less equally reclusive greats. Cardozo, a lifelong bachelor who lived with his sister until her death in 1929,⁹⁵ was

82. D. PEARSON & R. ALLEN, *supra* note 25, at 228; Burner, *McReynolds*, *supra* note 46, at 2025.

83. SUPREME COURT, *supra* note 66, at 138.

84. *Id.* at 142.

85. *Id.* at 147.

86. *Id.* at 138.

87. *Id.* at 142.

88. *Id.* at 138.

89. *Id.* at 188.

90. *Id.* at 176.

91. *Id.* at 197.

92. *Id.* at 176-77.

93. For a revealing portrait of Frankfurter's personality, see H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981).

94. Burner, *McReynolds*, *supra* note 46, at 2023-26.

95. Kaufman, *supra* note 32, at 2287.

dubbed "the Hermit Philosopher" by a capitol journalist.⁹⁶ Other observers described Cardozo as "[q]uiet, mild-mannered, [with] an almost feminine softness, gentle, shy, courteous, courtly, lonely, ascetic, saintly."⁹⁷ He was, however, a much sought-after speaker, as was Holmes.

Holmes's taste in companions was what some would call "elitist:" intellectuals like Brandeis, Laski, Frankfurter, and Leslie Stephen, plus English and New England aristocrats. Yet he was more diplomatic than many of his brethren, and according to one observer "played an important personal role in the lives of the Nine Old Men. He was a focal point, a common meeting ground, someone they all loved, even two such diametrically opposite characters as McReynolds and Brandeis."⁹⁸ There are, it should be obvious, recluses and recluses.

There is no tradition of judicial service in Souter's family.⁹⁹ According to the experts' ratings, it is helpful to have a judicial ancestor: the twenty-five justices who did had an average ability score of 3.36, as contrasted with 3.11 for the justices who did not.¹⁰⁰ Of course this, like the other biographical data, may be a proxy for some underlying trait like wealth, good genes, or an intellectual family.

C. GEOGRAPHY, ETHNICITY, AND RELIGION

Justice Souter's critics were correct, according to the experts, in wondering whether his small-town background will be a handicap: the forty-one justices from small towns had a score of only 3.07, almost identical to those from "rural areas" (3.10) and below those from "urban areas" (3.35).¹⁰¹

A prairie populist might suppose that justices from the East are less able to comprehend the problems of ordinary Americans than those from, say, the Midwest. According to the experts, however, Justice Souter's Eastern background is an advantage. Justices from the East had an average ability score of 3.60, followed by those from the West (3.33), the South and Border (2.97) and — finally — the Midwest (2.75). "The superiority of the East," our authors conclude, "is probably due to the fact that the northeastern United States has always been the

96. D. PEARSON & R. ALLEN, *supra* note 25, at 207.

97. *Id.*

98. *Id.* at 180-81.

99. Interview with William D'Gregorio, *supra* note 64.

100. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 58.

101. *Id.* at 59.

center of the nation's best law firms and institutions of legal education."¹⁰²

Ethnicity is an even more delicate subject. The relatively small number (13) of justices with "Continental European" backgrounds had the best average score (3.60), followed by English/Welsh (55 justices, 3.22 average score) and Scottish/Irish (27 justices, 2.89 average score).¹⁰³ The sole justice of African origin, Thurgood Marshall, received a 3.00 or "average" rating.¹⁰⁴

According to the experts, Justice Souter's Episcopalian¹⁰⁵ religious affiliation does not augur well for his likely performance. The five Jewish justices had an average ability score of 4.40; six Catholics were a distant second (3.33), followed by Souter's "High Protestant" group (3.13), with "Low Protestants" coming in last (2.93).¹⁰⁶

D. EDUCATION

Souter's education may enable him to surmount his liabilities. It is helpful, the experts say, to obtain one's pre-legal education from a school of high standing.¹⁰⁷ Souter received a B.A. in 1961 from Harvard, where he was Phi Beta Kappa¹⁰⁸ and graduated magna cum laude.¹⁰⁹ He studied as a Rhodes Scholar at Oxford¹¹⁰ and then attended Harvard Law School.

As a graduate of Harvard, Souter joins the thirty-eight justices from a law school of "high standing." Their average ability score of 3.45 is well above the 2.85 earned by the thirteen who attended schools of average standing, followed by the 2.73 of those who had only an apprenticeship from an "average attorney."¹¹¹

Thomas Marshall supervised his son John's education, and gave him "an early taste for history and poetry."¹¹² At twelve, young John transcribed Pope's *Essay on Man*, and some of his

102. *Id.*

103. *Id.* at 60.

104. *Id.*

105. 2 WHO'S WHO IN AMERICA, 1988-1989, at 2923 (J. Pfister 45th ed. 1989).

106. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 61.

107. *Id.* at 62.

108. Carlson, *supra* note 14, at 21.

109. Lacayo, *A Blank Slate*, TIME, Aug. 6, 1990, at 16-18.

110. *Id.*

111. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 63.

