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The All-Time All-Star All-Era Supreme Court

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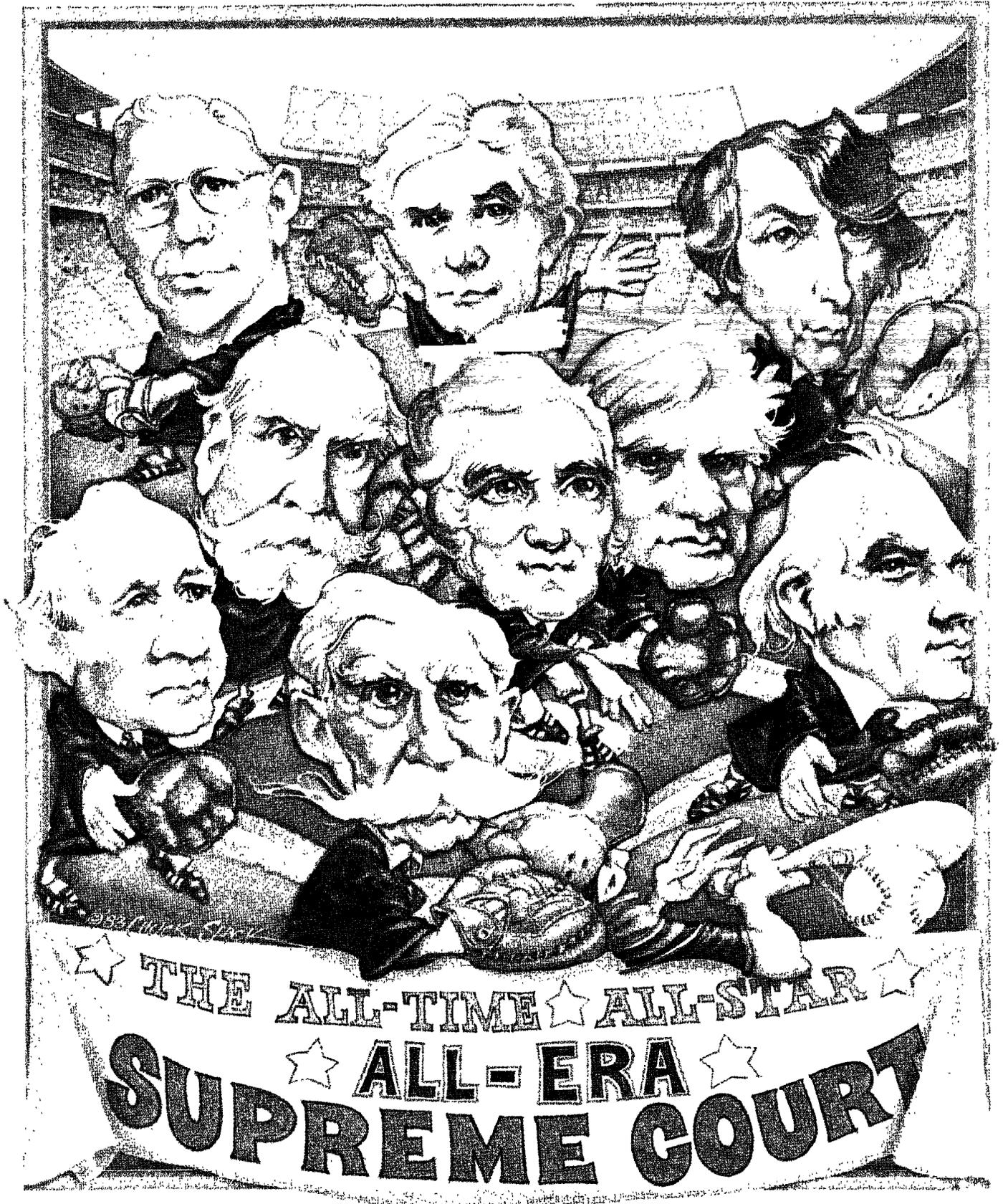
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THE ALL-TIME ALL-STAR
ALL-ERA
SUPREME COURT

A lot of people have come up with lists of "great" judges. Here's the list to end all lists: a distillation of everyone's choice for the greatest justices of the United States Supreme Court.

