

## NO JUSTICE, NO FOUL

*Jim Stallard*

WHENEVER I HEAR some historian on PBS prattling about the Supreme Court, I have to step outside for air. I know it's a matter of seconds before the stock phrases—judicial review, legal precedent, activist court—will start rolling out, and I'll feel my blood coming to a boil as I hear the scamming of yet another generation.

Are you sitting down? Everything you were taught about the Supreme Court and its decisions is bunk. For most of the nineteenth century and all of the twentieth, our biggest, most far-reaching legal decisions have been decided not by careful examination of facts and reference to precedent but by contests of game and sport between the justices. The games varied through the years—cribbage, chess, horseshoes, darts—even a brief, disastrous flirtation with polo. (Now do you understand *Plessy v. Ferguson*?) But ever since 1923, basketball has been the only game, and as the years rolled by and the decisions came down, the whole thing has settled nicely into place. Basketball has shaped the way our society is today, every contour, every legality, every way that one person relates to another in an official, sanctioned sense.

I know, I know—you're thinking I got this stuff from radio signals in my head. Actually, the reason I'm privy to this info is really quite mundane. My father was a Supreme Court maintenance worker from 1925 until he retired forty years later. He started sneaking me in to see games when I was eight. I saw my share (though none of the landmarks) and heard from many sources about countless others.

Oliver Wendell Holmes hit on the basketball idea after attending a collegiate game in New York during the Court's Christmas recess in 1922. He thought he had finally identified the type of contest that could involve all the justices, could be played indoors when the Court was in "session," and, most important of all, did not involve horses.

Holmes brought the idea back to Washington and pitched it to Chief Justice Taft. The corpulent chief had been lobbying for Greco-Roman wrestling, but he was starting to realize none of his colleagues would go for a sport in which they might be killed. (The Fatty Arbuckle incident was fresh on everyone's minds.) Taft finally agreed that basketball offered a superior form of jurisprudence.

After a little tinkering, the procedure came down to this: whenever the justices were evenly split over a judgment (four to four with one judge abstaining) and the deadlock persisted for more than a week, the issue would move to the hardwood. In general, the "teams" could be described as liberal vs. conservative, although as court watchers know, legal philosophies cannot be reduced to such simplistic terms. The justice voted most valuable player in the game was allowed the choice of writing the opinion or—in the case of a political hot potato—making someone else do it.

For the first twelve years, the justices scrapped in a dreary gymnasium tucked in the basement of the Capitol building. The floor was cement and the baskets were mounted flush on the walls so that every fast break or layup carried the threat of a concussion. (Owen Roberts became notorious for his short-term memory and was constantly being carried off the floor.)

When the new Court building went up across the street in 1935, the justices insisted that the fourth floor remain mostly vacant to house the real highest court in the land. Because of a mix-up in the architectural plans, the room had a ceiling that was far too low—a fact that made Chief Justice Charles Evans Hughes livid and which has left its imprint on American history: many landmark decisions might have gone differently if the room could have accommodated justices with a high arc on their shot—Stanley Reed, Robert Jackson, and, most tragically, Abe Fortas.

Mind you, everything leading up to the actual decision was, and is, legitimate. The Court still accepted petitions on merit, they still read the briefs, listened (or dozed) during oral argument and then went into conference prepared to vote one way or another. When the deadlock came, however, the bifocals came off and the hightops went on.

Let's look at some of the landmark games, with impressions gleaned from those lucky few who witnessed them:

### **Near v. Minnesota (1931)**

A First Amendment ruling that came down in favor of a sleazy Minnesota newspaper being sued for libel after using ethnic slurs. Charles Evans Hughes (twenty-eight points, thirteen rebounds, seven steals) thought some of the newspaper's comments were pretty funny, so he set out to win the MVP and the opinion that followed. "He was good, and he loved to talk out there," said one observer. "I'm no choirboy, but some of the things he was saying had my face turning red. The ref finally gave him a technical to quiet him down." Hughes's mouth finally got him in trouble in the waning moments. After hitting nothing but net, he pointed at Justice Pierce Butler—a bookish sort who had been the subject of persistent rumors—waited a few beats ... and then yelled "Swish!" The observer recalled, "It was the only time I've ever seen a referee give two technicals at once to the same guy: One, two, gone."