112. L. BAKER, *supra* note 22, at 12-13.

moral essays.¹¹³ As there were no formal schools on the frontier, John's education consisted solely of tutoring by his parents until, at fourteen, he was sent to a clergyman's school one hundred miles away — a rare opportunity for a frontier boy.¹¹⁴ Later, his father wrote a friend in Edinburgh, Scotland, "requesting a tutor for his children, specifically a college graduate well versed in Greek and Latin, an Episcopalian, and — most importantly — a gentleman."¹¹⁵ The tutor thus obtained was a deacon, who taught John to read Horace and Livy in Latin.¹¹⁶ He left after a year and thereafter Marshall's only formal education consisted of one six-week course of law lectures at the College of William and Mary.¹¹⁷ He was essentially a self-taught lawyer, learning the law as he practiced it.¹¹⁸ His mental prowess became legendary.¹¹⁹

Joseph Story quit high school before graduation and sought early admittance to Harvard.¹²⁰ In order to be admitted, Story had to show academic attainment comparable to that of the incumbent freshman class. He accomplished this by self-tutoring, exhibiting a studious dedication that continued throughout his "bookish and somewhat isolated college years."¹²¹ He graduated in 1798, second in his class academically.¹²² During most of his years as a justice, Story was also a professor of law at Harvard. A famous scholar who is still remembered for his *Commentaries on the Constitution*, Story is credited with having established Harvard Law School's reputation.¹²³

113. *Id.* at 13.

114. *Id.*

115. *Id.*

116. *Id.*

117. SUPREME COURT, *supra* note 66, at 138; Johnson, *John Marshall*, in 1 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 289.

118. Johnson, *supra* note 117, at 285.

119. Dumas Malone cited William Wirt's *The Letters of the British Spy* description of Marshall's intellect:

Marshall enjoyed, Wirt asserts, "one original, and, almost, supernatural faculty," that "of developing a subject by a single glance of his mind. . . . Nor does the exercise of it seem to cost him an effort." He determined immediately on which side of a question was to be most advantageously assailed; and "his premises once admitted, the demonstration, however distant, follows as certainly, as cogently as inevitably as any demonstration in Euclid."

6 DICTIONARY OF AMERICAN BIOGRAPHY 319 (D. Malone ed. 1933) (citing W. WIRT THE LETTERS OF THE BRITISH SPY 46-47 (1803)).

120. Dunne, *supra* note 35, at 435.

121. *Id.* at 436.

122. *Id.*

123. *Id.*

Roger Taney attended the usual one-room, one-teacher elementary school in his native Maryland.¹²⁴ Private tutoring prepared him for entrance to Dickinson College in Pennsylvania at the age of fifteen. He graduated in 1795, at age eighteen, as his class valedictorian. Taney's legal education consisted of an apprenticeship of three years in the law office of Judge Jeremiah Chase.¹²⁵

The first Justice Harlan graduated from Centre College in Kentucky in 1850 and went on to study law at Transylvania University, which was then known as "The Harvard of the West."¹²⁶ He completed his legal education at his father's law office.

Of the greats, Holmes was the first to graduate from a law school. He received his undergraduate degree at Harvard in 1861, graduating — like Story before him — as class poet.¹²⁷ After serving three years with the Harvard Regiment, Holmes returned to Harvard to study law. After graduation, he practiced law, edited the *American Law Review* and the twelfth edition of *Kent's Commentaries*. With the publication of *The Common Law* in 1881, Holmes became a famous legal scholar and a professor at Harvard Law.¹²⁸

As anyone who has read his published letters knows, Holmes was extremely cerebral and erudite; it would be hard to find a law professor who was so well-read in the classics of literature and political thought. His powers were apparent before he reached adulthood: "Aged nineteen, in the summer before Lincoln's election, he wrote a Harvard theme on Albrecht Dürer, that, many years after his death, was cited by Wolfgang Stechow, an eminent German critic, as making Ruskin's essay on Dürer sound hazy, hasty, and trivial by comparison."¹²⁹

His service as an officer in the Civil War, however, may have affected him more than any of the thousands of books that he read. Wounded three times — in the breast at Ball's Bluff, in the neck at Antietam, and in the foot at Fredericksburg — and witness to the slaughter of comrades, Holmes knew

124. Gatell, *supra* note 16, at 635-36.

125. *Id.* at 636.

126. SUPREME COURT, *supra* note 66, at 162.

127. Freund, *Oliver Wendell Holmes*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 1755.

128. *Id.* at 1757.

129. Rovere, *Oliver Wendell Holmes, Jr.*, in ATLANTIC BRIEF LIVES, *supra* note 21, at 373, 374.

better than most that, in his words, "Civilization rests on the death of men."¹³⁰

Charles Evans Hughes led an extraordinarily isolated childhood.¹³¹ "He was timid, slight, definitely the bookworm type and had few friends."¹³² At the age of six, three weeks after he entered school, he begged his parents to let him continue his studies at home, submitting to them "Charles E. Hughes's Plan of Study," which included Herodotus, Homer, and Virgil.¹³³ His proposal was accepted.¹³⁴ By the age of eight he was reading Shakespeare and the Bible from the Greek,¹³⁵ his father gave him a Greek New Testament for his birthday.¹³⁶ His parents' educational slogan was "Be thorough, be thorough, BE THOROUGH," which he adopted at an early age.¹³⁷ Hearing that his parents were considering adoption in order to give their precocious child some companionship, Hughes immediately informed them that this would be a mistake, because education was more important than companionship.¹³⁸ He promised his father that he would not read a novel until he had finished college, and at thirteen he composed essays on "The Evils of Light Literature" and "The Limitations of the Human Mind."¹³⁹ At fourteen he entered Madison College (now Colgate University) with the intention of preparing for the ministry,¹⁴⁰ but he eventually graduated from Brown University Phi Beta Kappa in 1881.¹⁴¹ He graduated from Columbia Law School with highest honors and passed the New York bar exam with a score of ninety-nine and one half.¹⁴² Among his many adult achievements was a brief stint as a law professor at Cornell.¹⁴³

