SUPREME COURT SLUGGERS: INTRODUCING THE SCALIA, FORTAS AND GOLDBERG/MILLER TRADING CARDS

Ross E. Davies, George Mason University School of Law; Craig D. Rust & Adam Aft

***Journal of Law*, Vol. 2, (*Journal of Legal Metrics*, Vol. 1), No. 1, 2012**

George Mason University Law and Economics Research Paper Series

12-30

SUPREME COURT SLUGGERS

INTRODUCING THE SCALIA, FORTAS, AND GOLDBERG/MILLER TRADING CARDS

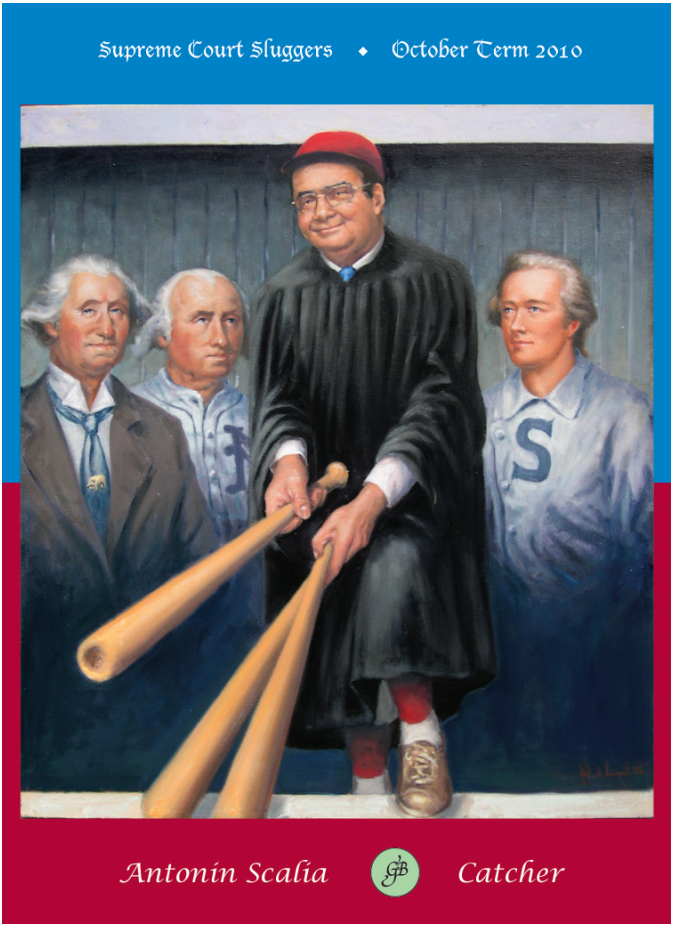
Ross E. Davies, Craig D. Rust & Adam Aft[†]

We are pleased to introduce a few new members of the "Supreme Court Sluggers" trading card lineup. The addition of Justice Antonin Scalia to the team is in keeping with our goal of expeditiously compiling and publishing data for all current members of the Supreme Court. (We have issued cards featuring Chief Justice John G. Roberts and Justice John Paul Stevens, and Justices Sandra Day O'Connor and Samuel Alito are in the works.) This season, we have also completed the first two cards of what might be called our "Veterans" series of those who served long ago: Justice Arthur Goldberg, who appears in the company of baseball great Marvin Miller, and Justice Abe Fortas.[1]

[†] Ross Davies is a professor of law at George Mason University and editor-in-chief of the *Green Bag*. Craig Rust is a former law clerk to the Honorable Samuel G. Wilson of the U.S. District Court for the Western District of Virginia. Adam Aft is a law clerk in the United States Court of Appeals for the Fifth Circuit.

[1] *See* National Baseball Hall of Fame and Museum, *2010 Induction Ceremony*, baseballhall.org/hall-famers/hall-fame-weekend/past-ceremonies/2010-induction-ceremony ("The Veterans Committee for Managers and Umpires elected former National League arbiter Doug Harvey to the Hall of Fame . . ."). This analogy invites the question of what we ought to do about recognizing jurists who had no real chance of serving on the Supreme Court because of their race (for which our "Veterans" date might be 1966 (pre-Thurgood Marshall) or 2008 (pre-Sonia Sotomayor)), or gender (perhaps 1980 (pre-Sandra Day O'Connor)). *See* National Baseball Hall of Fame and Museum, *Rules for Election for Managers, Umpires, Executives and Players for Pre-Integration Era Candidates to the National Baseball Hall of Fame*, baseballhall.org/hall-famers/rules-election/eras-pre-integration.

Electronic copy available at: http://ssrn.com/abstract=2001114



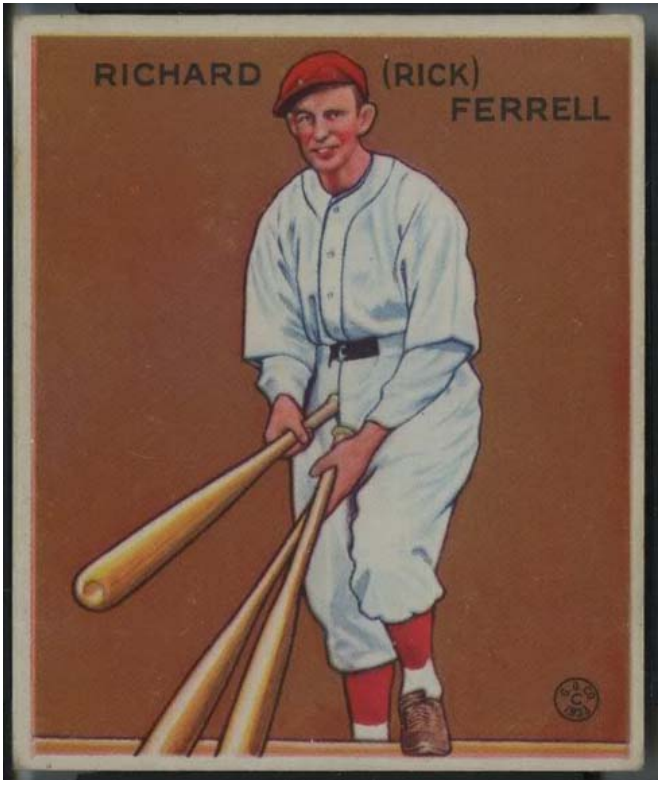
I.
JUSTICE ANTONIN SCALIA, ILLUSTRATED

John Sargent painted this portrait of Justice Scalia.[2] It is based on the classic Richard Benjamin "Rick" Ferrell trading card pictured on the next page.[3] Why Ferrell? Because:

[2] John A. Sargent III, *Supreme Court Justice Antonin Scalia* (2010) (oil on canvas). *See* www.johnasargent.com; www.greenbag.org/sluggers/sluggers_home.html.

