Stephen Johnson Field: Near-Great Justice, or Near-Greatest Justice?

Let us set the playing field. Stephen Johnson Field is no John Marshall. Nor is he Holmes, nor Brandeis, nor Story. He lacks the weight of Warren, the influence of Black, the force of Rehnquist.

We do not argue otherwise.

This is our modest proposal: When considering the vast tier of second-rate justices, Justice Field deserves to be at the top.[1] Field set the pace for the also-rans; of those justices whose ideas were discarded, Field's had the most force. He is the most distinguished of the indistinguishable, as measured by numbers, substance, or more subjective qualifications.

David S. Terry, Field's predecessor as Chief Justice of California, may have captured it best when he described Field as "an intellectual phenomenon" who could "give the most plausible reasons for a wrong decision of any person I ever knew."[2] High praise when you consider that Terry later tried to assassinate Field.[3]

Field was a stalwart by standard quantitative measures. He was the longest-serving justice at his retirement, and his 12,614 days on the Court are second only to William O. Douglas.[4] Field served with twenty-seven justices (four chiefs, twenty-three associates), a total surpassed only by the first Justice Harlan (twenty-nine).[5] His 544 majority opinions place him among the ten most-prolific justices of all time.[6]

These opinions demonstrate Field's near-greatness, in the sense that they provide the foundation for great doctrines, rather than consistently announcing them. Not a student passes through law school doors without reading the foundational case on *quasi in rem* jurisdiction: *Pennoyer v. Neff.*[7]

Readers with more refined Constitutional tastes may recognize Justice Field as the godfather of substantive due process. His dissents in the *Slaughter-House Cases*[8] and *Munn v. Illinois*[9] planted the seed for the Court's decision in *Lochner v. New York*[10] three decades later.[11] True, "*Lochner*" may now be a dirty word, but it was Field's conception of the Fourteenth Amendment that controlled the social and economic doctrine of the Court for four decades.[12]

Some of Field's work proved genuinely useful well into the twentieth century. His dissent in *O'Neil v. Vermont*[13] provided critical guidance to the Court eighty years later in *Furman v. Georgia*,[14] where several justices relied on Field's discussion of excessive or disproportionate punishment when tracing the scope of the Eighth Amendment.[15]

By now some of you are surely protesting: "What about *Chae Chan Ping v. United States*?[16] Indefensible!" To which we say: When it comes to near-greatness, no press is bad press.[17] Sure, maybe a Great Justice would have dissented,[18] but a near-great one like Field would go along and craft a narrow opinion for a unanimous Court. Besides, if Holmes gets a mulligan on *Buck v. Bell*,[19] and we are willing to excuse Chief Justice Taney for *Dred Scott*,[20] so should Field get a pass here.

Field's sturdy judicial record warrants his inclusion among the Court's Near-Greats. Had history developed differently, he may have edged into the top tier. But empirical data aside, these ratings are inherently subjective. So when it comes time to separate Field from Fortas, consider the following:

Inane Cocktail Party Trivia

Field scores exceptionally high on "ICPT":

He was the first and only "tenth" justice, and the only person to serve as the junior justice on a court of three different sizes.[21]

Field was the first member of the Court from the Golden State, and the only Justice to have first served on the Supreme Court of California.

He is an essential link in the chain connecting the Jay Court with the Roberts Court based on the fewest number of overlapping justices.[22]

Most Interesting Justice

Field also has a strong claim to the title of "MIJ":

He is the only justice to have been disbarred twice.[23]

He narrowly escaped death at the hands of one judge,[24] and accepted a challenge to duel another on incredible terms: In a small room, starting with pistols and ending with bowie knives.[25]

Field survived an assassination attempt, and in the process became the only justice to be charged with murder. While riding circuit in California, Field was attacked by David Terry. A U.S. Marshal assigned to guard Field shot and killed Terry.[26] Both men were arrested. The charges against Field were soon quashed at the urging of California's Governor, and his bodyguard's case eventually reached the Supreme Court.[27]

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Others may argue that their favorite second-tier justice should lead the pack. But none can match Field's legacy on the bench, or his life off of it.

Q.E.D.

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[1] Field was rated “Near-Great” in the Blaustein and Mersky survey. Albert P. Blaustein & Roy M. Mersky, The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States 38 (1978).