Louis Brandeis's early education was in the Louisville public schools until the age of sixteen.¹⁴⁴ At that time he went

130. Freund, *supra* note 127, at 18.

131. G. WHITE, *supra* note 18, at 254.

132. D. PEARSON & R. ALLEN, *supra* note 25, at 76.

133. *Id.*

134. Hendel, *Charles Evans Hughes*, in 3 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 1894.

135. D. PEARSON & R. ALLEN, *supra* note 25, at 76.

136. A. MASON, *THE SUPREME COURT FROM TAFT TO BURGER* 82 (1979).

137. *Id.*

138. *Id.*

139. D. PEARSON & R. ALLEN, *supra* note 25, at 76.

140. Hendel, *supra* note 134, at 1894.

141. SUPREME COURT, *supra* note 66, at 176-77.

142. Hendel, *supra* note 134, at 1899.

143. SUPREME COURT, *supra* note 66, at 176-77.

144. Mason, *supra* note 24, at 2043-44.

with his parents to Dresden, Germany, and completed two years of study at the *Annen-realschule*. He returned to the United States, and without the benefit of a college education entered Harvard Law School. In two years, at the age of twenty, he completed his legal studies, having earned the highest average in the school's history.¹⁴⁵

Harlan Fiske Stone graduated from Amherst College in 1894, Phi Beta Kappa and president of his class.¹⁴⁶ Three years later he received his M.A. from the same institution. Fellow students at Columbia Law School, where he graduated in 1898, predicted that he would one day sit on the Supreme Court.¹⁴⁷

Interestingly, Benjamin Cardozo — whose common-law opinions did so much to enrich legal education — did not graduate from law school. His early education consisted of home tutoring from his sister and others, including Horatio Alger, who was in dire financial straits, and tutored young Benjamin in return for the Cardozo family's assistance.¹⁴⁸ In 1885, at the age of fifteen, Cardozo entered Columbia College, and finished at the top of his class with the highest scholastic record in Columbia's history.¹⁴⁹ He then entered Columbia Law School, but left after two years to go into practice with his brother.¹⁵⁰ During his Supreme Court years, he rose "at six or earlier every morning," and — if he had no pressing judicial business — he liked "nothing better than plowing through a book of history or philosophy or even a volume of Greek."¹⁵¹

Hugo Black's most important schooling was not formal. He attended local schools in Ashland, Kentucky, before entering medical school in 1903.¹⁵² He stayed only one year and then applied for admission to the University of Alabama Law School, which had a faculty of exactly two professors, neither of whom fooled around with the new-fangled "case book" method of instruction.¹⁵³ Black by-passed college courses entirely, but nevertheless managed to graduate from law school with honors,¹⁵⁴ a class officer, commended in the yearbook for his tenacity and

145. *Id.*

146. SUPREME COURT, *supra* note 66, at 186.

147. *Id.*

148. Kaufman, *supra* note 32, at 2288; D. PEARSON & R. ALLEN, *supra* note 25, at 215.

149. S. ASCH, *supra* note 17, at 147.

150. Kaufman, *supra* note 32, at 2288.

151. D. PEARSON & R. ALLEN, *supra* note 25, at 215.

152. Frank, *supra* note 39, at 2323.

153. G. DUNNE, *supra* note 37, at 91.

154. Frank, *supra* note 39, at 2323.

urbanity.¹⁵⁵ In 1927, as a new United States senator, he began a program of self-education, reading voraciously in American and European history, a habit that persisted throughout his life.¹⁵⁶

Felix Frankfurter was another abnormally bookish "great." In the Jewish immigrant culture of New York, education was the key to achievement. Young Frankfurter sat for hours at nearby Cooper Union, reading newspaper accounts of politics and public affairs, listening to debates, and arguing afterwards with his friends. Unable to afford the Horace Mann School, he attended City College, an intensive course that covered high school and college in five years. While there, "his major activity was debating, and his arguments . . . were remembered by classmates as incisive and convincing."¹⁵⁷ He was also vice president of the senior class, a member of the chess club, and an assistant editor of a college magazine. After graduating at nineteen, third highest in his class, he attended Harvard Law School where he "cut an intellectual swath through the school, led his class for all three years, edited the *Harvard Law Review*, and was graduated in 1906."¹⁵⁸ Frankfurter subsequently became a famous Harvard Law professor.

Earl Warren attended law school at the University of California.¹⁵⁹ According to a biographer, "[h]e had been encouraged to pursue an education, but had not been conspicuous in his academic performance."¹⁶⁰

Taking the same chronological approach to the failures, Willis Van Devanter attended Indiana Asbury University (now DePauw), graduating with a near perfect record in history, mathematics, Greek, Latin and deportment.¹⁶¹ He graduated from the University of Cincinnati Law School in 1881, second in his class.¹⁶²

In 1882, James McReynolds graduated from Vanderbilt University as valedictorian of his class.¹⁶³ While at Vanderbilt he was editor of the school paper and a prominent debater.¹⁶⁴ He attended law school at the University of Virginia, graduat-

155. *Id.*

156. Frank, *supra* note 39, at 2326.

157. L. BAKER, *supra* note 42, at 20.

158. *Id.* at 15.