[3] *Richard "Rick" Ferrell, Boston Red Sox*, No. 197 (Goudy Gum Co. 1933).

Electronic copy available at: http://ssrn.com/abstract=2001114



- He was a catcher, the #2 position on the baseball diamond, just as Scalia is #2 in seniority on the Court.[4] (And just as Justice John Paul Stevens was when we based his Supreme Court Sluggers portrait on a Gabby Hartnett card.[5])
- He was an excellent performer over a long career. Between 1929 and 1947, he played more than 1,800 games – all of them at catcher – for the Boston, St. Louis, and Washington teams in the American League. He was a good batter, with a career average of .281,[6] but he was best-known for his work

[4] KERRIE FERRELL WITH WILLIAM M. ANDERSON, RICK FERRELL, KNUCKLEBALL CATCHER (2010); 28 U.S.C. § 3.

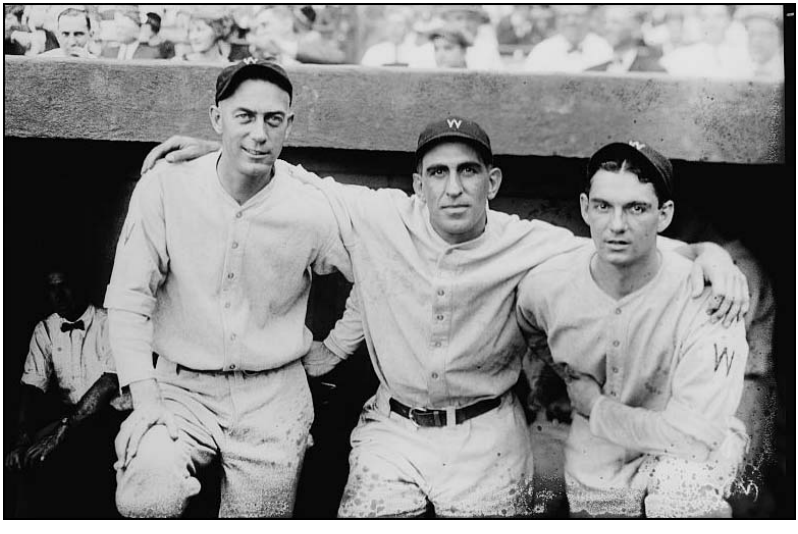
[5] Ross E. Davies, Craig D. Rust & Adam Aft, *Supreme Court Sluggers: John Paul Stevens Is No Stephen J. Field*, 13 GREEN BAG 2D 465, 472-73 (2010).

[6] *Rick Ferrell*, RETROSHEET, www.retrosheet.org/boxesetc/F/Pferrr101.htm (vis.

> behind the plate, and especially for his skill catching knuckleball pitchers. According to his brother, All-Star pitcher Wes Ferrell, "Brother or no brother . . . he was a real classy receiver. You never saw him lunge for the ball; he never took a strike away from you. He'd get more strikes for a pitcher than anybody I ever saw, because he made catching look easy." He was elected to the Baseball Hall of Fame in 1984.[7]

People who know more about Scalia and Ferrell might well come up with other interesting connections.

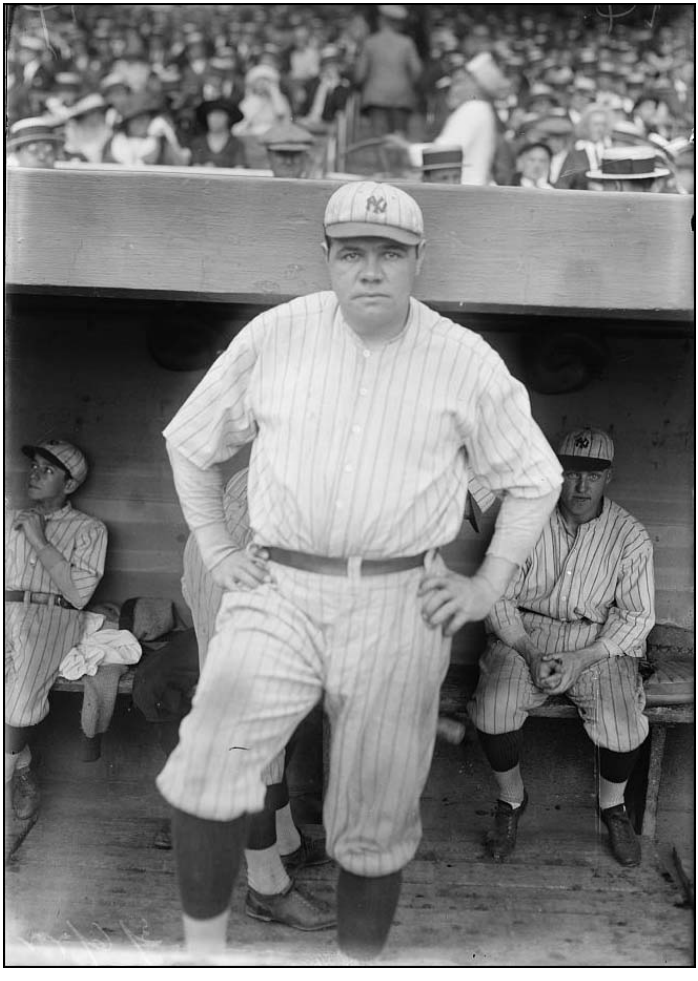
The selection of the Ferrell card, however, had as much to do with his pose on the card as with his performance on the field. Ferrell is clearly standing at the edge of a dugout. And if we had the whole picture, it would surely include at least one or two of his teammates, sitting or standing around or behind him, like the Washington Senators below or the New York Yankees on the next page.



