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Jeffrey W. Stempel

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# THE WORST SUPREME COURT CASE EVER? IDENTIFYING, ASSESSING, AND EXPLORING LOW MOMENTS OF THE HIGH COURT

Jeffrey W. Stempel\*

One of the great joys of legal scholarship is the chance to criticize the work of the judiciary with the luxury of time, perspective, and freedom from the political and institutional pressures that often impinge upon courts. But this vantage point—and the zeal with which academics often criticize courts—leads to charges of “judge-bashing” by some and similar charges that legal scholarship is insufficiently pragmatic or even downright unhelpful to bench and bar.<sup>1</sup>

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\* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Bill Boyd, Doris Lee, Ted Lee, Ann McGinley, Jim Rogers, and John White. Thanks also to Jeanne Price and David McClure for valuable research assistance. © 2012 Jeffrey W. Stempel

<sup>1</sup> See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991). But see David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1345 (2011) (concluding that “over the last fifty-nine years there has been a marked increase in the frequency of citation to legal scholarship in the reported opinions of the circuit courts of appeals.” (emphasis omitted)). Most recently, Chief Justice John Roberts jumped into the academic-bashing fray by describing most legal scholarship as “‘more abstract’ than practical” and not “‘particularly helpful for practitioners and judges.’” See Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more/>. According to Justice Roberts, the Court does not make much use of legal scholarship in its opinions or analyses. However, empirical research is to the contrary—at least if one equates the frequency of citations to secondary legal authority with influence or usefulness of the secondary legal authority. The Court often cites secondary legal authority.

Both perspectives (that scholarship is cited but not important/determinative/helpful) might, of course be correct. The Court may be citing legal scholarship with some frequency but be doing so only to confirm its pre-existing view of a legal issue. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (Court in 5–4 opinion refuses to apply California contract law to prevent enforcement of arbitration term limiting class treatment of disputes) (majority opinion citing to Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006) (misquoted by the Court as “*An Unconscionable Applicable of the Unconscionability Doctrine*” (emphasis added)) and Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004), articles critical of state court application of the unconscionability doctrine to arbitration clauses but failing to acknowledge that there is substantial academic support for such state court activity); Aaron-Andrew P. Bruhl, *The Unconsciona-*

My own view (not very surprising coming from an academic) is that much of this attack is off base. Particularly galling is judicial criticism of legal scholarship when the bench itself so frequently makes such limited, sloppy, or result-oriented invocations of secondary legal authority.<sup>2</sup>

But let me cede to critics a concession and operate under the assumption that much criticism of the courts is in fact excessively esoteric, self-reverential, impractical, obscure, or even trivial.<sup>3</sup> This hardly means that legal scholarship

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*bility Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004); Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts' Grapple with Challenges to Mandatory Arbitration Agreements*, 62 HASTINGS L.J. 1065 (2011).

Notwithstanding criticisms of *AT&T v. Concepcion*, the current Court has on occasion saved courts (even courts whose work I think is generally as good as or better than that of the High Court) from some bad mistakes. *See, e.g.*, Nevada Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011) (unanimously reversing a near-unanimous Nevada Supreme Court decision that had barred application of disqualification rule to city councilman on First Amendment grounds); *see also* Carrigan v. Comm'n on Ethics, 236 P.3d 616 (Nev. 2010).

Unfortunately, however, error correction and quality control is not available to the Supreme Court because it is a forum of last resort. As Justice Robert Jackson famously observed, "We are not final because we are infallible, but we are infallible only because we are final." *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>2</sup> One of my personal favorite examples is the tendency of courts ruling in favor of pro-rata apportionment of consecutively triggered liability insurance policies—holdings that can unfairly deprive policyholders of purchased coverage in a manner inconsistent with policy text, intent, and purpose—citing as support for the decision student notes on the topic or articles written by insurer counsel who of course are carrying water for their clients. *See, e.g.*, Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co., 717 S.E.2d 589, 601–02 (S.C. 2011) (citing through other secondary authority—a student note—William R. Hickman & Mary R. DeYoung, *Allocation of Environmental Cleanup Liability Between Successive Insurers*, 17 N. KY. L. REV. 291 (1990) (Mr. Hickman & Ms. DeYoung were prominent insurer counsel at the time of authoring the article)).

