



THUNDERBOLTS ON OLYMPUS

Robert A. James

OUR CULTURE ADORES LISTS. Itemization is the stock in trade of the popular press and clickbait websites. The legal subculture is no exception, and for decades observers have engaged in the naming and ordering of the greatest American judges.

Many forms of evaluation cover our pursuits. Sports, rife with these judgments and prizes, are the homes of the original Halls of Fame. Rankings dominate the conversations about universities, professional schools, U.S. Presidents, and great places to work. In creative and aesthetic realms, there are the Modern Library's *100 Best Non-Fiction Books*, *Rolling Stone* magazine's *500 Greatest Albums of All Time*, and *People* magazine's *Sexiest Man Alive* and *Sexiest Woman Alive*.

The late Harold Bloom maintained his personal Western Canon of literature. He wrote of the anxiety of influence, the worry of poets that they are too much the children of a prior generation, a concern that impels them to misread the past and leave space to create something novel. Such apprehensions may be allayed or even reversed, as today's artist may strive to be seen as the successor to those of a golden age. There is also the anxiety of competition, as members of the same generation jostle for recognition and endurance in the present marketplace of ideas.¹

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¹ See HAROLD BLOOM, *THE WESTERN CANON* (1994); HAROLD BLOOM, *A MAP OF MISREADING* (1975); HAROLD BLOOM, *THE ANXIETY OF INFLUENCE* (1973); cf. EZRA POUND, *MAKE*

The creators themselves engage in criticism: they are not only subjects to be appraised, but partisans in the conversations about the quality of others and themselves. (Beware, some artists have been lousy critics, and most critics have been lousy artists.) A question naturally and repeatedly arises: What have the greatest in any field had to say to or about the other greats?

The *locus classicus* is the one-upmanship between Oscar Wilde and James McNeill Whistler, immediately after Whistler pulled off a witticism. (*Wilde*: “I wish I had said that.” *Whistler*: “You will, Oscar, you will.”) We have vivid examples in the field of classical music, as captured in the deliciously wicked *Lexicon of Musical Invective*. (*Giacomo Rossini*: “[Richard] Wagner has good moments, but bad quarter-hours.”) In popular music, we have seen the spats between aficionados of heavy metal and New Wave. (*David Lee Roth of Van Halen*: “Most music critics like Elvis Costello because most music critics look like Elvis Costello.”)

We eat up the zingers flung between the poets. [*Wallace Stevens*: “Your trouble, Robert, is that you write poems about subjects.” *Robert Frost*: “Your trouble, Wallace, is that your poems are about bric-a-brac.”] And we savor even a media-manufactured rivalry, as with Bing Crosby’s career-long pseudo-feud with Bob Hope and his Christmas Eve standoff with David Bowie.²

In most fields, rankings of quality are readily acknowledged to be subjective. In the law, we are much more deliberative, analytic, and, well, judgmental. The concept of judicial greatness has been endlessly debated. Is it found in fidelity to precedent, or in forging new doctrines disdainful of precedent? Is it contained in surface eloquence, in deep logic, or in expanding influence? Is it capable of measurement by citation frequency, or by length of time on the bench? Is our concept the same in 2020 as it was in 1920, and is it the same in conservative as in progressive circles?³

IT NEW (1934); Guido Calabresi, *Grant Gilmore and the Golden Age*, 92 YALE L.J. 1 (1982).

² See BOSTON HERALD, Jan. 24, 1886 (Wilde-Whistler); NICHOLAS SLOMINSKY, LEXICON OF MUSICAL INVECTIVE 244 (2000) (Rossini); *The 50 greatest rock star insults*, TELEGRAPH, Dec. 21, 2017 (Roth); LAWRENCE THOMPSON & R. H. WINNICK, ROBERT FROST: THE LATER YEARS, 1938-1963 (1976) (Stevens-Frost).