Left to right: George Mogridge, Roger Peckinpaugh, and Herold "Muddy" Ruel. Library of Congress, repro. no. LC-DIG-ggbain-37515.

Feb. 5, 2010).

[7] National Baseball Hall of Fame and Museum, *Rick Ferrell*, baseballhall.org/hof/ferrell-rick; *see also* DICK THOMPSON, THE FERRELL BROTHERS OF BASEBALL ch. 14 (2005) ("The Knuckleball Catcher").



Babe Ruth. Library of Congress, repro. no. LC-DIG-ggbain-32385.

This kind of dugout setting seems like an appropriate one in which to portray, light-heartedly, Scalia's important relationship to the uses of history in modern American adjudication – to originalism, that is. It is an arena in which he is the great figure. He has presented his views in widely-discussed scholarship,[8] and applied them

[8] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

in important judicial opinions.[9] His views are not uncontested,[10] but they also are not without influence. Indeed, their durability is apparent from the very fact that "[t]he debate over constitutional Originalism continues to spark scholarly controversy" among serious students of the subject.[11]

And so we present Scalia in a constitutional dugout, in the company of three prominent early figures in American lawmaking (commonly called "Framers" or "Founders") whose intentions might well qualify as original in at least some constitutional contexts. And we portray those Framers in the distinctive garb of similarly prominent figures from the early years of baseball – figures whose public identities to some extent interestingly correspond to and contrast with their Framing counterparts.

From left to right, appearing with Antonin Scalia on his "Supreme Court Sluggers" card, we have:

1. George Washington – with whom Scalia has associated himself in several cases, including, for example, *City of Boerne v. Flores*.[12] Washington appears on the card in the guise of Cornelius McGillicuddy, Sr., better known in his own day and ours as Connie Mack. Mack was a founder of the Philadelphia (now Oakland) Athletics and manager of the team for its first 50 years, from 1901 to 1950. Like Washington in the fields of constitution-making, nation-building, and governing, Mack in the field of baseball had "the greatest impact . . . in establishing orthodoxy in how the game was played"[13] due to his incomparable combination of ability, industry, decency, dignity, and success.

---

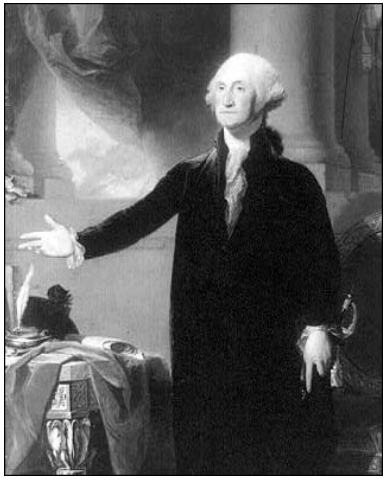
[9] *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[10] Start with the dissenting opinions in *District of Columbia v. Heller* and the majority opinion in *Roper v. Simmons*.

[11] Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution*, 23 YALE J. L. & HUMANITIES 295, 295 (2011).

[12] 521 U.S. 507, 542 (1997) (Scalia, J., joined by Stevens, J., concurring in part); *see also, e.g., McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

[13] THE BILL JAMES GUIDE TO BASEBALL MANAGERS 64 (1997).

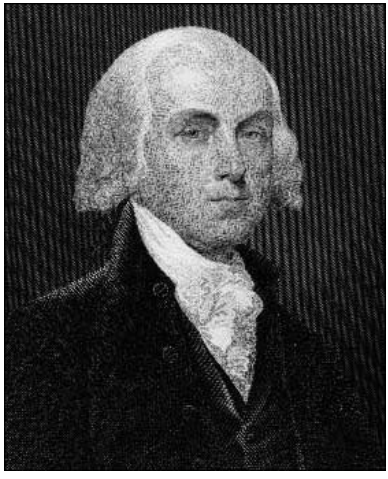


Connie Mack (with Bucky Harris at left) and George Washington. Library of Congress, repro. nos. LC-DIG-hec-24442 and LC-USZ62-96385.

To the extent there is a foundational character in baseball who is of Washingtonian stature, it is Mack. (He was also notable as the manager who continued to wear a suit-and-tie in the dugout long after his peers had switched to player-style attire.) In other words, Washington and Mack were much alike in fundamental ways – they were important players, formative figures, and fine role models in their respective fields both because of who they were and because of the results they achieved by being who they were.[14]

2. James Madison – with whom Scalia has associated himself in many cases, including, for example, *Printz v. United States*.[15] Madison appears on the Scalia "Sluggers" card in the uniform of longtime New York (now San Francisco) Giants manager John McGraw. Like Mack, McGraw was tremendously successful over a long period of time and is still respected and influential today.[16] And just as Madi-

[14] *See, e.g.*, NORMAN L. MACHT, CONNIE MACK AND THE EARLY YEARS OF BASEBALL (2007); JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON (2004).
[15] 521 U.S. 898, 910, 914-15, 919-22 (1997); *see also, e.g., Rogers v. Tennessee*, 532 U.S. 451, 478 (2001) (Scalia, J., joined by Stevens and Thomas, JJ., dissenting).
[16] *See, e.g.*, THE BILL JAMES GUIDE TO BASEBALL MANAGERS at 48-58; *see generally* CHARLES C. ALEXANDER, JOHN MCGRAW (1988).



John McGraw (left) and James Madison. Library of Congress, repro. nos. LC-DIG-ggbain-21535 and LC-USZ62-106865.

son was a talented junior to Washington – in some respects a superior talent – so was McGraw to Mack. As Giants manager from 1902 to 1932 he won ten National League pennants and three World Series, and at his retirement had a far better won-lost record than Mack would at his (at 2763 and 1947, McGraw had a winning percentage of .587, while Mack at 3731 and 3948 had a winning percentage of .486). But head-to-head on the biggest stage, Mack dominated. While McGraw's Giants did defeat Mack's Athletics in the 1905 World Series, Mack's team turned the tables in 1911 and 1913).[17] Similarly, for as long as Washington chose to lead, he did. Madison and Thomas Jefferson and their political allies failed to occupy the Presidency or, through it, significantly influence the makeup of the federal judiciary until after Washington had left public office, and this world.