Although courts should of course be willing to consider notes, comments, and articles from all sources, judges could in my view display a good deal more discrimination in assessing the sources and recognize the agenda held by many lawyer-authors. In my own field of insurance, the matter is etched in pronounced relief in that most of the treatises and many of the articles regarding insurance coverage are written by either insurer counsel or policyholder counsel. Surprisingly to me, courts seem to embrace these more compromised works with no consideration of the distinction between these works and those of full-time law school faculty. What faculty may lack in real world experience and "feel" for the problem is in my view more than compensated for by the greater independence of faculty. Professors may have opinions. But by and large these are not opinions purchased by interested parties or opinions the author must embrace as a necessity of professional livelihood. Of course, perhaps my pride is simply wounded. *Crossman Communities* superseded the South Carolina Supreme Court's earlier opinion in the case, which had cited one of my favorite academics. *See* Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co., No. 26909, 2011 S.C. LEXIS 2, at \*7 (S.C. Jan 7, 2011) (citing 2 JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS §14.13[D], at 14-224.8 (3d ed. Supp. 2007)).

<sup>3</sup> But perhaps not as obscure or trivial as scholarship in other disciplines. A colleague in the Geology Department at UNLV once informed me that the average scholarly publication in his field is cited nine times. Hardly best seller material. The comment was made with the implication that in geology, as in law, there is some serious question about whether the

is not valuable or that the world would be a better place if only those pesky academics would stop having the temerity to criticize judicial opinions and judicial behavior. Critical legal commentary by the academy is essential—if nothing else because no other reasonably neutral source will provide such criticism.<sup>4</sup>

To be sure, attorney commentators sometimes engage in sustained critical analysis of opinions, but that is something of an exception and tends only to involve lawyers who do not appear before the courts they criticize. Lawyers in a given judicial system tend not to attack judicial decisions if they expect to continue practicing in the jurisdiction, most likely because they do not want to risk offending the judges or justices involved. Indeed, several high profile practitioners were invited to contribute to this Symposium. All demurred. One candidly admitted that this was not entirely the product of a busy schedule or hopes

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professoriate is writing more and more about less and less that is of interest to very many people.

Playing devil's advocate, I responded that citation was not the same as readership and articles may have an impact because they are read even if not cited. Law as an academic discipline certainly seems to agree given the emphasis many place on the number of article downloads from SSRN, Bepress, or similar digital archives of scholarship. Lots of pieces are extensively downloaded from these websites and then not discussed much in subsequent articles. Although this may indicate that on closer reading, the pieces are not thought particularly important by readers, it also undoubtedly reflects the reality that we are all influenced by what we read even if we do not document the influence. The increasing legal periodical ethos of shortening articles and footnotes probably plays a part in reduced citations as well.

Further playing devil's advocate, my response is also that if even one of the (nine on average) subsequent scholars making use of the average geology article is doing so to the benefit of society, the article has not been for naught. Gauging this, of course, is one of the problems academics have justifying their existence in a world of market-driven economic metrics, particularly at public institutions funded (in increasingly smaller proportion) by taxpayer dollars. Undoubtedly, institutions of learning and research can and should do a better job of informing the larger world of the value of their work beyond merely dishing out facts and doctrine to students. But to some extent, the task is unwinnable. The effect of scholarship (for either good or ill) does not easily lend itself to empirical analysis. Bibliotechnics is a promising means of studying the impact of scholarship but will always paint an incomplete picture.

But if nothing else, my conversation with the geology professor made me feel a little bit better about legal academia and its torrent of writing and abundance of journals. Most law review articles appear to be cited more than nine times and successful articles that become classics may be cited more than a thousand times. Even one of my articles has been cited more than 100 times. See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (criticizing U.S. Supreme Court's 1986 trilogy of summary judgment cases as shifting summary judgment doctrine too much in pro-defendant direction that tends to unfairly truncate fact-finding and full scrutiny of alleged wrongs) (cited 137 times according to August 22, 2011 search of LexisNexis Law Review database). Some of the contributors to this Symposium have particularly enviable citation rates. For example, Richard Delgado has been cited roughly 4,000 times in the legal literature while Jean Stefancic has been cited more than 1,000 times in the legal literature. Law may lack some of the tangibility of geology, but it has a most active scholarly community.

