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The Most Scholarly Justices

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A Top Ten Ranking of the U.S. Supreme Court

The Most Scholarly Justices

Brian L. Frye

Abstract

Supreme Court justices both use and produce legal scholarship. This article identifies the ten most scholarly justices, based on both productivity and impact.

Introduction

The Supreme Court’s opinion of legal scholarship has changed over time. Historically, it was quite deferential, relying heavily on learned treatises.1 But its deference gradually waned. Recently, some justices have even suggested that most contemporary legal scholarship is irrelevant to legal practice.2

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1 See, e.g., Marbury v. Madison, 5 U.S. 137 (1803) (citing Blackstone’s Commentaries four times).

2 See, e.g., Chief Justice of the United States John G. Roberts, Jr., Interview at Fourth Circuit Court of Appeals Annual Conference, available at www.cspanvideo.org/
But Supreme Court justices don’t just use (or ignore) legal scholarship in their judicial opinions. They also produce it themselves. Over the years, they have published many scholarly (and some not-so-scholarly) books and articles. In fact, some of the most important (or at least influential) legal scholarship was written by Supreme Court justices. This empirical study identifies the “most scholarly justices” by counting both the number of law review articles written by each justice and the number of citations to those articles.

Legal scholarship takes many forms: books, treatises, hornbooks, restatements, monographs, reports, articles, essays, manuscripts, editorials, speeches, and so on. But today, the paradigmatic form of legal scholarship is the law review article.


See e.g. Paul F. Campos, Advocacy and Scholarship, 81 Cal. L. Rev. 817 (1993) (“The apex of American legal thought is embodied in two types of writings: the federal appellate opinion and the law review article.”).
Of course, it wasn’t always so. For most of the 19th Century, the prevailing forms of legal scholarship were treatises and case reports, and student-edited law reviews were largely ignored prior to the founding of the Harvard Law Review in 1886. Indeed, Justice Holmes (at least apocryphally) “admonished counsel who had the temerity to refer to them in argument that they were merely the ‘work of boys.’”

Some may object that excluding forms of legal scholarship other than law review articles unfairly disfavors those justices who chose to produce legal scholarship in other formats. But you can’t argue with the “rules of the game.” We must be as unforgiving as a tenure committee: the benchmark for legal scholars is their production of law review articles.

Some may also object that including all law review articles unfairly rewards justices for producing articles unworthy of consideration as legal scholarship. But it is an academic truism that a tenure committee knows how to count, even if it doesn’t know how to read.

**METHODODOLOGY**

The dataset used for this study was the HeinOnline database of United States law reviews, which is the most comprehensive database of legal periodicals. In order to measure scholarly productivity, I performed an author search for the name of each Supreme Court Justice.

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7 Charles E. Hughes, Foreword, 50 Yale L.J. 737 (1941).
Court justice, and counted the number of articles properly attributed to that justice, screening out false positives, and counting both co-authored and reprinted articles. In order to measure scholarly influence, I counted the number of citations to articles written by each justice, as reported by HeinOnline.\textsuperscript{12}

Of course, social and technological changes complicate cross-historical comparisons of scholarly productivity. For example, the first American law review was the American Law Register, which was founded in 1852, so many justices had little or no opportunity to publish law review articles. Moreover, the number of law reviews has gradually increased over time, creating ever more opportunities to publish law review articles. However, while 20th Century justices had more opportunities to publish law review articles, 19th Century justices had more opportunities to make a scholarly impact.

\begin{table}[h]
\centering
\caption{The Ten Most Scholarly Justices Based on Productivity (as of May 9, 2015)}
\begin{tabular}{|c|c|c|}
\hline
Rank & Name & Number of Articles \\
\hline
1 & Warren E. Burger & 188 \\
\hline
2 & Ruth Bader Ginsburg & 155 \\
\hline
3 & Tom C. Clark & 124 \\
\hline
4 & William J. Brennan, Jr. & 121 \\
\hline
5 & William Rehnquist & 116 \\
\hline
6 & William O. Douglas & 112 \\
\hline
7 & Earl Warren & 97 \\
\hline
8 & Lewis F. Powell, Jr. & 90 \\
\hline
9 & Felix Frankfurter & 89 \\
\hline
9 & Robert H. Jackson & 89 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{12} The complete dataset is available at https://perma.cc/4FXQ-3YJ9.
TABLE II:
THE TEN MOST SCHOLARLY JUSTICES
BASED ON INFLUENCE (AS OF MAY 9, 2015)

<table>
<thead>
<tr>
<th>Rank</th>
<th>Name</th>
<th>Number of Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Oliver Wendell Holmes, Jr.</td>
<td>5379</td>
</tr>
<tr>
<td>2</td>
<td>William J. Brennan, Jr.</td>
<td>4699</td>
</tr>
<tr>
<td>3</td>
<td>Felix Frankfurter</td>
<td>4220</td>
</tr>
<tr>
<td>4</td>
<td>Antonin Scalia</td>
<td>4130</td>
</tr>
<tr>
<td>5</td>
<td>Louis Brandeis</td>
<td>4110</td>
</tr>
<tr>
<td>6</td>
<td>Stephen Breyer</td>
<td>3324</td>
</tr>
<tr>
<td>7</td>
<td>Ruth Bader Ginsburg</td>
<td>2631</td>
</tr>
<tr>
<td>8</td>
<td>William O. Douglas</td>
<td>2278</td>
</tr>
<tr>
<td>9</td>
<td>Warren E. Burger</td>
<td>2141</td>
</tr>
<tr>
<td>10</td>
<td>William Rehnquist</td>
<td>1692</td>
</tr>
</tbody>
</table>

REFLECTIONS

Table I lists the ten most scholarly justices, based on scholarly productivity. Unsurprisingly, it shows that 20th Century justices were the most productive scholars, reflecting the increased prevalence and prominence of law reviews in the 20th Century. But it also shows that mid-20th Century justices were more productive scholars than most of the more recent justices. Four of the ten most productive scholars were former law professors: Burger, Ginsburg, Douglas, and Frankfurter. And while some of the ten most productive scholars are popularly associated with legal scholarship, others are not.

Table II lists the ten most scholarly justices, based on scholarly impact. While six of the ten most productive scholars are also among the ten most impactful scholars, four are not: Clark, Warren, Powell, and Jackson.13 Six of the ten most impactful scholars were

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13 Their rankings based on scholarly impact are: Jackson (#13: 1312 citations); Warren (#19: 657 citations); Powell (#20: 614 citations); and Clark (#22: 521 citations).
former law professors: Holmes, Frankfurter, Scalia, Ginsburg, Douglas, and Burger. Presumably, former law professors have an edge on producing impactful scholarship. Notably, the scholarly impact of several of the ten most impactful scholars depends primarily or exclusively on one particularly impactful article. For example, Holmes’s article, *The Path of the Law*, received 3600 of his 5379 citations; Brandeis’s article, *The Right to Privacy*, received 4002 of his 4110 citations; and Brennan’s article, *State Constitutions and the Protection of Individual Rights*, received 1855 of his 4699 citations.

**CONCLUSION**

This article identifies the ten most scholarly Supreme Court justices, based on both productivity and impact. The results suggest that scholarly productivity and scholarly impact are only partially correlated. They also suggest that scholarly productivity peaked in the mid-20th Century, but scholarly impact is broadly distributed.