Essential differences between the greatnesses of McGraw and Mack (paralleling again, perhaps, Madison and Washington) are cap-

[17] *Compare John McGraw*, RETROSHEET, www.retrosheet.org/boxesetc/M/Pmcgrj101.htm (vis. Feb. 3, 2012), *with Connie Mack*, RETROSHEET, www.retrosheet.org/boxesetc/M/Pmackc101.htm (vis. Feb. 3, 2012); *see also* ROB NEYER AND EDDIE EPSTEIN, BASEBALL DYNASTIES chs. 2 & 3 (2000).

tured to some extent in one modern expert remark and one old anecdote. The modern remark:

> McGraw's philosophy was, you have to control every element of the player's world and get rid of everything in there that might cause you to lose a game. Mack's philosophy was, you get good people, you treat them well, and you'll win. McGraw's approach was and is much more common among managers and coaches in all sports. But Mack won just as often, and his approach has another advantage.
>
> If you do it Connie Mack's way, you won't drink yourself into an early grave.[18]

And the old anecdote:

> Midway through the 1902 season McGraw deserted the faltering Baltimore Orioles in the new [American] league and hooked up with the New York Giants. From his new vantage point with the old establishment, McGraw told the press that [half-owner of the Athletics Benjamin] Shibe, in Philadelphia, would find that he had a "white elephant" on his hands. [Quarter-owner and manager of the Athletics Connie] Mack quickly adopted the White Elephant as the symbol of his club. It was an enduring symbol [that is still used by the modern Oakland Athletics] . . . . In 1902 it provided a rallying point for Mack and his team as they fought for the pennant.[19]

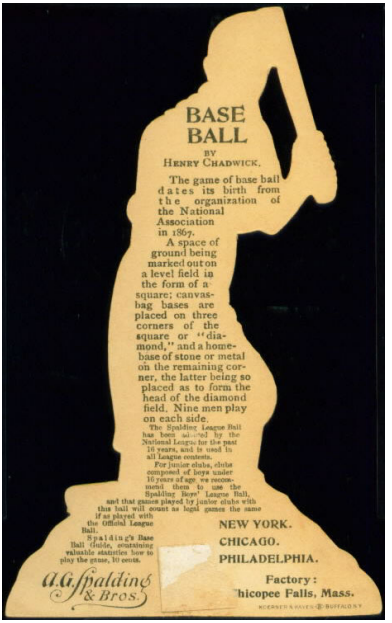
Thus the white-elephant tie tack worn by Mack on the Scalia "Sluggers" card.[20]

---

[18] THE BILL JAMES GUIDE TO BASEBALL MANAGERS at 65.

[19] DAVID M. JORDAN, THE ATHLETICS OF PHILADELPHIA: CONNIE MACK'S WHITE ELEPHANTS, 1901-1954 at 15-16, 26 (1999); *see also, e.g.,* DOROTHY AND HAROLD SEYMOUR, BASEBALL: THE GOLDEN AGE 78 (1971). Consider, in this light, Washington's famous use of eyeglasses during his speech to the Continental Army at Newburgh on March 15, 1783 – a gesture that Mack may well have been familiar with. *See* WASHINGTON IRVING, 4 LIFE OF WASHINGTON 380-83 (1859).

[20] These days the elephant – now called "Stomper" – is more gray than white and the official mascot of the Oakland Athletics. *See About Stomper*, oakland.athletics.mlb.com/oak/fan_forum/about_stomper.jsp.



The Spalding Base Ball Player card, front and back (circa 1894).

3. Alexander Hamilton – with whom Scalia also has associated himself in many cases, such as *Neder v. United States*.[21] Hamilton appears on the Scalia card outfitted not as real-life baseball icon, but, rather, as a fabricated icon. He is wearing the uniform of "Spalding's Base Ball Player" – a marketing device employed in the 1890s by the A.G. Spalding & Brothers sporting goods company. The company was founded in 1876 by Albert G. Spalding, an individual of prodigious ability and even more prodigious energy and ambition, much like Hamilton.

Both men left distinctively durable marks in their respective fields in part because of their penchant for expressing their ideas in ink, on paper. Hamilton had, among many other works, his famous "Reports" on Public Credit (1790) and on Manufactures (1791);

[21] 527 U.S. 1, 31 (1999) (Scalia, J., joined by Souter and Ginsburg, JJ., concurring in part and dissenting in part); *see also, e.g., Nevada v. Hicks*, 533 U.S. 353, 366 (2001).

Spalding had, among many other products, his "Official" baseball guides (1878 and for the rest of his life).

Like Hamilton's departure from the fields of law and government, Spalding's departure from the game of baseball came at an early age. The critical difference between the two was that Spalding had a plan that worked out well. Hamilton did not. Hamilton died in a duel with Aaron Burr, and so he did not live to see his young children grow up, or see many of his controversial policy initiatives endure despite the rising power of his Jeffersonian political adversaries, or see his own reputation rise and solidify.[22] Spalding chose the less risky (or at least lower-stakes) path of entrepreneurship in the untried field of mass-market sporting goods during the commercially and socially volatile Gilded Age. He cut short a brilliant pitching career (he won 253 games and lost 65) at age 27 in 1878 to pursue his commercial vision. He was blessed with a life long enough to see his choices vindicated. Spalding built his company into the most important operator in the sporting goods business. "To this day, no other athlete has so successfully managed to transform athletic prowess and personal celebrity into such corporate dominance."[23]

These three giants constitute just a fraction of Scalia's team of Framers. But alas, there is not room for everyone on just one "Supreme Court Sluggers" card. Maybe the next edition of the Scalia card will feature the likes of John Adams,[24] Thomas Jefferson,[25] and James Wilson.[26]

---

[22] *See* RONALD CHERNOW, ALEXANDER HAMILTON CH. 43 (2004).