159. Lewis, *supra* note 44, at 2727.

160. G. WHITE, *supra* note 18, at 336.

161. Burner, *Van Devanter*, *supra* note 47, at 1945.

162. *Id.*

163. Burner, *McReynolds*, *supra* note 46, at 2024.

164. *Id.*

ing in fourteen months.¹⁶⁵

Neither Pierce Butler¹⁶⁶ nor James Byrnes¹⁶⁷ received a law degree. Smarter than the other local farm boys, Butler also possessed a powerful physique and "became the foremost wrestler and bruiser of that neighborhood."¹⁶⁸ He attended a country school in Northfield, Minnesota, and was, himself, teaching school by the age of fifteen. In 1883 he enrolled at Carleton College and graduated in 1887.¹⁶⁹ He then read law for a year with a St. Paul firm before being admitted to the bar.¹⁷⁰

James Byrnes's education was unconventional for a future Supreme Court justice. He left school at fourteen to make his own living.¹⁷¹ His mother helped him learn shorthand which he put to use by entering a competitive examination to become a court reporter. He won the position and "read the law" while he worked as a court reporter, passing the South Carolina Bar in 1903.¹⁷²

Harold Burton received a B.A. from Bowdoin College and his law degree from Harvard.¹⁷³ Fred M. Vinson worked his way through Centre College, Kentucky, receiving an A.B. in 1909 and his law degree two years later.¹⁷⁴ He excelled in his studies and athletics.¹⁷⁵ Sherman Minton graduated at the head of his class at Indiana University where he was an outfielder on the baseball team and a guard on the football team. He then attended Yale Law School where he continued to excel.¹⁷⁶ While at Yale he won the Wayland Prize for writing on constitutional law with a piece that, according to the *Washington Post*, was "one of the best ever written at the university."¹⁷⁷ He also helped to establish the University Legal Aid Society before graduating in 1916.¹⁷⁸

Charles Whittaker's education is also rather unusual in

165. *Id.* at 2025.

166. Burner, *Butler*, *supra* note 50, at 2183.

167. Murphy, *supra* note 58, at 2517.

168. D. PEARSON & R. ALLEN, *supra* note 25, at 126.

169. Burner, *Butler*, *supra* note 50, at 2183.

170. *Id.*

171. Murphy, *supra* note 58, at 2517.

172. *Id.*

173. SUPREME COURT, *supra* note 66, at 194.

174. *Id.* at 195.

175. Kirkendall, *Fred M. Vinson*, in 4 L. FRIEDMAN & F. ISRAEL, *supra* note 16, at 2639 [hereinafter Kirkendall, *Vinson*].

176. CURRENT BIOGRAPHY: WHO'S NEWS AND WHY 430 (A. Rothe ed. 1949).

177. *Id.*

178. *Id.*

that the first and only institution from which he graduated was the University of Kansas City Law School in 1924.¹⁷⁹ As a youth he attended a "little white school house" on the corner of his father's farm in eastern Kansas.¹⁸⁰ He went to high school in Troy, Kansas, but in 1917 he quit school when his mother died. Whittaker was then sixteen years old.¹⁸¹ In 1920 he convinced the University of Kansas City Law School to admit him, agreeing to be tutored in any high school subject in which he was deficient. From 1920 to 1924 Whittaker attended law school, went to tutoring sessions, and worked as a messenger for a Kansas City law firm.¹⁸²

As this survey suggests, the most highly-rated justices have usually had extremely impressive intellects and superb academic records. Somewhat surprisingly, the failures also were often fine students, although fewer of them appear to have been awesomely brilliant, and they attended institutions that were, on average, less distinguished.

It is enormously helpful to have been an academic lawyer. The fifteen justices who had been law professors at some stage of their careers¹⁸³ earned a 4.50, far above the 3.23 of thirty-one corporate lawyers, the 3.07 of fifty-five lawyer-politicians, and the 3.00 of six miscellaneous justices.¹⁸⁴ Remarkably, these results suggest that remoteness from the experiences of ordinary people is helpful to a justice: professors are better than corporate lawyers, who in turn are better than politician-lawyers.

We do not know how long Justice Souter will serve, but to the extent that "greatness" is a measure of influence, a long tenure on the Court is of course important. This is presumably why justices who served for 25 or more years had the highest average ability score (3.75), while those with less than five years had the lowest (2.44).¹⁸⁵

Summarizing the data, the authors provide a profile of a nominee with the best prospect of becoming a great justice.

[H]e would be a person raised in a northeastern urban area as a mem-

179. Friedman, *supra* note 51, at 2893.

180. *Id.* at 2894.

181. *Id.*

182. *Id.*

183. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 19. Of these, only Taft and Frankfurter were teaching at the time of their elevation to the Court. It should be emphasized that many justices who were essentially practitioners rather than academics nevertheless were counted as professors because of brief teaching experiences.

184. *Id.* at 65.

185. *Id.* at 68.

ber of a business-oriented family. His ethnic roots could be traced back to the European continent and he would be Jewish. He would have received his education from high-quality institutions and would have experience in the academic community as a legal scholar. He would have been appointed to the Court at a relatively early age, without prior judicial experience, and serve in that institution for more than twenty-five years.¹⁸⁶

This ideal justice, it seems, would be a typical Harvard or Yale law professor. This justice would have an elite and bookish "human resume" and would not have endured the problems of the average American.

II. EVALUATING THE EVALUATION

There is something faintly comic, in a peculiarly academic style, about this earnest effort to quantify the ingredients of a perfect judicial biography. Part of the comedy derives from the pretensions of social science, and part from the pretensions of constitutional expertise. It should come as no surprise that the kind of justice whose performance pleases professors turns out to have a background, on average, which bears an uncanny resemblance to that of many of the best professors. To be sure, our authors overstated the matter: They ignored the evidence that working-class origins produce good justices, presumably because the data was too sparse, yet were willing to generalize from the equally small sample of Jewish justices.