³ See, e.g., Bernard Schwartz, *The Judicial Ten: America’s Greatest Judges*, 1979 SO. ILL. U.L.J. 405; RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990) (herein POSNER, CARDOZO); Richard A. Posner, *The Learned Hand Biography and the Question of Judicial*

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Remarkably, despite the varying measures and contestability of greatness, the same names appear time and again at the summit. Five is a good number adapted from the uniquely American sport of basketball, and the starting lineup of the modern era is almost always Oliver Wendell Holmes, Jr., Louis D. Brandeis, Benjamin Nathan Cardozo, Learned Hand, and Henry J. Friendly.⁴

The appellations given these judges often soar beyond titles bestowed on ordinary humans. They are hailed as saints, or at least as “saints” in protectively ironic quotation marks. Their works live on, often cited with nonessential parentheticals (like “(Friendly, J.)”) that confer on them an enhanced touch of immortality. Those who appraise them are devotees of the “cult of the robe.” They are “canonized,” and they reside in the “pantheon.” Holmes was lionized as the *Yankee from Olympus*, and he may fairly be said to enjoy company there.⁵

It is to be expected that such beings would exchange glances with one another. Do not one’s peers deserve such attention? Indeed, one could say that inter-celebrity repartee, akin to flashes of lightning upon a sacred mountain, is in the nature of things:

Greatness, 104 YALE L.J. 511 (1994); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF AMERICA’S LEADING JUDGES* (3d ed. 2007); Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 THE OHIO ST. L.J. 1149 (2010); Charles M. Cameron & Mehdi Shadmehr, *Great Judges: Judicial Leadership in Theory and Practice* (2017 working paper, Princeton University).

⁴ See POSNER, CARDOZO 9-10 (and citations therein). John Marshall, James Kent, Joseph Story, and Lemuel Shaw come too early for modern lists. Roger Traynor is close to a starter, according to some observers including Friendly himself. The pundits often sight blue water before they slot others in the next tier. On Posner himself, see below.

⁵ See POSNER, CARDOZO 7 & n.15, 9 (Cardozo called a “saint,” but not really one); ANDREW L. KAUFMAN, CARDOZO 3 (1998) (herein KAUFMAN, CARDOZO) (Cardozo called a “saint,” but not really one); Jerome Frank, *The Cult of the Robe*, SATURDAY REV. OF LITERATURE 12 (Oct. 13, 1945); LIVA BAKER, THE JUSTICE FROM BEACON HILL 1 (1991) (herein BAKER, HOLMES) (“canonization” of Holmes); Charles Alan Wright, *A Modern Hamlet in the Judicial Pantheon*, 93 MICH. L. REV. 1841 (1995) (Hand); CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS* (1944).

What is the nature of thunderbolts? . . .
Why does [a god] let fly
His missiles at the holy shrines of gods,
His own included, break their images
Made with such artistry, and take away
Their standing with his wounding violence?⁶

This article gathers records of concise remarks that these five great judges made about each other. They do not form a collective definition of greatness, nor do they complete a portrait of any individual jurist; the reader should look to the magnificent biographies and studies for those purposes. We have only a handful, expressed at uneven intervals, of “these chance utterances of faith and doubt.”⁷ Yet they include entertaining and useful confessions by human beings who are petrifying into statuary marble before our eyes.

The thunderbolts as a whole may be divided into five parts.

I. POLITICS

Four of the five judges were active during the Progressive Era in American politics, at its peak from 1890 to 1920. Freedom of expression, worker rights, and public regulation of hitherto private activities were hallmarks of the most significant cases of the time.

Hand on Holmes. Hand approved of Holmes’s dissent in *Abrams v. United States*, though he was concerned how a “clear and present danger” standard would be applied. Sure enough, in other Supreme Court cases, with fair regularity Holmes found just such dangers to be clearly present. Hand felt that Holmes left in his wake a “morass” and that in this respect “for once Homer nodded.”⁸

⁶ LUCRETIUS, THE NATURE OF THINGS 6.219, 417-422 (Rolfe Humphries trans. 1969).

⁷ Oliver Wendell Holmes, Jr., *Foreword* to O.W. HOLMES, SPEECHES (1891).

⁸ *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 167 (1994) (herein GUNTHER, HAND); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 426 (1993) (herein WHITE, HOLMES); LEARNED HAND, THE BILL OF RIGHTS 59 (1963).

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Holmes on Brandeis. Holmes and Brandeis are often tethered as great dissenters. But Brandeis was a political partisan while Holmes doubted the efficacy of political change. Holmes's reaction to minimum wage laws, "though perhaps the Brandeis school don't believe it," was for the "crowd" to "face it instead of trying to lift yourselves by the slack of your own breeches."⁹

Brandeis on Holmes. The Court's decision in *Pennsylvania Coal Co. v. Mahon* thwarted land use legislation infringing on the rights of coal mining property interests, with Holmes in the majority. Brandeis was reportedly incensed that Holmes had followed abstract property and contract precepts to an unjust outcome.¹⁰