### **Hirabayashi v. United States (1943) {see fig.1}**

The case involved the rights of a Japanese-American citizen as the wartime government was herding his kind around California, but it turned out to be about so much more. Harlan Stone lured Robert Jackson into committing three charging fouls and turned the game around with a steal, a blocked shot, and a wicked bounce pass to Felix Frankfurter that left Owen Roberts and Stanley Reed glued to the floor, their mouths agape. Stone is credited by more than one as the person who remade the legal landscape in this century. "That was the start of a new kind of law," says one observer who was privy to the Court's biggest cases over decades. "No longer were people standing and taking two-handed set shots. No law is going to survive without being innovative and flexible."

### **Brown v. Board of Education (1954)**

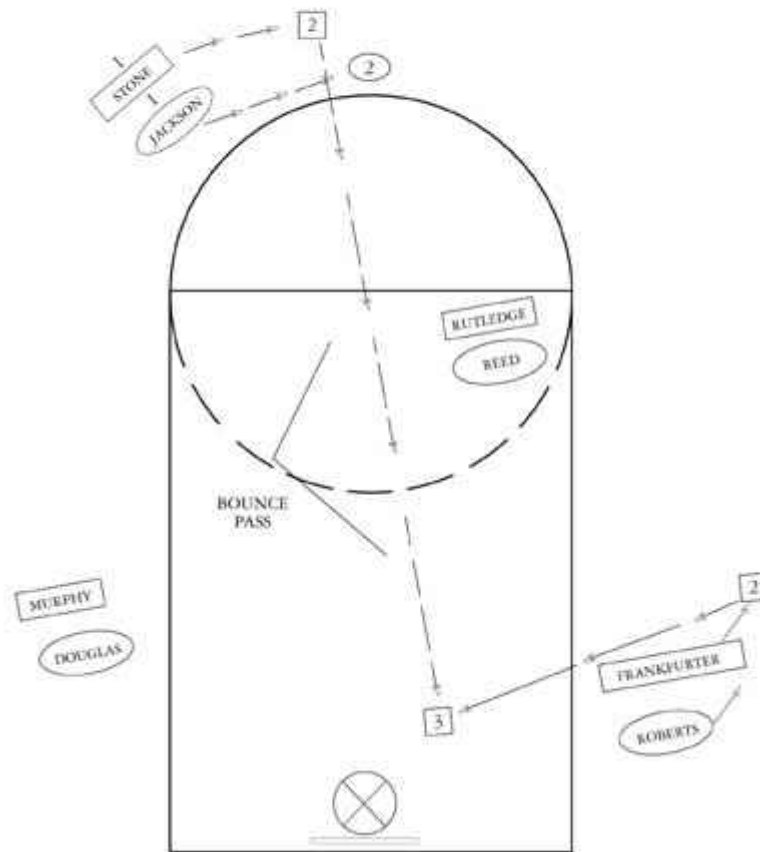
Those who watched remembered Earl Warren, "The Aircraft Carrier," posting up and calling for the ball four, five times in a row and kicking it back out until he saw a hairline