By James E. Hambleton

AMERICANS are great list makers. The *New York Times* best-seller list, the top 40 tunes, the *Women's Wear Daily* best-dressed list, the *Guinness Book of World Records*, and even the *Book of Lists* all attest this fact. Making the all-star roster can be the highlight of an athlete's season.

It is not surprising, then, to find that lists of America's "best" judges have been compiled. There are at least four of these, the first of which was drawn by Roscoe Pound in his 1938 book, *The Formative Era of American Law*. Pound's roster of "the ten judges who must be ranked first in American judicial history" includes both state and federal entries. Pound put his list in a footnote without detailing the criteria he used for selection.

In 1964 George Currie of the Wisconsin Supreme Court picked an "all-time, all-star United States Supreme Court comprised of nine members [who] have

been particularly outstanding among the legal luminaries who have sat on the Court during its long history." His "Judicial All-Star Nine" appears in 1964 *Wisconsin Law Review* 3. Excluding living Court members, Currie gives as his selection criteria: over-all ability, prophetic vision, and judicial statesmanship.

Prophetic vision

Ability is defined by Currie as proficiency in the law, the power of persuasion, the power to reason logically and write well, and the capacity to "rise above prior political or economic views" to decide an issue objectively. Prophetic vision enables a judge to discern the impact of a decision both on future legal development and on the social order. Judicial statesmanship includes the power to draft an opinion dictated by prophetic vision but placed on the proper legal and constitutional grounds. The enduring character of a judge's legal contributions was counted as proof that a particular judge possessed these qualities.

The third survey of best judges was tallied from a questionnaire sent to 65 law school deans and professors of law. Compiled by Roy M. Mersky and Albert P. Blaustein, "Rating Supreme Court Justices" appears in 58 *American Bar Association Journal* 1183 (1972). The respondents to the questionnaire evaluated all justices who had sat on the Supreme Court on a one-to-five scale, from "great" to "failure." No selection criteria were suggested. From this survey, 12 justices qualified as "great."

A more recent roster of greatest judges has been drafted by Bernard Schwartz, "The Judicial Ten: America's Greatest Judges," 1979 *Southern Illinois University Law Journal* 405. Schwartz discusses the reasons why each particular judge was chosen and near the end of the article generalizes about what characteristics the selected judges share. His conclusions are that all the judges can be distinguished by "their more affirmative approach to the judicial role." Each judge held rather strong views and "did not hesitate to employ judicial power to

meet the time's necessities." "All of those on our list used the power of the bench to the full." Other shared traits are long tenures on the bench and serving during "creative" periods of American law.

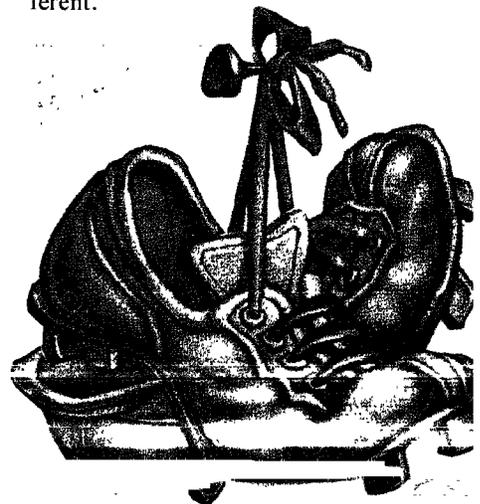
Blue ribbon rosters

These four lists vary in their scope, the criteria for selection, and the number of judges chosen. The Mersky-Blaustein and Currie lists have only United States Supreme Court justices; the Pound and Schwartz lists also have candidates from the various state benches. Neither Pound nor Mersky-Blaustein discusses criteria for selection, while Currie elaborates on selection standards, and Schwartz draws conclusions about shared traits from the judges chosen. Mersky's and Blaustein's survey produced 12 justices termed "great." The Schwartz and Pound tallies contain ten names, while Currie limited himself to an all-star nine.

The dates at which the various lists were published also vary widely. The Pound list was the first, released in 1938, followed by the Currie list in 1964, Mersky's and Blaustein's in 1972, and Schwartz's in 1979. The 40-year lapse between Pound's roster and that of Schwartz accounts for the last four names in Schwartz's roster being different.