Hand to Holmes to Hand. These exchanges lead up to one of the most famous of the thunderbolts, told various ways at various times. The gist is that Hand light-heartedly urged Holmes to "do justice," to which Holmes retorted that his task instead was to "follow the law," or to "play the game according to its rules." The relation between justice and law, and the judge's role in the quest for either or both principles, have been sensitively explored.¹¹

Holmes on Brandeis. Holmes was concerned that the nomination of the politically active Brandeis was a problem no matter how it turned out. If he was not confirmed, the "proletariat" would say that the fix was in. If he sat on the Court, the other part of the population would regard its decisions as being politically motivated.¹²

Brandeis on Hand, Hand on Brandeis. Brandeis mentioned to friends that he did not approve of Hand's running to be the chief judge of the highest

⁹ Letter from Holmes to Harold J. Laski, Jan. 8, 1917, in Oliver Wendell Holmes, Jr. Digital Suite, Historical and Special Collections Department of the Harvard Law School Library (herein *Holmes Papers*); BAKER, HOLMES 496.

¹⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); BAKER, HOLMES 568.

¹¹ See, e.g., Hand, *A Personal Confession*, in LEARNED HAND, THE SPIRIT OF LIBERTY 302, 306-07 (Irving Dillard 3d ed. 1960) (herein HAND, SPIRIT); Michael Herz, "Do Justice!": *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996); STEPHEN BUDIAANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 415 (2019). In some variants of the story, the colloquy occurs between Brandeis and Holmes.

¹² Letter from Holmes to Lewis Einstein, May 14, 1916, in *Holmes Papers*; BAKER, HOLMES 486.

court of New York State. Hand was disappointed by this view, rejecting it as unworkable so long as we have elections for judges.¹³

II. JUDGING

a. Interpretation and subjectivity

Cardozo to Hand. Hand said that a judge enters the realm of subjectivity when rendering a decision. Cardozo suggested to Hand that he was only interpreting the “common will.” Hand confessed that he did not know what that term implied, but held that a judge may endeavor to state a proposition of which the citizenry would approve, after they had read it.¹⁴

b. “A little learning is a dangerous thing” (Alexander Pope)

Friendly on Hand. Friendly was impressed by the learnedness of Hand, who said that a judge ruling on constitutional law should have a “bowing acquaintance” with many Western thinkers, including Plato, Hume, and Kant. Friendly respected the limits of his own erudition. In 1964, he told incoming University of Chicago law students, “A Harvard graduate student asked me last year, quite seriously and perhaps not without basis, how anyone could become a lawyer, much less a judge, without understanding modern analytical philosophy, particularly Wittgenstein. I have never so deeply valued the privilege of silence conferred by the Fifth Amendment.”¹⁵

c. Mastering the facts

Holmes on Brandeis. There are several Holmes references, many with tongue planted firmly in cheek, to Brandeis’s intense desire to understand the facts of a case. Holmes joked to then-professor Felix Frankfurter that, when a coal commission report arrived, Brandeis would delve into and master it, while Holmes would instead read the work of a French literary

¹³ GUNTHER, HAND 238.

¹⁴ KAUFMAN, CARDOZO 215.

¹⁵ HENRY J. FRIENDLY, *On Entering the Path of the Law*, in BENCHMARKS 28-29 (1967) (herein FRIENDLY, BENCHMARKS) (citing Hand, SPIRIT 133); cf. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS proposition 7 (1921, D.F. Pears & B.F. McGuiness trans. 1961) (“What we cannot speak about we must pass over in silence”).

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critic. “If I want to be epigrammatic I should say that he [Brandeis] always desires to know all that can be known about a case whereas I am afraid that I wish to know as little as I can safely go on.” On other occasions, Holmes did express admiration of the power afforded to Brandeis by his factual prowess. And Holmes wrote, “Brandeis always has left me feeling happier about the world.”¹⁶

Brandeis on Holmes. Brandeis seems to have taken the issue of factual mastery more seriously. According to Holmes himself, Brandeis encouraged the Yankee from Olympus to digest the facts of an area of learning – the Massachusetts textile industry, or any subject for that matter – just to “get a human notion of how it really is.”¹⁷

Cardozo on Brandeis, imagined by Friendly. Friendly suspected that Cardozo would have been on Holmes’s part of the spectrum on the factual knowledge required for judgment. The younger Second Circuit judge imagined that Cardozo “would have echoed Holmes’s response: ‘I hate facts. I always say the chief end of man is to form general propositions – adding that no general proposition is worth a damn.’”¹⁸

d. The will to prevail

Brandeis on Holmes. Brandeis was frustrated that Holmes did not take sufficiently into account how to move from a personal conclusion to the judgment of a majority of Justices. His lack of understanding of “the need of others to understand” cost Holmes the five votes needed to reap the fruits of his mental labors.¹⁹