Of course, bias does not entail error. When Einstein looked in the mirror, he thought he saw a genius, and he was right. It is not ridiculous, though it may be mistaken, to suppose that the same background that makes a good professor also makes a good justice. At least as conventionally understood, both professions require analytical and verbal skills. Nevertheless, the fact that the great professors' "great justice" tends to be a mirror image of the great professors themselves does suggest the possibility that the prejudices of the evaluators are as decisive as the performances of the evaluated. Prejudice quantified is still prejudice.

A. ACADEMIC BIAS

The most conspicuous personal attribute of the greats is their collective brilliance. Perhaps professor-evaluators tend to overestimate the importance of brains, erudition, and even of the professorial style in opinion-writing: One wonders, for ex-

186. *Id.* at 69.

ample, whether a panel of practicing lawyers would have rated Frankfurter and Cardozo above men like Jackson and Harlan II, who were lawyers of long experience as well as great intellects. Frankfurter was a defensible — though not inevitable — choice, but the selection of Cardozo, who served only briefly and left no large imprint on the law, was surely due either to his pre-Court reputation, some sort of bias of the evaluators, or both.

There is some evidence in the ratings of what Allen Tate called “provincialism in time.” Most of the great justices (and all of the failures) served during the twentieth century. The six “below-average” justices all served sometime between 1791 and 1895, and so did most of the “average” justices. In short, the evaluators had more extreme opinions about relatively recent justices. To some degree, this may reflect the evaluators’ preoccupation with modern issues. Apart from three or four famous Marshall opinions, law professors rarely encounter Supreme Court decisions of the nineteenth-century. Their casebooks are loaded with recent decisions, and few of them are competent to evaluate nineteenth century justices. Even historians and political scientists are likely to care more about modern issues, and in consequence to react more strongly to modern justices. Then too, the Court’s role in the twentieth century has been greater than in the nineteenth, magnifying the virtues and vices — real or imagined — of every justice.

B. POLITICAL IDEOLOGY

Did political ideology affect the ratings? The Walker-Hulbery essay says nothing about the political inclinations of the evaluators and very little about those of the justices. The evaluators, we are given to understand, are dispassionate experts, and the great justices came from a wide spectrum of political affiliations. “None of the parties,” say the authors in passing, “can lay claim to producing the most superior justices”¹⁸⁷ This assertion is buttressed by a table showing that the highest average ability score (4.00) was earned by the one Whig justice, followed by seven Democratic-Republicans (3.29), thirty-three Republicans (3.27), forty-two Democrats (3.10) and thirteen Federalists (3.00).¹⁸⁸

If one probes a little deeper, a different picture emerges.

187. *Id.* at 64.

188. *Id.*

Party affiliations are not reliable indicators of political ideology. Relatively conservative Southern Democrats like McReynolds and Byrnes should not be lumped together, for ideological purposes, with zealous liberals like William O. Douglas. Furthermore, a justice's private political ideology is not necessarily indicative of whether his jurisprudence in the long run served liberal or conservative political causes. As private citizens, Holmes and Stone were Republicans, basically conservative in economic matters,¹⁸⁹ but their philosophy of judicial restraint in property rights cases, coupled with their regard for civil liberties,¹⁹⁰ made them heroes to progressives. Federalist though he was, John Marshall eventually became an idol of many liberal law professors, who forgave him for his property-rights decisions, largely because nationalistic opinions like *McCulloch v. Maryland*¹⁹¹ laid the legal foundation for the New Deal and, later, civil rights legislation, while his loose constructionist maxims were cited in justification of "liberal" decisions.¹⁹²

With these complexities in mind, let us reexamine the experts' list of great justices. Almost without exception,¹⁹³ these justices helped to advance at least one — more often, two or

189. A Coolidge appointee, Stone was an intimate of Herbert Hoover. According to a 1936 account, he "did not approve of many New Deal policies . . ." D. PEARSON & R. ALLEN, *supra* note 25, at 110. Like Stone, Holmes was sometimes mistaken for a liberal because of his civil liberties opinions and his unwillingness to declare labor legislation unconstitutional, but he was privately skeptical of efforts to deal with poverty by legislation. See, e.g., HOLMES-LASKI LETTERS 42, 49, 51-52, 165, 921 (M. Howe ed. 1953).

190. Stone's famous footnote number four in *United States v. Carolene Products, Co.*, 304 U.S. 144 (1938), is one of the seminal texts of modern liberal jurisprudence. Holmes's record as a defender of civil liberties was more uneven, but compared to other members of his Court he was regarded as a great libertarian. See Bryden, *Mencken and Holmes*, 2 CONST. COMMENTARY 277, 282-83 (1985).

191. 17 U.S. (4 Wheat.) 316 (1819).

192. *E.g.*, *Home Bldg. and Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934).