<sup>4</sup> A close-to-home illustration was provided during the shaping of this Symposium. Some who were approached to contribute declined out of concern that their occasional involvement in cases that might be reviewed by the Court made it impolitic for them to write an article criticizing any Court decision as "the worst," even if that decision was not the product of the current Court.

that a more prominent legal periodical might call. Rather, the advocate simply did not want to be on record criticizing any decision of the Court because of its possible adverse impact on the lawyer or the lawyer's firm.

Rather than attacking bad decisions head-on, sophisticated practitioners generally accept the precedent and attempt to limit it, distinguish it, or find aspects of it that can be unearthed to reach better results, even results seemingly at odds with the thrust of the bad opinion. This is the essence of the lawyer's craft: to bob and weave through holding, dicta, and the fine distinctions of the record in order to win even when precedents are not favorable. Good lawyers such as star appellate and Supreme Court practitioners do it well, probably better than all but a few scholars could.

In contrast, the scholarly enterprise is one of more overt criticism—and that's a good thing. Without it, public debate over judicial outcomes would be more limited or left only to the interest groups and their surrogates. Whether esoteric or approachable, pragmatic or ethereal, liberal or conservative, well or poorly done, legal scholarship assessing judicial decisions illuminates those decisions more starkly than can even the best advocacy, which by design tries not to tell judges they are wrong unless absolutely necessary. Even then, opinions are usually subject to direct criticism by attorneys only if the opinion is old, at least old enough that no current members of the relevant court continue to sit.

When a judicial decision or opinion is bad, it deserves to be figuratively called out. And for the most part, this task over the years has been the province of the academy.<sup>5</sup> In that vein, this Symposium takes aim at the respective authors' "worst" U.S. Supreme Court decisions. Only if such decisions are directly assessed (and sometimes defended as well as attacked) will jurisprudence improve.

In conceptualizing this Symposium and inviting contributions, the hope was that the resulting Law Journal issue would not be devoted to the "usual suspects" of bad Supreme Court decisions: *Dred Scott*,<sup>6</sup> *Plessy v. Ferguson*,<sup>7</sup> *Korematsu*,<sup>8</sup> or even *General Electric Co. v. Gilbert*.<sup>9</sup> In that sense, this Symposium from the outset has differed from other similar projects, including a fine recent effort where prominent commentators focused on several well-known decisions widely regarded as horrendous.<sup>10</sup> Rather, the aspiration of this issue

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<sup>5</sup> But not exclusively. As noted above, practitioners (particularly those who will not be before the Court in question) and interest groups often criticize judicial decisions. In addition, a wonderful aspect of the decentralization and pluralism of the American bench is that courts often extensively criticize the work of one another notwithstanding the general professional regard for decisions from other jurisdictions.

<sup>6</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>7</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>8</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>9</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that pregnancy discrimination was not illegal gender discrimination because men cannot become pregnant, thereby precluding possibility that men and women with the same condition were treated differently in violation of Title VII of the 1964 Civil Rights Act. The decision was subsequently legislatively overruled by amendments to Title VII).

<sup>10</sup> See Symposium, *Supreme Mistakes: Exploring the Most Maligned Decisions in Supreme Court History*, 39 PEPPERDINE L. REV. 1 (2011); Carol J. Williams, *Legal Scholars Examine*

was that authors would address decisions that often flew under the metaphorical radar of scholarly commentary and political scrutiny.

The authors responded with an examination of a wide range of cases, although some recent decisions (e.g., *Ricci v. DeStefano*,<sup>11</sup> *Ashcroft v. Iqbal*<sup>12</sup>) are addressed and (as one might expect) *Bush v. Gore*<sup>13</sup> made the list even if most of us would not regard it as “bad” to the same degree as *Dred Scott*, *Plessy*, and *Korematsu* (unless one dwells too long on aspects of the George W. Bush Administration such as the Iraq war and the 2008 economic debacle generally viewed as resulting from a militant aversion to financial regulation).

Many of the cases addressed have faded into the mists of history or were never well-known. Some are criticized more for their outcome or practical effect. Others are seen as bad because of their judicial craft or excessive judicial sleight-of-hand. Although most in the profession would regard a majority of this Symposium’s contributors as politically and judicially liberal, a substantial number are conservative or sufficiently eclectic to defy categorization.