¹⁶ Letters from Holmes to Felix Frankfurter, July 12, 1923 and Dec. 3, 1925, in *Holmes Papers*; Letter from Holmes to Laski, May 8, 1918, in *Holmes Papers*; Oscar Kraines, *The Holmes Tradition*, 42 PUBS. AM. JEWISH HIST. SOC. 341 (1953); LEWIS J. PAPER, *BRANDEIS* 280 n.14 (1983) (herein *Paper, BRANDEIS*); see generally SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS* (1956).

¹⁷ Letter from Holmes to Sir Frederick Pollock, May 26, 1919, in *Holmes Papers*; BAKER, *HOLMES* 533.

¹⁸ FRIENDLY, *BENCHMARKS* 311-12 (1967); cf. Letter from Holmes to Pollock, Sept. 4, 1904 (“not worth a d.”), Letter from Holmes to Pollock, May 26, 1919 (“damn”), and Letter from Holmes to Laski, May 18, 1919 (“damn”), all in *Holmes Papers*. The “not worth a damn” observation was a favorite of the author’s late Pillsbury mentor James O’Malley Tingle.

¹⁹ ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 226-27 (1957); WHITE, *HOLMES* 312, 321; see generally PIPER, *BRANDEIS*; JEFFREY ROSEN,

Friendly on Brandeis, and on Holmes. According to Friendly, the personal decision, which was the end of the judicial process for Holmes, was only the beginning for Brandeis. Brandeis thought his responsibility was not only to find the truth but to realize it through a decision.²⁰

III. STYLE

Hand on Cardozo, relayed by Friendly to Felix Frankfurter (a three-or-four for one thunderbolt). “To start out with areas of agreement, I wholly concur in your observations, and in the much more pungent ones of LH [Learned Hand], concerning Cardozo’s style which, as Judge Hand [used] to say, reeked mightily of the boudoir – strangely enough since I doubt if Cardozo was even in one.”²¹

Cardozo on Holmes. Cardozo heaped effusive praise on Holmes throughout his career. He lauded Holmes’s ability to “pack within a sentence the phosphorescence of a page.” Holmes is “the Master, the man of the future, able in a flash to say something that lifts you up, at the summit, bathed in eternal life.” *The Common Law* is the “text to be unfolded,” in the works of Roscoe Pound and of Cardozo himself.²²

Hand on Cardozo, through Friendly. According to Friendly, “[Hand] came slightly to mistrust Cardozo’s pre-Raphaelite beauty of expression . . . [H]e seemed to fear that in Cardozo the love of phrase had occasionally outrun the quest for accurate thought, so that language, instead of being the servant of decision, may in some degree have become its master.” Oddly, Hand himself is reported to have said that Cardozo could be “a little naughty.”²³

BRANDEIS (2016); MELVIN I. UROFSKY, LOUIS DEMBITZ BRANDEIS: A LIFE (2009) (political skills of Brandeis).

²⁰ Friendly, Book Review of Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis*, 106 U. PENN. L. REV. 766, 767 (1958); DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 123 (2012) (herein DORSEN, FRIENDLY).

²¹ Letter from Friendly to Frankfurter, Aug. 14, 1963, in Henry J. Friendly Papers, Historical and Special Collections Department of the Harvard Law School Library (herein *Friendly Papers*) (Box 188, Folder 13); DORSEN, FRIENDLY 123.

²² Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 683 (1931); Cardozo, *Law and Literature*, 52 HARV. L. REV. 472, 480 (1939); KAUFMAN, CARDOZO 152-53.

²³ FRIENDLY, BENCHMARKS 313; KAUFMAN, CARDOZO 153-54.

IV. REPUTATION

Brandeis, Cardozo, and Hand paid frequent homage to Holmes as the greatest jurist of their time, but they do not appear to have voiced opinions on their own reputations. I have not included their generous and extended encomiums in this modest quiver of thunderbolts. Coming later as he does, Friendly has the perspective (and forthrightness) to provide some discriminating appraisals.

Judge Posner has frequently evaluated the relative influence of judges.²⁴ If some day he joins this group and makes it a sextet, the number of thunderbolts on reputation will at least sextuple.