[23] *See* MARK LAMSTER, SPALDING'S WORLD TOUR: THE EPIC ADVENTURE THAT TOOK BASEBALL AROUND THE GLOBE – AND MADE IT AMERICA'S GAME 23-26 (2006); *see also Heritage Timeline*, www.spalding.com/heritage.html; *compare* Letter from Thomas Jefferson to James Madison, Sept. 21, 1795, *in* 16 THE PAPERS OF JAMES MADISON 88 (1989) (J.C.A. Stagg et al., eds.) ("Hamilton is really a colossus to the antirepublican party. Without numbers, he is an host within himself.").

[24] *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

[25] *See, e.g.*, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 372 (1995) (Scalia, J., joined by Rehnquist, C.J., dissenting).

[26] *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 585 (2008).

II.
JUSTICE ANTONIN SCALIA, QUANTIFIED

As we continue to compile statistics for more members of the Supreme Court, we are presented with new opportunities to make comparisons between the justices. These new opportunities are – from a methodological standpoint – some of the most exciting aspects of the Justice Antonin Scalia card. Many people have strong opinions regarding Scalia, and in presenting his opinion authorship and citation statistics, we hope to provide a basis for comparing him to other justices, and perhaps the opportunity to prove or dispel certain theories about his opinion writing behavior over the years. And all of our data is, as usual, available in the "Supreme Court Sluggers" area of the *Green Bag*'s website at www.greenbag.org.

As to the card's compilation, we utilized the same methodology as we did for the compilation of Justice Paul Stevens's card.[27] For Scalia's time on the U.S. Court of Appeals for the District of Columbia Circuit, we collected all of the data by conducting Westlaw searches and checking each search result individually. For his time on the Supreme Court, we utilized the Supreme Court Database[28] to gather his opinion authorship data, while we collected his cites by name by again conducting Westlaw searches and manually verifying the results. By using the same methods as we did to create previous cards in the series, we can to continue to create opportunities to make "apples-to-apples" comparisons between the different justices that we examine. One such in-depth comparison is made elsewhere in this volume.[29]

However, we have one other brief observation to make, at this time, about the Scalia data. Between Justice Stephen Breyer's arrival on the Court in 1994 and Chief Justice John G. Roberts's in 2005,

---

[27] Ross E. Davies & Craig D. Rust, *Supreme Court Sluggers: Behind the Numbers*, 13 GREEN BAG 2D 215 (2010).

[28] *The Supreme Court Database*, http://scdb.wustl.edu/.

[29] *See* Craig D. Rust, *24 Rounds: Justices Scalia's and Stevens's Battle for America's Hearts and Minds*, 2 J.L. (1 J. LEGAL METRICS) 77 (2012).

the Court went through one of the longer stretches in its history without a change in its makeup. Other researchers have used this opportunity to look for trends and other observations we can utilize to learn more about the Court and the way it conducts its business.[30] For Scalia, this stable environment may have contributed to the rate at which he authored unanimous opinions. From the 1995 Term through the 2004 Term he wrote unanimous opinions at a rate of 3.11 per term. That is about a 33% greater rate than his career average, which is just over two unanimous opinions per term.

Given the generally low number of unanimous opinions it is difficult to draw any concrete conclusions from this trend. One potential explanation is that as the Court settled into an iterated game with the same players[31] it was easier for one justice to determine where the votes would lie and carry more votes. Perhaps it is an indication of increased civility among the members of the Court bred by working with the same colleagues over a long period of time. Maybe it is an indication that this group of justices simply worked well together, or, in the alternative, were simply more receptive to Scalia's persuasive techniques. It is, at best, an anecdotal observation when viewed in the context of only one justice. Still, these anecdotal observations are important as the Sluggers project continues to gather more data. As we achieve a critical mass in the data, these anecdotes will become concrete and identifiable trends.

For example, when Stevens's numbers are also examined, it appears that at least some of these theories do a particularly poor job explaining the trend. During the same time period (the 1995 through 2004 Terms), he authored an average of 1.2 unanimous

---

[30] The Supreme Court Database collects data on this statistic under the heading "natural court." *The Supreme Court Database*, scdb.wustl.edu/. *See also* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004); Josh Blackman, Adam Aft, & Corey Carpenter, *FantasySCOTUS: Crowdsourcing a Prediction Market for the Supreme Court*, 10 NW. J. OF TECH. & INTELL. PROP. 125 (2012).

[31] For models of Supreme Court decision making, see generally MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009).

opinions per term, almost two opinions per term lower than his career average of about three per term.

Another potential explanation could be the nature of the cases. During the 1995 and 1996 Terms, in which Scalia authored five unanimous opinions per term, almost all of those cases – eight out of ten – involved questions of statutory interpretation.[32] Given that the 1995 Term came after he had spent a decade on the Court, it could be that this trend of unanimous opinions we have observed is a quantitative vindication of his jurisprudential philosophy on statutory interpretation. Alas, this explanation is still imperfect, as it fails to explain the recent decline in his number of unanimous opinions.[33]

As stated above, it is difficult to draw any conclusions from this one trend. However, we hope that our data will give both us and our readers a platform to make similar and more definitive observations about these types of trends in the future.[34]

III.
JUSTICES ARTHUR GOLDBERG AND ABE FORTAS, QUANTIFIED

And now to our first "Veterans" – that is, justices no longer serving on the Supreme Court.

We chose Arthur Goldberg (1962-65) and Abe Fortas (1965-69) to be our first "Veterans" because each served on the Court for only a few years. They provided relatively small data sets with which we could experiment, testing our methods of data collection and analysis, and, if need be, refining them. We are pleased to report that our experiments were successful. With these historical, yet still fair-

[32] The only two cases that were not questions of statutory interpretation were *Whren v. United States*, 517 U.S. 806 (1996) and *Gilbert v. Homar*, 520 U.S. 924 (1997).

[33] Since the 2005 Term, Scalia has averaged only .833 unanimous opinions per term.