In sum, this Symposium seeks to address both some major Supreme Court mistakes and cases that have evaded much sustained commentary to date and to take on the task of locating the “worst” decisions from a variety of ideological and jurisprudential perspectives.

Richard Delgado addresses the low-profile *Naim v. Naim*,<sup>14</sup> a case he places among the worst because the Court chose not to intervene to right injustice, either because of racism or inertia. The Court missed an opportunity to achieve the results of *Loving v. Virginia*<sup>15</sup> a decade earlier.<sup>16</sup> In essence, the Court in *Naim* acted like the Court of *Plessy v. Ferguson*<sup>17</sup> and similarly delayed law’s walk into the “bright sunshine of human rights”<sup>18</sup> through either failure of nerve or the Justices’ own biases.

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*the U.S. High Court’s ‘Supreme Mistakes’*, L.A. TIMES, Apr. 2, 2011, at AA3 (discussing Pepperdine Symposium).

<sup>11</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), discussed in Ann C. McGinley, *Ricci v. DeStefano: Diluting Disparate Impact and Redefining Disparate Treatment*, 12 NEV. L.J. 626 (2012).

<sup>12</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), discussed in Stephen N. Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571 (2012).

<sup>13</sup> *Bush v. Gore*, 531 U.S. 98 (2000), discussed in Mark S. Brodin, *Bush v. Gore: The Worst (or at least second-to-worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563 (2012).

<sup>14</sup> *Naim v. Naim*, 350 U.S. 891 (1955), *review denied*, 350 U.S. 985 (1956).

<sup>15</sup> *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state anti-miscegenation statute as violation of equal protection).

<sup>16</sup> See Richard Delgado, *Naim v. Naim: The Case That Never Was*, 12 NEV. L.J. 525 (2012).

<sup>17</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896), effectively repudiated by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>18</sup> I borrow the phrase not from Professor Delgado but from then-Senator and later Vice-President Hubert Humphrey’s famous speech to the 1948 Democratic National Convention in support of the party platform provision endorsing a federal law protecting civil rights. This plank of the platform implicitly rejected the view that the states, particularly those of the old Confederacy, had a right to make their own decisions regarding the issue. Humphrey urged the delegates to back the plank, stating, “To those who say that this civil-rights program is an infringement on states’ rights, I say this: The time has arrived in America for the Democratic Party to get out of the shadow of states’ rights and to walk forthrightly into the

Jean Stefancic addresses a similarly low-profile case with significant implications: *Terrace v. Thompson*.<sup>19</sup> This relatively unknown case becomes one of the worst because of its implicit jingoism and nativism, displaying a Court that reflected the nation's sense of "manifest destiny" in conquering the West at the expense of those who came before.<sup>20</sup>

Linda Mullenix and Chuck Knapp each separately take on the more recent and somewhat better known *Carnival Cruise Lines v. Shute*<sup>21</sup> (both picked that case as the "worst" independently of one another) from both a civil procedure perspective and a contracts perspective.<sup>22</sup> The Court enforced a forum selection clause that most observers (at least judging from the reaction of my students during the past twenty years) regard as unreasonably one-sided that also is contained more in a receipt than a true contract, at least not a contract reflecting any bargained-over terms.

Mark Brodin's contribution addresses a case (*Bush v. Gore*) that makes many "worst" lists, sometimes for conservatives and Republicans as well as liberals and Democrats, and brings to bear sharp new analyses. Although Professor Brodin concedes that *Bush v. Gore* may not be quite as bad as *Dred Scott*, he finds the decision's shortcomings pronounced despite a decade's passage.<sup>23</sup>

Steve Subrin also attacks a recent decision almost as well-known, at least among lawyers. *Ashcroft v. Iqbal*, along with *Bell Atlantic v. Twombly*,<sup>24</sup> has changed the face of modern pleading and Fed. R. Civ. P. 12 motion practice and are sufficiently closely associated that law professors have come to refer to them as "Twiqbal." Professor Subrin persuasively argues that the Court (or at least five of the Justices) acted as a bad super-legislature, giving a lie to the popular notion that judicial activism is a vice of liberals.