193. Frankfurter, though critical of what he regarded as the excessive liberal activism of Justices like Murphy, Black, Douglas, and Warren, devoted most of his career to progressive causes, and was in most respects an orthodox liberal of his time, albeit — like many people — a bit behind the times in his last decades. Writing in 1936, the liberal journalists Pearson and Allen described Hughes as "a weak-kneed oscillator between the two wings of the Court . . ." D. PEARSON & R. ALLEN, *supra* note 25, at 97. Concerning his first tenure on the Court, however, they had nothing but praise: He "upheld social, labor and anti-trust measures," "championed the right of federal and state governments to regulate utilities, railroads and industry" and so on. "In the six years that he served on the Court," they report, "he voted with the liberal wing 51 times, with the conservatives only 10 times, as against a record for Justice Holmes of 37 votes on the liberal side and 32 on the conservative." *Id.*

three — of these major causes on the modern liberal agenda: transfer of power from the states to the national government; development of a welfare state; and expansion of civil rights and liberties, exclusive of property rights. Within the field of constitutional history, all three of these causes are so sacred, and so rarely challenged, that they have acquired the aura of incontestable progress, rather than being seen as large and complex phenomena whose import is sometimes problematic or even harmful.¹⁹⁴

The second Justice Harlan, widely considered (even by liberals) to have been the finest legal craftsman on the Warren Court, was “near great” rather than “great.” One might try to explain this on the ground that, since the Court’s majority was liberal, Harlan was not highly influential. But Cardozo, who served only from 1932-1938, was rated “great,” and the relatively undistinguished Justice Fortas, after serving only from 1965-1969, became “near great,” as did his fellow liberal Wiley Rutledge (1943-1949). Harlan’s grandfather, the first Justice Harlan, was “great,” we suspect, mainly because he dissented in *Plessy v. Ferguson*¹⁹⁵ and The Civil Rights Cases.¹⁹⁶ His analytical skills were inferior to those of his grandson, and he was not conspicuously influential. None of the influential conservative-activist justices of the late nineteenth and early twentieth centuries was “great”: Field and Bradley, for example, were only “near great.”

The list of eight “failures” is even more revealing. All of the failures served during a pivotal fifty-year period of the Court’s history, spanning the final battles involving conservative activism on behalf of property rights and the subsequent emergence of a liberal-activist bloc that eventually became a majority during the Warren Court years. Every failure belonged to one of two groups: the conservative-activists who re-

at 80. His record as an efficient chief justice may also have influenced some of the evaluators. See A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 43.

Concerning Taney, our authors offer this justification of his selection: “The selection of Roger B. Taney reflects the judgment of experts that a jurist with outstanding skill and competence should not be rated on the basis of the negative view which history has affixed to one of his decisions.” *Id.* at 41. They add that Taney “proved willing to deny the states the power to obstruct federal processes, thus enhancing the stature which the Court had achieved under Marshall.” *Id.* at 42.

194. See Bryden, *Brandeis’s Facts*, 1 CONST. COMMENTARY 281, 323-26 (1984).

195. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

196. 109 U.S. 3 (1883).

sisted the New Deal, or the moderate-restraintists who, in the 1940s and 1950s, served as a drag on the emerging and finally dominant liberal-activist wing of the Court. Thus, the jurisprudential sin of the first group was conservative activism, and of the second, conservative restraint.

Of the four conservative-activist justices who most regularly voted to invalidate New Deal legislation, three (Van Devanter, McReynolds, and Butler) were "failures." In the postwar era, Whittaker and Burton — two more failures — were considered conservative, though of a less activist type.¹⁹⁷ Whittaker proved unequal to the Court's tasks and soon resigned. Burton, however, was a capable judge who probably would have received a higher rating had he been a liberal-activist, or served during an earlier decade, such as the 1930s, when his deference to legislators would have been regarded as a virtue. Like other Democrats, Vinson generally supported a strong federal government. By the time he reached the Court, however, this virtue was taken for granted; the constitutionality of the New Deal was no longer in doubt. On Vinson's Court, the only activist justices were liberals, and compared to them he was thought to be too passive. After Murphy and Rutledge were replaced, Vinson was part of a dominant bloc that liberals criticized as "cautious" about race relations and that "rarely ruled in favor of individual freedom."¹⁹⁸ Similarly, Minton — though a militant New Dealer — became one of the most conservative members of the postwar Court.¹⁹⁹ Byrnes was moderately libertarian in Bill of Rights cases, but in comparison to the more liberal members of his Court he often seemed insensitive to civil liberties,²⁰⁰ and his post-Court record as a segregationist governor further tainted his reputation.

The lowest rating any *liberal* activist received was "average," or two notches above the failures: Justices Murphy, Goldberg, and Thurgood Marshall received this rating.²⁰¹

All told, nine of the evaluated justices are strongly identified with liberal activism: in addition to the three "average"

197. Kirkendall, *Harold Burton*, in 4 L. FRIEDMAN & F. ISRAEL *supra* note 16, at 2619; Friedman, *supra* note 51, at 2896. Blaustein and Mersky noted that "Whittaker cast the deciding vote in forty-one crucial decisions, each time standing on the side that would deny civil rights or the extension of personal liberty." A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 48.

198. Kirkendall, *Vinson*, *supra* note 175, at 2644.

199. Kirkendall, *Minton*, *supra* note 49, at 2699.

200. Murphy, *supra* note 58, at 2527.

201. A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 39.

justices, there are Fortas (near great), Brennan (near great), Rutledge (near great), Douglas (near great), Warren (great) and Black (great). The average ability score of this bloc was 3.89. This means that the explanatory power of a liberal-activist record is superior to any of the predictors emphasized by the authors except Jewishness and being a professor, two categories that to some degree overlap political liberalism.²⁰² If we add Brandeis to the "liberal activist" list, as perhaps we should,²⁰³ its average score becomes 4.00. Adding the Federalist and Republican justices who were celebrated chiefly for their contributions to liberal jurisprudence — Marshall, Holmes, and Stone — would raise the average even higher, to 4.23, far above even such supposedly significant predictors as whether the justice attended a prestigious law school.