Friendly on Holmes. “As the years go on, I wonder how much of a poseur Holmes was and whether my generation was not overly impressed by him.” “I hope I am not being snide, but when one looks back at the great man’s opinions in cases about which he did not care very much, there are plenty of bad ones.”²⁵

Friendly on Cardozo, expressed to Frankfurter. “Cardozo’s books are not works of original scholarship, such as *The Common Law* [by Holmes] assuredly was, even though many of the details would probably not have been approved by historical scholars at the time. Where I do part is in your low estimate of the utility of Cardozo’s books. It seems to me that he performed signal service by working a great many ideas, including Holmes’, into a synthesis on which judges and lawyers have been drawing ever since.”²⁶

²⁴ See, e.g., POSNER, CARDOZO; Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511 (1994); WILLIAM DOMNARSKI, RICHARD POSNER (2016).

²⁵ Letter from Friendly to Michael Boudin, July 2, 1984, and Letter from Friendly to Richard Posner, Oct. 25, 1985, in *Friendly Papers* (Box 221, Folders 4 & 7); DORSEN, FRIENDLY 121.

²⁶ Letter from Friendly to Frankfurter, Aug. 14, 1963, in *Friendly Papers* (Box 188, Folder 13); DORSEN, FRIENDLY 121.

Friendly on Hand. Friendly felt that Hand's reputation derived not from era-defining great decisions, but from "the great way in which he dealt with a multitude of little cases."²⁷

V.

CERTAINTY

When you possess an ideology you lose less sleep – Brandeis ensconced in a political position and Holmes in an intellectual position seem fairly sure of themselves. Holmes appears comforted by the impression that he was goaded by Brandeis into taking some stands contrary to a majority.

a. Wrestling with angels

Friendly on Brandeis, Holmes, and Hand. "There were other reasons why Judge Hand could never find in Brandeis the comfort and delight he did in Holmes. Brandeis possessed a certainty about everything that Hand had about nothing; 'long ago,' Mr. Burlingham wrote of Hand in 1947, 'he cast off his moorings and put out on a sea of doubts.'"²⁸

Friendly on Brandeis and Cardozo. "Decision came quickly to [Brandeis] – he knew nothing of Cardozo's anguish or 'wrestling with the angel.'"²⁹

Hand on Cardozo. Hand remarked that although Cardozo indeed wrestled, he was rigid and resolute at the end of the wrestling match. "At times to those of us who knew him, the anguish which had preceded decision, was apparent . . . and he wrote his opinion with his very blood . . . But when once his mind came to rest he was as inflexible as he had been uncertain before. No man ever gave more copiously of himself to all aspects of his problem, but he knew that it was a judge's job to decide, not to debate, and the loser who asked him to reopen a decision once made, found a cold welcome."³⁰

²⁷ Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 BROOKLYN L. REV. 6, 13 (1962); GUNTHER, HAND 145.

²⁸ Friendly, *supra* note 27, at 9 (quoting Charles C. Burlingham, *Judge Learned Hand*, 60 HARV. L. REV. 330, 331 (1947)); FRIENDLY, BENCHMARKS 311.

²⁹ Friendly, Book Review, *Alexander M. Bickel, The Unpublished Opinions of Mr. Justice Brandeis*, 106 U. PENN. L. REV. 766, 767 (1958).

³⁰ Hand, *Tribute to the Memory of the Late Justice Benjamin N. Cardozo of the Supreme Court of the*

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b. The influence of Brandeis on Holmes's dissents

Holmes on Brandeis. There is thunderbolt after thunderbolt where Holmes maintains that Brandeis has once again hornswoggled him into dissenting from an opinion. Holmes seems mentally prepared to resist the notion, then to be “convinced” by Brandeis by any means necessary. A typical example: “My labors are finished for the moment (unless I let Brandeis egg me on to writing a dissent in advance).” Separately, Chief Justice William Howard Taft reported that Holmes said he would not have dissented in *Olmstead*, the Court’s first wire-tapping case, if Brandeis had not asked him to do so.³¹

c. Are you 51% right, or 100% right?

Brandeis on Cardozo, and Cardozo on Brandeis. Brandeis commented to one of Cardozo’s law clerks, “The trouble with your Judge is that he thinks he has to be one hundred percent right. He doesn’t realize that it is enough to be fifty-one percent right.” When the remark was relayed, Cardozo retorted: “The trouble with that is that when you are only fifty-one percent right, it may be forty-nine percent.”³²

d. And finally

Hand to Friendly. Another Hand thunderbolt has been repeatedly recalled. Shortly after taking office, Friendly confessed that he was having a difficult time coming to a decision on an appeal. Hand is reported to have slammed his fist and said: “Damn it, Henry, make up your mind. That’s what they’re paying you to do!”³³

United States, 72 U.S. L. REV. 496 (1938); KAUFMAN, CARDOZO 165.