Another somewhat well-known case, *Hustler Magazine, Inc. v. Falwell*,<sup>25</sup> is addressed by John Kang. The prominent raunchy magazine and the fiery activist fundamentalist preacher make for good copy but Professor Kang concentrates not on the personalities involved but instead on the Court's handling of the matter and finds it wanting.<sup>26</sup>

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bright sunshine of human rights." See MICHAEL A. COHEN, LIVE FROM THE CAMPAIGN TRAIL 187 (2008) (internal quotation marks omitted); see also WINTHROP GRIFFITH, HUMPHREY: A CANDID BIOGRAPHY 158 (1965); HUBERT H. HUMPHREY, THE EDUCATION OF A PUBLIC MAN: MY LIFE AND POLITICS 77 (1976) ("But I meant what I was to say in my speech: that the time had arrived for the Democratic party to get out of the shadow of states' rights and walk forthrightly into the bright sunshine of human rights.").

<sup>19</sup> *Terrace v. Thompson*, 263 U.S. 197 (1923).

<sup>20</sup> See Jean Stefancic, *Terrace v. Thompson and the Legacy of Manifest Destiny*, 12 NEV. L.J. 532 (2012).

<sup>21</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>22</sup> See Charles Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L.J. 553 (2012); Linda Mullenix, *Carnival Cruise Lines v. Shute: The Titanic of Worst Decisions*, 12 NEV. L.J. 549 (2012).

<sup>23</sup> See Brodin, *supra* note 13.

<sup>24</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>25</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

<sup>26</sup> See John M. Kang, *Hustler v. Falwell: Worst Case in the History of the World, Maybe the Universe*, 12 NEV. L.J. 582 (2012).

Brooke Coleman takes on a case known to civil procedure teachers but almost unknown among the general public.<sup>27</sup> In *Lassiter v. Department of Social Services*,<sup>28</sup> the Court stripped a mother of parental rights under circumstances so drenched in class consciousness and elitism that it calls to mind more totalitarian countries.

*Allstate Insurance Co. v. Hague*,<sup>29</sup> assessed by Thom Main, is also relatively well-known to law faculty teaching civil procedure and conflict of laws but is otherwise obscure despite Professor Main's well-made case that the decision is a disaster of legal reasoning that continues to cause litigation mischief.<sup>30</sup>

Better known is *Terry v. Ohio*,<sup>31</sup> one of the Warren Court's major cases expanding civil liberties protection for "criminals." Tom McAfee finds it legally defective, but not for the reasons generally given by the political right upset that the Fourth Amendment intruded on police frisking at all.<sup>32</sup> Rather, his concern is that the decision "lent itself too readily to supporting law enforcement efforts rooted in stereotypical generalizations and racial profiling."<sup>33</sup>

Ann McGinley addresses the more recent and more conservative *Ricci v. DeStefano*<sup>34</sup> decision and similarly finds it defective in a variety of ways that tend to be overlooked in the wider debate over civil rights, affirmative action, and alleged reverse-discrimination.<sup>35</sup> As Professor McGinley points out, *Ricci* is a poor decision for those who care about playing by the rules of litigation and civil procedure in that a slim majority of the High Court acts ultra vires as if it were a jury or judge presiding at trial by dismissing evidence of race discrimination, doing so with an ahistorical view of the discrimination problem while simultaneously narrowing the definition of disparate impact.

Fred Gedicks finds similar technical violations of the rules of adjudication in *Lynch v. Donnelly*,<sup>36</sup> flaws that make the case one of the "worst" decisions regardless of one's position on the proper relationship between religion and the state.<sup>37</sup> Professor Gedicks provides a useful, non-partisan three-part criteria for assessing the "badness" of a case and finds that *Lynch* is one of the few to "win this trifecta" in that it was in his view an oxymoronic victory for a type of secularized religion.

Chris Bryant takes on the jurisprudential craft and candor of the Court in *Nigro v. United States*<sup>38</sup> and finds it horribly wanting notwithstanding what

<sup>27</sup> See Brooke D. Coleman, *Lassiter v. Department of Social Services: Why is it such a Lousy Case?*, 12 NEV. L.J. 591 (2012).

<sup>28</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

<sup>29</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

<sup>30</sup> See Thomas O. Main, *On Teaching Conflicts and Why I Dislike Allstate Insurance Co. v. Hague*, 12 NEV. L.J. 600 (2012).

<sup>31</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>32</sup> See Thomas B. McAfee, *Setting Us Up For Disaster: The Supreme Court's Decision in Terry v. Ohio*, 12 NEV. L.J. 609 (2012).