It is equally important to stress that the professors who did the evaluations obviously tried hard to be non-partisan; they gave considerable — some would say excessive — weight to intellect and traditional lawyers' skills. Most of the greats had superlative legal minds. In contrast, whatever one may think of their politics and their votes, none of the "failures" wrote many impressive constitutional opinions; McReynolds and Van Devanter did not even do their fair share of the Court's work.²⁰⁴ Although Warren was "great," (mainly, one supposes, because of his role as leader of the Warren Court) and Douglas "near great" (perhaps partly because he served so long and ultimately prevailed on so many issues), other liberals whose judicial opinions were often criticized for lack of legal craft were rated only average. The lackluster conservative Justice Sutherland received a surprisingly high rating of "near great," perhaps on the theory that he was influential, or because he wrote the opinion in some famous cases, or simply to give some representation to the twentieth-century conservatives. Despite his infamous *Dred Scott*²⁰⁵ opinion, Taney was rated "great." Plainly, judicial craftsmanship was a factor, although not

202. There have been no strongly conservative, Jewish justices.

203. Brandeis earned his reputation for judicial restraint mainly in economic regulation cases, where that position coincided with the liberal political position. In the field of civil liberties, he was basically activist. See Louis Leventhal Jaffee, "Was Brandeis an Activist?," speech delivered at the University of Louisville School of Law on the fiftieth anniversary of Justice Brandeis's appointment to the Supreme Court (Jan. 28, 1966).

204. See A. BLAUSTEIN & R. MERSKY, *supra* note 5, at 48.

205. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1854).

enough to lift even consummate lawyers like Harlan II or Robert Jackson to the highest level of excellence.

A panel of conservative scholars probably would have reached some of the same conclusions. Because most conservatives today advocate judicial restraint, this hypothetical panel probably would have agreed with liberals in rating Butler, Van Devanter, and McReynolds near the bottom of the pack. Conservatives would be loathe to conclude, however, that Fortas and Douglas were "near great" justices, even if they reluctantly conceded — as they might — that Warren and Black were "great" because of their historical impact.

The problem is not that political bias improperly distorted the evaluations, but that political bias inevitably and properly affects evaluations of justices. To be sure, the idea of non-partisan ratings of justices is not wholly misguided. After all, even presidential candidates can to some extent be evaluated on the basis of politically neutral criteria like administrative experience. But how many people vote for a president on that basis? We need to remind ourselves that justices are not merely opinion-writers; they also vote. One may argue about the precise mix of law and politics in constitutional judging, but the stubborn fact remains: If you usually like the way a justice votes, you will not regard his or her performance on the Court as abysmally poor or even below average. It would be indefensible for a liberal professor, sympathetic to judicial activism, to rate Douglas lower than Harlan, however much he might admire the latter's legal craft. If anything, today's professors would give greater weight to politics than the 1970 panel did. We suspect that a similar survey today would rate Brennan "great" and would have less esteem for Frankfurter and Taney than the experts of 1970.

III. THE RESUME MENTALITY

What, then, shall we say about the concept of a "human resume" for Supreme Court nominees? The first and most important thing to say is that all resumes — whether legal, academic, or "human" — are extremely superficial. A resume reveals little about character, and less about wisdom. Every fall, the faculty hiring committee at Harvard Law School looks at several resumes that are about as impressive as Felix Frankfurter's was, but how many Frankfurters do they hire? Of course, no one proposes to evaluate nominees solely by perus-

ing resumes, but equally superficial appraisals abound, on both sides, in every confirmation debate.

If one's main interest is in the legal quality of a justice's opinions, there is no reason to believe that non-legal biographies furnish useful predictors. No one who thought that a nominee's legal and political credentials were impressive would even consider opposing him on the ground that he was a Baptist who grew up on a farm in Iowa and went to an obscure law school. The fallacy in using such predictors is not that they are imperfect; all predictors are imperfect. But once we know someone's qualifications we no longer care about predictors of those qualifications. There is nothing in the data discussed in this Essay that refutes the possibility that the nominees with "ideal" biographical data who became highly-rated justices are the same people that a competent observer would have expected to be great without considering such data. Few if any of the greats would have looked better, when nominated, on the basis of their "human resumes" than on the basis simply of their legal and political qualifications.

If one is chiefly interested in the political soundness of a justice's votes, why rely on an ostensibly neutral criterion like the nominee's class origins or non-legal experiences? A liberal hermit will be as suitable (or unsuitable) as a liberal labor lawyer. So even if the data showed that justices from a particular background are more likely to vote in certain ways than justices of different origins, there would be no reason to prefer a nominee with that background to one with the opposite background who was known to have the same political and jurisprudential convictions.

It is only when we are uncertain about the nominee's political opinions that there is any reason to consider biographical data — not because of its intrinsic significance, but because of its value in predicting political inclinations. Common experience tells us that if all we know about a nominee is that he was a corporate lawyer, then we should conclude that he is likely to be more conservative than someone, for example, about whom we know only that she was a professor of constitutional law. Many similar inferences are equally reasonable generalizations, albeit inaccurate in some cases. Even so, history reveals the dangers of facile predictions that someone from this or that background will have this or that inclination as a justice.

This is particularly true in the area of race relations. Contrary to what some who opposed Souter implied, proximity to

another race is not generally conducive to conciliatory attitudes: consider Jerusalem and New York. Professors, who as a rule have very little contact with poor blacks, have generally supported affirmative action and other programs that are less popular among whites in racially heterogeneous areas. If Justice Souter proves to be less liberal than a Rockefeller, it will not be because he has led a more sheltered life.