³¹ *Olmstead v. United States*, 277 U.S. 438 (1928); Letters from Holmes to Laski, April 9, 1918, May 25, 1918, December 3, 1918, and December 26, 1931, in *Holmes Papers*; WHITE, HOLMES 322; BAKER, HOLMES 541-42, 614 (Taft’s recollection).

³² Ambrose Duskow, *A Personal View of Justice Benjamin N. Cardozo*, 1 CARDOZO L. REV. 5, 18-19 (1979); PIPER, BRANDEIS 374; KAUFMAN, CARDOZO 212.

³³ Jeffrey Cole, *An Interview with Judge Randolph*, 25 LITIGATION 16, 17 (1999); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 167 (1991).



It is difficult to form a general conclusion based on the remarks as a whole (summarized in the Appendix). Some of them preserve unguarded moments in letters or conversation, while others are fragmentary and gnomic. When assembled in this novel manner, however, some individual instructive questions appear, particularly with respect to the anxiety of influence. Could Holmes *really* have been concerned that Brandeis would induce him to join a dissent, if the Olympian Yankee were not already so inclined?³⁴ Are the critiques of Cardozo's *Nature of the Judicial Process* fair, or do they at least in part reflect that someone else arrived first at its precepts?³⁵ The great judges, like the great artists, have a sense of where they come (or should come) in a succession of professionals, and of what it is that they are contributing to the evolution of a craft.

The thunderbolts I find most enduringly useful are the salvoes fired between Brandeis and Cardozo (albeit through the medium of a clerk). We like to think of ourselves as rational, especially when rendering a deliberative, slow-motion, "System 2" decision.³⁶ This interchange should give us pause. A standard of bare preponderance is well and good in a solitary instance, but looms slight across all the judgments in a career and a life — whether a great judge's or our own.

Reader, where lies your threshold? Are you striding through life with your confidence level set at 51%, risking error after error but making good time? Or are you often sitting on the sidelines of life, holding out for 100%? The Thunderbolts of Faith and Doubt await your answer true.

³⁴ Cf. FLIP WILSON, *THE DEVIL MADE ME BUY THIS DRESS* (Little David Records 1970).

³⁵ Cf. HAROLD BLOOM, *YEATS 4* (1970) (aspiring poets are disappointed they "cannot be Adam early in the morning" — the Adams (the prior poets) have already named all the animals).

³⁶ See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

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APPENDIX: THE THUNDERBOLT MATRIX

<i>Author:</i>	Holmes	Brandeis	Cardozo	Hand	Friendly
<i>Subject:</i>					
Holmes		Criticized Holmes vote in <i>Pa. Coal v Mahon</i> . H needs to understand the need of others to understand. H should master the facts of one thing, anything.	H the man of the future, <i>The Common Law</i> the text to be unfolded. 1905 <i>Lochner</i> dissent praised in 1921, well before decision over-ruled. H's prose packs phosphorescence.	Criticized Holmes's application of "clear and present danger" standard.	Holmes possibly over-rated. There are bad Holmes decisions, in minor cases.
Brandeis	B partisan, political. B goads Holmes into dissenting. B masters facts, Holmes tries to know as few as needed. Admiration of power B has by virtue of knowing the facts.		51% or 100% certainty.	B's view on running for judicial office is impractical, so long as judicial elections exist.	Decisions came quickly to B. For Holmes, the decision was the end. For B it was just the beginning; to make it prevail, B sought the other four votes.
Cardozo	O?	51% or 100% certainty.		C's pre-Raphaelite prose redolent of the boudoir. C's use of "common will" unclear to Hand C anguishes over judgments.	C wrestled with angels. C would have endorsed Holmes's aversion to factual details, but also Holmes's conclusion that "no general proposition is worth a damn." F appreciated Hand's "boudoir" appraisal of C's prose. <i>Nature of the Judicial Process</i> not as scholarly as <i>The Common Law</i> .
Hand	[Learned,] job not to do justice but to play game by its rules.	B thought a judge like Hand should not run for state judicial office.	[Learned,] say the judge searches for the "common will."		Hand's reputation earned in "little cases."
Friendly				Henry, make up your mind!	