<sup>33</sup> *Id.* at TAN 35.

<sup>34</sup> *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009).

<sup>35</sup> See McGinley, *supra* note 11.

<sup>36</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>37</sup> See Frederick Mark Gedicks, *Lynch and the Lunacy of Secularized Religion*, 12 NEV. L.J. 640 (2012).

<sup>38</sup> *Nigro v. United States*, 276 U.S. 332 (1928).



may be the readers' views on the merits of the "war on drugs" of which *Nigro* was a "first shot," however errant.<sup>39</sup> The Court sustained use of the taxing power to regulate private conduct seen as immoral or improper through what Professor Bryant labels "transparent fiction." Although the conservative Justice Taft and his Court resisted federal power to enact economic or labor legislation, they approved such expansive federal power to regulate morals, an unjustified inconsistency that continues to dog the Court.

In his contribution to the Symposium, Larry Garvin reminds us that even great minds can have bad days.<sup>40</sup> In particular, Justice Oliver Wendell Holmes erred twice in *Globe Refining Co. v. Landa Cotton Oil Co.*,<sup>41</sup> by not only mischaracterizing the standard for satisfaction of federal diversity jurisdiction's amount-in-controversy requirement but also by applying a standard of foreseeability regarding consequential contract damages far beyond the norm of *Hadley v. Baxendale*.<sup>42</sup> Although sounder thinking has largely prevailed on both points during the intervening half-century, the damages law of at least three states appears to continue to suffer from this oft-overlooked nodding of a judicial Homer.<sup>43</sup>

Employing a baseball metaphor and an iconic poem (*Casey at that Bat*), Tuan Samahon brings some heat to *Freytag v. Commissioner of Internal Revenue*,<sup>44</sup> a case he describes as a "strikeout" with an "anemic" majority opinion that errors in "authorizing cross-branch control of officers" with a concurrence "infected with an anti-conceptualism that proves problematic for the separation of powers."<sup>45</sup> In *Freytag*, the Court unanimously ruled that Congress had not acted unconstitutionally in vesting the power to appoint special trial judges for tax cases in the Chief Judge of the U.S. Tax Court, rejecting a challenge pursuant to the appointments clause. Ironically, Professor Samahon sees the result as correct but finds the two competing rationales embraced by the Court to be highly problematic because they fail to provide a reliably consistent and correct means of distinguishing acceptable and unacceptable delegations of power.<sup>46</sup>

My own pick for "worst" case is *Garcetti v. Ceballos*,<sup>47</sup> in which the Court denied a retaliatory discharge claim based on the purported First Amendment rights of a government employee—and in the process almost completely overlooked or ignored that the employee in question was a government prose-

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<sup>39</sup> See A. Christopher Bryant, *Nigro v. United States: The Most Disingenuous Supreme Court Opinion, Ever*, 12 NEV. L.J. 650 (2012).

<sup>40</sup> See Larry T. Garvin, *Globe Refining Co. v. Landa Cotton Oil Co. and the Dark Side of Reputation*, 12 NEV. L.J. 659 (2012).

<sup>41</sup> *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903).

<sup>42</sup> *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854).

<sup>43</sup> See Garvin, *supra* note 40, at text accompanying notes 123–31 (noting degree to which Arkansas, New Mexico, and New York still appear to follow *Globe Refining Co.*).

<sup>44</sup> *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991).

<sup>45</sup> See Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court's Separation of Powers Strike Out in Freytag*, 12 NEV. L.J. 691, 692 (2012).

<sup>46</sup> See *id.*

<sup>47</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

cutor sworn to uphold the law but appears to have been disciplined when he tried to do so.<sup>48</sup>

Together, these Symposium cases represent an array of greater and lesser known decisions united in some combination of failure of analysis, reasoning, reflection, empathy, courage, or common sense. Although not the classic “murderers’ row” of notoriously bad Court decisions, each case and each essay serves to illustrate the degree to which even typically good organizations can fall short at times and that the Court, although final, is far enough from infallible to continue to justify the enterprise of critical scholarship and to caution lawyers, teachers, students, and the public against easy acceptance of the Court’s decisions.

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<sup>48</sup> See Jeffrey W. Stempel, *Tending Potted Plants: The Professional Identity Vacuum in Garcetti v. Ceballos*, 12 NEV. L.J. 703 (2012).