[34] For another example of the use of Supreme Court data see Lincoln Caplan, *Clarence Thomas's Brand of Judicial Logic*, N.Y. TIMES, Oct. 22, 2011 (editorializing on Justice Thomas's first 20 years on the Court utilizing data from the Supreme Court database).

ly modern, justices we were able to apply the same methods we have used before and discussed above in reference to Roberts, Stevens, and Scalia.

Goldberg and Fortas also have a lot in common. For example, they served in successive order, both resigning – albeit under very different circumstances – to pursue other endeavors. Additionally, both authored seminal opinions in their short time on the Court.[35]

One striking data set to consider is citations by name (CN) while on the Court. Fortas and Goldberg have about the same average CN numbers for their time on the Court – approximately 25 per term. Their CN statistics do not even come close to such moderns as Scalia and Stevens. Fortas and Goldberg are closer to Roberts, although even he has about twice as many citations by name per term:

Rank	Justice	Avg. Cites by Name Per Term
1	Scalia	358.48
2	Stevens	317.62
3	Roberts	52
4	Fortas	25.5
5	Goldberg	23

As we continue to compile data for both current and former members of the Court it will be interesting to see if there is an era adjustment needed to fairly compare justices' CN statistics across time, or if instead the numbers will eventually converge in some sensible way.

A. Justice Fortas and His Up-to-Date CN Trend

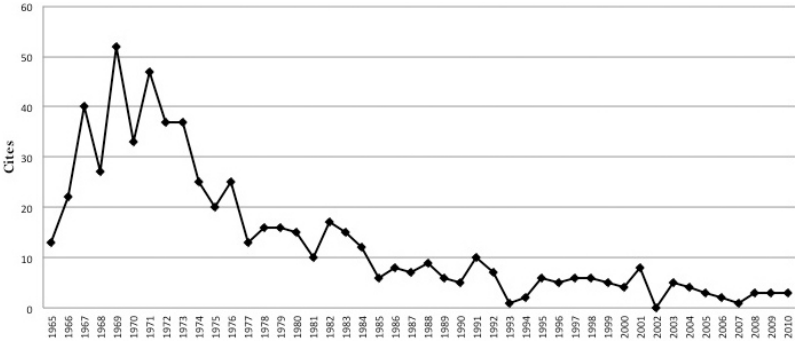
With Fortas we also are excited to present our first set of CN data that runs from the beginning of a former justice's service on the Court all the way up to the present day, rather than simply through the justice's date of retirement. CN is only a rough and inexact indicator of a justice's impact,[36] but it is still a fascinating metric to con-

[35] Goldberg wrote a concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and Fortas wrote for the Court in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), and *In re Gault*, 387 U.S. 1 (1967).

[36] *See* Craig D. Rust, *The Leadership Legacy of Justice John Paul Stevens*, 2 J.L. (1 J.

sider, as it gives us a view into the influence a justice exerted after he or she left the high court. The graphical representation of Fortas's CN for his time on the Court up to the present is striking:

FORTAS CITES BY NAME



Fortas's diminishing impact over time is obvious. While we lack the data for other justices necessary to form a supportable hypothesis regarding the meaning of this trend, it seems consistent with our intuition that as a justice's opinions are superseded or updated, or as the thoughts of an individual inevitably become dated as society continues to grow and evolve, the influence of any given justice will decline. Whether these suppositions will stand up once we have compiled more CN data remains to be seen.

IV.
JUSTICE ABE FORTAS, ILLUSTRATED

There is a painfully obvious choice for the baseball great on whom to base a "Supreme Court Sluggers" card for Justice Abe Fortas: Shoeless Joe Jackson, star outfielder of the Chicago White Sox from 1915 to 1920.[37] Both men were supremely talented and widely regarded by contemporaries as among the most accom-

LEGAL METRICS) 135 (2012).

[37] *See, e.g.*, SEYMOUR K. FREIDIN, A SENSE OF THE SENATE 149 (1972).

plished professionals in their respective fields. But each failed spectacularly, driven from his high-status role based on plausible but still-debated grounds of corruption. And each suffered his fate partly due to the prompting of an individual – White Sox owner Charles Comiskey in Jackson's case, U.S. Attorney General John Mitchell in Fortas's case – whose own separate malfeasances were arguably at least as reprehensible. In other words, pots calling kettles, and making it stick. These are truly disheartening episodes for any observer who values professional integrity or the reputation of either of the two great and tarnished national institutions in which they took place.

Jackson made the mistake of accepting money from someone involved in an attempt to pay him and several of his teammates to intentionally lose the 1919 World Series. It may have been more than a mistake. Maybe Jackson was corrupt. He took the money, which was bad – bad enough to justify the punishment he would eventually receive. But he played very well in the Series, which was good – good enough to suggest that he never betrayed the game on the field, even if he did so off the field. And he was acquitted of criminal charges in the matter. On the rare occasions when he spoke about the scandal in later years, Jackson insisted he was not a crook.[38] In any event, Jackson's involvement made him one of the infamous Chicago Black Sox. For his part, Comiskey at first financed an elaborate cover-up in an attempt to hold onto his star players who were implicated in the Black Sox affair, but when that maneuver failed, he claimed credit for having investigated and revealed their misdeeds.[39] Jackson's role in the scandal got him banned for life from major league baseball; Comiskey was elected to the Hall of Fame in 1939.

---

[38] *See* G. EDWARD WHITE, CREATING THE NATIONAL PASTIME: BASEBALL TRANSFORMS ITSELF, 1903-1953 at 91-104 (1996).

[39] *See id.*; Gene Carney, *Comiskey's Detectives*, 38 BASEBALL RESEARCH J. 108 (Fall 2009); *see also* MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION 404-05 (1991; 2004 ed.) ("I don't want to rehash the 1919 scandal, nor will I deny that there was evidence that gambling interests were a danger to baseball before the 1920s. . . . But I've always maintained that the question 'Why isn't Joe Jackson in the Hall of Fame?' should be supplemented with 'Why isn't Charles Comiskey *out?*'") (emphasis in original).