In any event, it is difficult to distinguish the question whether a Supreme Court nominee is well-prepared to understand the problems of the poor from the question whether he or she in fact understands the problems of the poor. Brandeis is a good example. His life was far removed from that of the average American, yet he had much practical experience in dealing with industrial disputes — no more so, however, than some company lawyers of conservative views. Many believe that Brandeis had an acute, even inspiring, understanding of workers, citizenship, and business. Certainly his factual mastery of economic problems was dazzling. But it is not at all clear that he exemplifies the value of any particular type of experience. For one thing, some of his causes look less attractive today. He was a devout believer in such eighteenth-century virtues as individual responsibility and states' rights,²⁰⁶ notions that sounded somewhat old-fashioned even in his time, and that are now firmly identified with conservatism. Was he "well-prepared" to understand those subjects? His efforts to obtain judicial approval of protective labor laws for women in his famous "Brandeis briefs" have often been cited as illustrative of Brandeis's understanding of real-world conditions, but those laws are no longer thought of as an unmixed blessing, even by liberals who have no qualms about most government regulations.²⁰⁷ So should we describe Brandeis as well-prepared to understand the problems of working women? Evidently not, though his contemporary allies thought him the very paragon of a well-prepared justice.

Although Brandeis's practical experiences may indeed have enhanced his understanding of various subjects, his contribution to constitutional law consisted chiefly of opinions espousing judicial restraint in the area of economic regulation and

206. See Mason, *supra* note 24, at 2043-59.

207. See generally, Bryden, *supra* note 194 (arguing that the factual portion of the "Brandeis briefs" are less compelling than previous accounts had described them).

vigilant protection of civil liberties — positions that were also commonly held by inexperienced schoolteachers.

Holmes moved in the rarefied environment of an intellectual aristocrat, and — apart from the Civil War — servants were probably the common men he knew best. As for the war, that horror may have made Holmes more, rather than less, callous about human suffering.²⁰⁸ Yet he usually voted with Brandeis, albeit sometimes with different motives. A detached, philosophic man, who found “facts” boring, Holmes believed that big corporations were inevitable, while Brandeis — whose mind was a virtual encyclopedia of economic facts — crusaded for small business, a cause that has perpetual appeal, like world government, but that looks even more quixotic today than it did in Brandeis’s time. Sometimes a coldly judicious mind is more valuable than a lifetime of passionate experience.

Frankfurter was a professor through and through, but he did not lead a cloistered life, and some would characterize him as well-versed in social realities. On the other hand, if we say that his pre-Court life manifested “concern for the poor,” how do we reply to someone who says that concern is no substitute for good policies? Depending on the observer’s convictions about the merits of the controversies, Frankfurter’s experiences on behalf of the minimum wage and similar causes will seem to be either “fine training” for a justice or symptomatic of trendy enthusiasm for the fads of the intelligentsia.

The concept of a human resume is reminiscent of the old conservative cliché that a politician who has “never met a payroll” is unfit to govern. That particular theory is rarely heard these days, perhaps because there are too few conservative politicians with standing to propose it. But conservative jurists have sometimes entertained analogous thoughts, as revealed in a liberal journalist’s 1936 account of Justice Butler’s attitude toward his liberal brethren:

One reason for Butler’s scorn for his liberal colleagues is that they stepped out of the cloistered atmosphere of the college or of remote-control law practice onto the bench without first making their mark fighting at the lower bar. Both he and Roberts spent the early years of their life as jury pleaders. Van Devanter, Sutherland and McReynolds also came to the Court as practicing attorneys, although their rough-and-tumble pleading was not so extensive. But all of them look down upon the qualifications of Cardozo, who they consider jumped from college to a very select law practice and then to

208. See S. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 141 (1989).

the bench; and upon those of Stone, who jumped from the deanship of Columbia Law School almost immediately to the bench; and upon those of Brandeis, who, although a practicing lawyer, had spent years in liberal crusades before he came to the Court. Hughes they consider a middle-of-the-road Y.M.C.A. Baptist with an evangelical outlook who entered the legal profession at the top, handling only the great cases and keeping carefully aloof from the school of hard knocks in the police and common-pleas courts.

None of this, in the opinion of Butler, is the experience that qualifies a man to pass on acts of Congress and the legislation of states as a member of the highest court of the land.²⁰⁹

Like Souter's critics, Justice Butler sincerely believed that his ideological foes were ill-prepared for their responsibilities. Would he have been quite so emphatic if his inexperienced colleagues had been right-wing professors who voted on his side and treated him with respect? And would liberals invoke the concept of a human resume to defeat the nomination of a rosy-cheeked liberal professor from a hamlet in New Hampshire? Why should they?

No judge has an adequate human resume, and so none will excel without the ability to transcend his apparent limitations. Thurgood Marshall, an elderly black, male lawyer, must try to understand young, white businesswomen; Sandra Day O'Connor, a sober, white, law-abiding, female lawyer, must somehow fathom an alcoholic, male, Hispanic criminal defendant. The patrician Holmes had to comprehend labor unions; Earl Warren, a politician, was called upon to understand soldiers and stockbrokers; Hugo Black, from Clay County, Alabama, had to appreciate life in the slums of Detroit; and John Marshall, from the woods of eighteenth-century Virginia, had to possess a vision of the great, commercial nation that we would become.

The justices have not always governed wisely. But if their human resumes had been a fair measure of their judicial limitations, they would never have done so.

209. D. PEARSON & R. ALLEN, *supra* note 25, at 136.