

# THE TWO WORST JUSTICES: WHAT MAKES A BAD SUPREME COURT JUDGE?

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## INTRODUCTION

There have been criticisms of Supreme Court Justices of the remote past; many denunciations, in fact. Just as an example, Chief Justice Roger Taney, the author of the Dred Scott decision, came to be hated by slavery abolitionists.<sup>[1]</sup> The reason may have been the holding: that although Scott was a free man, he was still enslaved, an idea repugnant today and strongly disliked at the time.<sup>[2]</sup> Or it may have been the reasoning, which was to the effect that as a former slave, Scott was mere ?property.? Or it might have been the impact of the decision on the Civil War.<sup>[3]</sup> And commentators have added other candidates for worst justice of all time, including Justices McReynolds, Moore, and Chase.<sup>[4]</sup>

But this article is about two modern justices. The two worst, in this author's judgment. This judgment, of course, demands a foundation in principles that are independent of the outcomes of the decisions the justices made. The criteria this article employs are four: how well the reasoning stands up to criticism, how well the justices have been able to recognize and deal respectfully with opposing views, whether they have avoided egotism and idiosyncratic preferences, and how the decisions that are the aftermath of the opinions have worked out.<sup>[5]</sup>

To end the suspense, let me disclose at this point that the two candidates here are Justices Blackmun and Scalia. This conclusion may surprise many people, especially those who are accustomed to seeing Justice Scalia as brilliant.<sup>[6]</sup> The ranking, however, is assigned independently of the outcomes of the justices' opinions.

Part I of this article covers Justice Blackmun. Subpart A concerns itself with what has been called the justice's ?other wrong decision?<sup>[7]</sup> his profoundly misdirected baseball-antitrust opinion. Then, subpart B considers his abortion opinions. A third subpart, C, concerns a decision that has not elicited the controversy it should have, his child-neglect-due-process decision, which refuses to consider whether a child has any interest in termination of parental rights after being neglected.

Part II is about Justice Scalia. Subpart A covers the fallout from his Confrontation Clause opinions, which begin with weak reasoning and which have tied the Court in knots. Subpart B evaluates these opinions and their aftermath. Subpart C concerns Justice Scalia's opposition to the Court's decision upholding the Sentencing Commission, in which his rhetoric was inappropriate.

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[1] <https://www.history.com/topics/black-history/dred-scott-case>. <sup>[2]</sup> Id.

<sup>[3]</sup> Id.

<sup>[4]</sup> See <https://www.findlaw.com/legalblogs/supreme-court/who-are-the-worst-supreme-court-justices-of-all-time>.

<sup>[5]</sup> See, infra, e.g., Pt. I(B)(9) of this article (applying these criteria to Justice Blackmun's opinion in *Roe v. Wade*).

<sup>[6]</sup> See Meghan J. Ryan, Justice Scalia's Bottom-Up Approach to Shaping the Law, 25 Wm. & Mary Bill of Rts. J. 297, 313-14 (2016).

[7] See infra Pt. I of this article (quoting source supporting this assertion).

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