The passage of time, an incomplete factual record, and the moral ambiguities of many of the actors and the contexts in which they were acting have combined to leave room for reasonable minds to convict, acquit, or suspend judgment about Jackson.[40] But one lesson should be clear: money taken with a wink and a nod toward an illicit quid pro quo is dirty, and clean money accepted on the sly can look just as dirty and tends to be treated that way.

Alas, it was a lesson that Fortas, like Jackson, learned late. Fortas made the mistake of accepting money (or at least the promise of it) from Wall Street financier Louis Wolfson under suspicious circumstances, and then compounded his error by attempting to conceal the nature and extent of their dealings. The financial relationship may have been more than a mistake. The cover-up surely was. Wolfson turned out to be a crook. During and after Wolfson's prosecution and conviction for various crimes connected with securities fraud, information about his relationship with Fortas began to come out, and Fortas responded by trying to cover it up.[41] There is no more evidence that Fortas did anything improper to help Wolfson than there is evidence that Jackson did anything improper to hurt the White Sox. But shady dealings combined with a cover-up – bad form for anyone – are poison to prominent public servants. When, on May 7, 1969, Mitchell presented Chief Justice Earl Warren with documentation of the Wolfson-Fortas relationship – enough to raise eyebrows, but not enough to support an indictment – Warren's reaction was, "He [Fortas] can't stay." That turned out to be the consensus on the Court. Fortas resigned one week later and spent the rest of his life in private practice. A remunerative but under the circumstances ignominious end to a brilliant career.[42]

---

[40] *See, e.g.*, Marc Fisher, *Shoeless Joe Jackson, best foot forward*, WASH. POST, Feb. 5, 2012, at F1, F4.

[41] This was not Wolfson's only, or even his most important, role in U.S. history. "He invented the modern hostile tender offer. This invention, which activated and energized the market for corporate control, was the primary cause of the revolutionary restructuring of American industry in the 1970s and '80s, and the ensuing economic boom." Henry G. Manne, *The Original Corporate Raider*, WALL ST. J., Jan. 18, 2008.

[42] *See generally* LAURA KALMAN, ABE FORTAS 322-26, 359-78 (1990).

Like Jackson, Fortas was never convicted of a crime for his acceptance of money that might have been dirty. Indeed, Fortas was never even indicted, or impeached. And it was ironic, but surely no consolation to Fortas (who was not a mean-spirited person), that Mitchell would pay for his own cover-up work during the Watergate affair with a jail term and loss of his license to practice law.[43]

There is little evidence that Fortas had any interest in the game of baseball. But he did speak of baseball on two occasions that merit notice, and get it in his Sluggers card. (Like the Scalia portrait, this one was painted by John Sargent.[44])

First, and importantly, there is the 1967 case of *In re Gault*.[45] Young Gerald Gault "had been committed as a juvenile delinquent to the State Industrial School by the Juvenile Court of Gila County, Arizona," accused of, among other things, stealing another child's

[43] *See* Lawrence Meyer, *John N. Mitchell, Principal in Watergate, Dies at 75*, WASH. POST, Nov. 10, 1988; *N.O.B.C. Reports on Results of Watergate-Related Charges against Twenty-nine Lawyers*, 62 A.B.A.J. 1337 (Oct. 1976).

[44] John A. Sargent III, *Supreme Court Justice Fortas* (2011) (oil on canvas). *See* www.johnasargent.com; www.greenbag.org/sluggers/sluggers_home.html.

[45] 387 U.S. 1 (1967).

baseball glove.[46] The Supreme Court decided that the procedures under which Gerald had been locked up were not up to federal constitutional standards. Writing for the Court, Fortas concluded that

> the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[47]

Other due process rights applied in such proceedings as well, including "notice which would be deemed constitutionally adequate in a civil or criminal proceeding" and "the constitutional privilege against self-incrimination."[48] Thus the glove labeled "G.G." in Fortas's left hand, and his protective right hand on the young baseball fan's shoulder.

Second, and less importantly, there is the knothole through which the young fan is watching Shoeless Joe chase a leftfield fly for his Chicago White Sox. It recalls Fortas's defense of his friend, President Lyndon Johnson, from some critics outside the Johnson administration. Fortas derided the non-insiders for their simple-minded and ill-informed commentary, describing them as

> like the little boy who would look through the knothole to see a baseball game, and it was a very small knothole and all he could see was the left fielder. The little boy would see that game and he would think that action happens only occasionally because only then does the left fielder move back and forth . . . .[49]

It must have been very difficult for Fortas, ceasing to be an insider after his resignation from the Court.

---

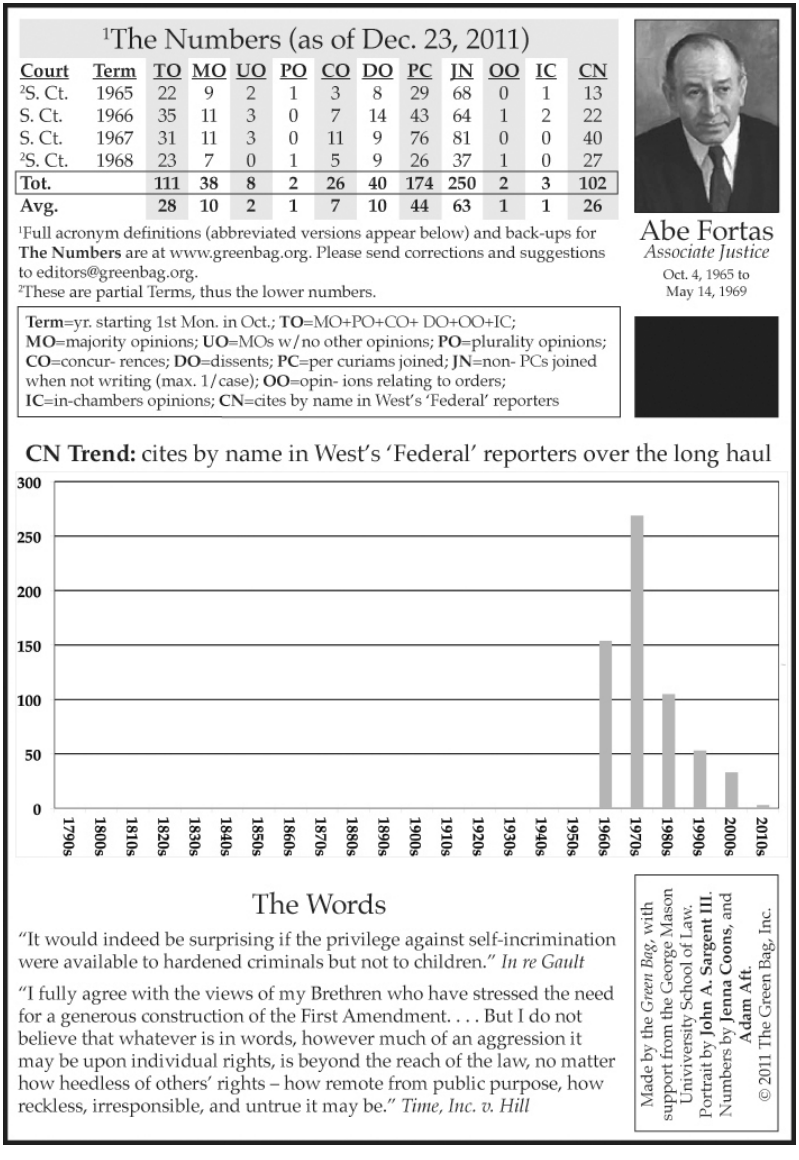
[46] *Id.* at 4, 9.