[2] A.E. Wagstaff, Life of David S. Terry 294 (1892).

[3] More on this later.

[4] Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 402, Table 5–1 (4th ed. 2007).

[5] By the authors’ calculation.

[6] *See* Epstein, *supra* note 5, at 635–37, Table 6-12. “Prolific” in this sense refers only opinions for the Court—a critical marker of Judicial Greatness. Writing separately deceptively increases the number of opinions authored. After all, anyone can write a dissent. *See* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. Chi. L. Rev. 466, 468 (1983).

[7] 95 U.S. 714 (1878), overruled in part by *Shaffer v. Heitner*, 433 U.S. 186 (1977).

[8] 83 U.S. 36, 105 (1872) (Field, J., dissenting).

[9] 94 U.S. 113, 136 (1876) (Field, J., dissenting).

[10] 198 U.S. 45 (1905).

[11] As Justice Frankfurter put it, Justice Peckham (the author of *Lochner* and *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)) “wrote Mr. Justice Field’s dissents into the opinions of the Court.” Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 Harvard L. Rev. 121,141-42 (1927); *see also id.* at 142 n.50. For a discussion of Field’s role in shaping *Lochner*, *see* Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 Tulsa L. J. 93, 109–114 (1995).

[12] The time may yet come for a Field revival. His protest that the *Slaughter-House* majority rendered the Privileges or Immunities Clause "a vain and idle enactment, which accomplished nothing," 83 U.S. at 96 (Field, J., dissenting), was cited by the Court in *McDonald v. City of Chicago*, 561 U.S. 742, 756 (2010), and that clause remains a cause célèbre in certain circles (*see, e.g.*, *McDonald*, 561 U.S. at 805 (Thomas, J., dissenting)).

[13] 144 U.S. 323, 337 (1892) (Field, J., dissenting).

[14] 408 U.S. 238 (1972).

[15] *Id.* at 249, 272, 277–80 (Douglas, J., concurring); *id.* at 323–24, 330–32 (Marshall, J., concurring); *id.* at 378–79 (Burger, C.J., dissenting); *id.* at 457 (Powell, J., dissenting).

[16] 130 U.S. 581 (1889), aka the "*Chinese Exclusion Case*."

[17] *See* William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 Marquette L. Rev. 401, 430-34 (1996) (discussing "the *Dred Scott* Factor").

[18] *E.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

[19] 274 U.S. 200 (1927).

[20] 60 U.S. 393 (1857).

[21] The Judiciary Act of 1863, 12 Stat. 794, added a tenth justice; that seat went to Field. The Court fell to nine members after Justice Catron's death in 1865. Congress then passed the Judicial Circuits Act of 1866, 14 Stat. 209, which allowed the Court to fall to seven members, and prevented President Johnson from appointing any justices. The Court stood at eight members from Justice Wayne's death in 1867 until 1870, when the Circuit Judges Act of 1869, 16 Stat. 44, set the Court at nine members.

[22] Eleven. *Viz.*: Jay–Cushing–Marshall–Wayne–Field–Harlan–Holmes–Roberts–Douglas–Rehnquist–Sc

alia.

[23] Carl Brent Swisher, Stephen J. Field, Craftsman of the Law 39–44 (1930).

[24] Donald R. Burrill, Servants of the Law 113 (2011). Field was saved from the would-be assassin's bullet by future U.S. Senator (and losing duelist) David Broderick. *Id. See also* Stephen J. Field, Personal Reminiscences of Early Days in California 85-87 (1893). For self-defense, Field had a coat made that concealed two revolvers and allowed him to fire through its pockets. *Id.* at 54.

[25] Swisher, *supra* note 24, at 62–63.

[26] Field had recently ruled against Terry's wife, who claimed to be the widow of a wealthy U.S. Senator and was seeking her share of the estate. For a thorough account of the ordeal, *see* Swisher, *supra* note 24, at 321–61. This was not Terry's first brush with infamy: He resigned as Chief Justice of California to duel U.S. Senator David Broderick. A. Russell Buchanan, David S. Terry of California, Dueling Judge 98 (1956). After killing Broderick, Terry left California for Texas, where he fought for the Confederacy. *Id.* at 129–39.

[27] *In re Neagle*, 135 U.S. 1 (1890).

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