The line-up:

Oliver Wendell Holmes, Jr., c
John Marshall, p
Joseph Story, 1b
Benjamin N. Cardozo, 2b
Charles Evans Hughes, ss
Hugo Black, 3b
Earl Warren, lf
Louis D. Brandeis, cf
Roger B. Taney, rf



Illustrations by Chuck Slack

Both Schwartz and Pound list:

John Marshall, Chief Justice of the United States, 1801-35

James Kent, Justice, New York, 1798-1823

Joseph Story, Justice, United States Supreme Court, 1811-45

Lemuel Shaw, Chief Justice, Massachusetts, 1830-60

Oliver Wendell Holmes, Jr., Justice, Massachusetts, 1882-1902; Justice, United States Supreme Court, 1902-32

Benjamin Nathan Cardozo, Justice, New York, 1914-32; Justice, United States Supreme Court, 1932-38.

The other four on Pound's tally are:

John Bannister Gibson, Justice, Pennsylvania, 1816-53

Thomas Ruffin, Justice, North Carolina, 1827-53

Thomas McIntyre Cooley, Judge, Michigan, 1864-85

Charles Doe, Justice, New Hampshire, 1861-76.

Pound drew only four of his ten names from the ranks of the United States Supreme Court: Marshall, Story, Holmes, and Cardozo. The other six all sat on their respective state benches.

Judicial M.V.P.'s

Schwartz chose six of his ten from the United States Supreme Court—the four from the Pound roster (Marshall, Story, Holmes, and Cardozo) plus Hugo LaFayette Black, 1937-71, and Earl Warren, 1953-69. Schwartz selected two state court judges whom Pound listed—Kent and Shaw. Schwartz rounds out his register of the ten greatest with Arthur T. Vanderbilt, Justice, New Jersey, 1947-57, and Roger John Traynor, Justice, California, 1940-70.

Currie's all-star nine consists only of United States Supreme Court justices. His nine include three of the four that both Pound and Schwartz selected: John Marshall, Joseph Story, and Oliver Wendell Holmes, Jr. Cardozo did not make the cut. The others are:

William Johnson, 1804-34

Roger B. Taney, 1836-64

Samuel Freeman Miller, 1862-90

Joseph P. Bradley, 1870-92

Louis Dembitz Brandeis, 1916-39

Charles Evans Hughes, 1910-16 and 1930-41.

The Mersky-Blaustein list, like Currie's, is made up only of United States



Supreme Court justices. The three names that appeared on the three other lists also appear here: Marshall, Story, and Holmes. Cardozo, cut from the Currie roster, reappears on Mersky-Blaustein. The two additional justices picked by Schwartz—Black and Warren—also are in the line-up. Three from Currie's tally also make the Mersky-Blaustein list: Taney, Brandeis, and Hughes. The final three Supreme Court justices honored are:

John M. Harlan, 1877-1911

Harlan F. Stone, 1925-46

Felix Frankfurter, 1939-62.

Hall of fame trio

No matter what selection criteria were used or whether the lists included state as well as United States Supreme Court justices, three people are always present: John Marshall, Joseph Story, and Oliver Wendell Holmes, Jr. These three undoubtedly would head the roster of the best Supreme Court justices. Another all-star selection would be Benjamin Cardozo, chosen by three of the four list makers.

To round out the all-star, all-era United States Supreme Court nine, there are five more judges whose names appear on two of the four lists. Roger Taney, Louis Brandeis, and Charles Evans Hughes were all rated among the greatest by both Currie and Mersky-Blaustein. The remaining two positions are filled by Hugo Black and Earl Warren, whose names are on both the Mersky-Blaustein and Schwartz rosters.

A synthesis of these four lists provides a new roster of the all-time, all-star, all-era, Supreme Court nine:

John Marshall

Joseph Story

Roger B. Taney

Oliver Wendell Holmes, Jr.

Benjamin Nathan Cardozo

Louis Dembitz Brandeis

Charles Evans Hughes

Hugo Black

Earl Warren.

This catalogue of greats represents the elite of all the justices who have sat on the Supreme Court. It is the definitive list until someone else draws up an all-star line-up.

—Journal

(James E. Hambleton is director of the Texas State Law Library.)

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