[47] *Id.* at 41.

[48] *Id.* at 33, 55.

[49] BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 124 (1988).

The Fortas card also features a graphic presentation of Fortas's up-to-date CN trend. It is in a format that should make for easy back-of-the-card comparisons between justices. We hope to make the "CN Trend" histogram a standard feature of all "Sluggers" cards.



[1]The Numbers (as of Dec. 23, 2011)

Court	Term	TO	MO	UO	PO	CO	DO	PC	JN	OO	IC	CN
[2]S. Ct.	1965	22	9	2	1	3	8	29	68	0	1	13
S. Ct.	1966	35	11	3	0	7	14	43	64	1	2	22
S. Ct.	1967	31	11	3	0	11	9	76	81	0	0	40
[2]S. Ct.	1968	23	7	0	1	5	9	26	37	1	0	27
Tot.		**111**	**38**	**8**	**2**	**26**	**40**	**174**	**250**	**2**	**3**	**102**
Avg.		**28**	**10**	**2**	**1**	**7**	**10**	**44**	**63**	**1**	**1**	**26**

[1]Full acronym definitions (abbreviated versions appear below) and back-ups for **The Numbers** are at www.greenbag.org. Please send corrections and suggestions to editors@greenbag.org.
[2]These are partial Terms, thus the lower numbers.

Term=yr. starting 1st Mon. in Oct.; **TO**=MO+PO+CO+ DO+OO+IC; **MO**=majority opinions; **UO**=MOs w/no other opinions; **PO**=plurality opinions; **CO**=concur- rences; **DO**=dissents; **PC**=per curiams joined; **JN**=non- PCs joined when not writing (max. 1/case); **OO**=opin- ions relating to orders; **IC**=in-chambers opinions; **CN**=cites by name in West's 'Federal' reporters

Abe Fortas
Associate Justice
Oct. 4, 1965 to
May 14, 1969

CN Trend: cites by name in West's 'Federal' reporters over the long haul

The Words

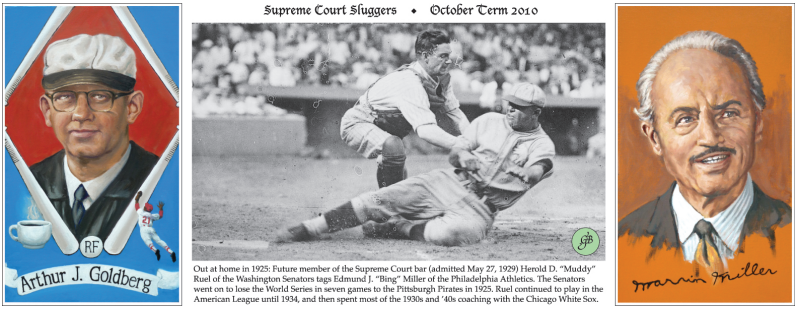
"It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." *In re Gault*

"I fully agree with the views of my Brethren who have stressed the need for a generous construction of the First Amendment. . . . But I do not believe that whatever is in words, however much of an aggression it may be upon individual rights, is beyond the reach of the law, no matter how heedless of others' rights – how remote from public purpose, how reckless, irresponsible, and untrue it may be." *Time, Inc. v. Hill*

Made by the *Green Bag*, with support from the George Mason Univiversity School of Law. Portrait by **John A. Sargent III**. Numbers by **Jenna Coons**, and **Adam Aft**.
© 2011 The Green Bag, Inc.

V.
JUSTICE ARTHUR GOLDBERG AND MARVIN MILLER OF THE MLBPA, ILLUSTRATED

The background and symbolic significance of this card are at least as elaborate and (we think) as interesting as the Scalia card's. Plus, we expect that in the not-too-distant future there will be another, better forum in which to describe the Goldberg-Miller card in full. And so for now this preview will have to suffice:[50]



CONCLUSION

From another current justice to our first forays into the Court's more distant past, we are continuing to strive towards our goals:

> (a) to develop and share comparable measurements of the work of every member of the Supreme Court since 1789;
>
> (b) to gradually expand and refine those measurements with an eye to making them as useful and interesting as possible;

[50] At least for those readers who do not already own this card, which was released last year and distributed at the annual convention of the Society for American Baseball Research.

> (c) to create informative, entertaining, and unorthodox yet respectful portraits of the Justices by first-rate artists; and
>
> (d) to present all of this material in a way that will be enjoyable for the producers, consumers, and subjects of the "Sluggers" cards.[51]

We hope that our new feature of up-to-date CN statistics will – along with all of our data – continue to provide fertile ground for appreciation and study of the people who did and do decide cases at the Supreme Court.

# # #

[51] Davies & Rust, *supra* note 27, at 215.