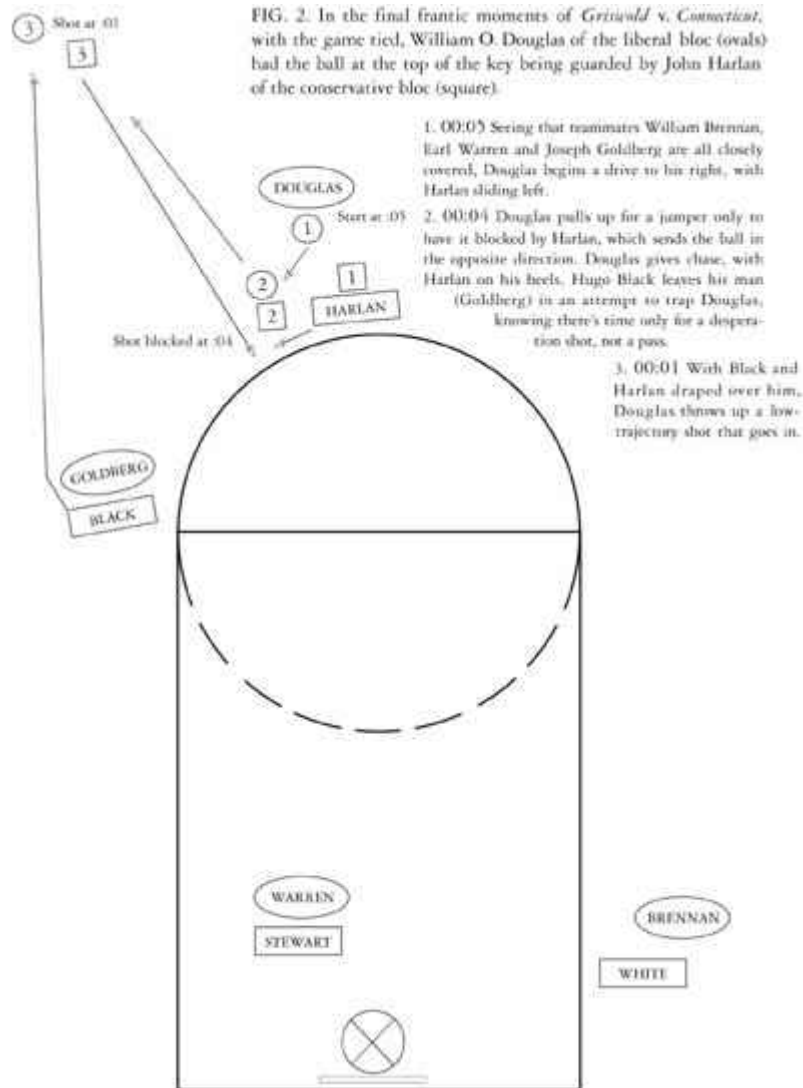
crack in the defense or a teammate left completely undefended for a jump shot. “So agile for a big man,” said one clerk. “They underestimated him at first, then they learned to play him tough. Not that it did them any good.” (Interesting side note: Rumor has it that during oral arguments for the case, Warren was sizing up Thurgood Marshall, pleading for the appellants, and sent a page scurrying off to find out how tall he was.)

**Griswold v. Connecticut (1964) {see fig. 2}**

The case that made contraception safe for America was a nail-biter. Thirty-three years later, a man who watched the game while clerking for Hugo Black was still bitter as he recalled the improbable thirty-foot shot William O. Douglas made at the buzzer: “Two defenders hanging all over him, absolutely no arc, and it goes in—I mean, he should have apologized to everyone. But instead of acknowledging he was lucky, he goes and writes that crap about the ‘penumbra of privacy’ to rub our noses in it. What a prick.”

FIG. 1. Pivotal play in *Hirabayashi v. United States* occurred with 1:23 left in the game, when Harlan Stone (1) dribbled to his left toward the top of the key (2) and then threw a behind-the-back bounce pass to Felix Frankfurter (3), who had faked outside and then cut back into the lane. Reed was busy trying to deny Rutledge the ball and so did not react in time to stop the pass.





**Miranda v. Arizona (1966)**

The case leading to the requirement that criminal suspects be informed of their rights. Warren again (fourteen points, nine rebounds, twenty-one assists), making it seem like there were eight players on his team instead of four. He also blocked out Stewart and defended Byron White so effectively that White threw the ball at Warren’s head and drew a costly technical. The Court’s legal historian put it in perspective: “Some justices—I’m thinking of Oliver Wendell Holmes here—had really high point totals, but their teammates suffered because of it. Earl made everyone else play better, and three men playing great is better than one any day.”

**New York Times v. United States (1971)**

The “Pentagon Papers” game, in which Hugo Black and William O. Douglas, teammates for once, shared MVP honors. More than one clerk said that Black clearly was the game’s outstanding player but that Douglas burned an indelible image into every brain with a monster dunk midway through the second half. “It got completely quiet for a few seconds, and then everyone—justices, clerks, refs—started to applaud. Then we had to wait another twenty minutes while they fixed the rim.”

### **Furman v. Georgia (1972)**

The death penalty game, when everything went to hell. Not only did several fistfights break out between sides, but justices were furious at their own teammates. After a while there was no passing; it got to be like a playground game where every person who grabbed a rebound turned and tried to take it himself to the other end. The result: a 16–16 final score, not even a pretense of choosing an MVP, and nine separate opinions. Bad law all around, which was overturned just a few years later. A disgusted clerk who witnessed the game summed it up: “I don’t care how many lives are at stake—you don’t play like a bunch of municipal court thugs. A lot of my idealism died that day.”

### **Roe v. Wade (1973)**

“I’ve never seen someone take control of a game the way [Harry] Blackmun did that day,” said one of his clerks. “He was on a mission. You could tell he had stopped being intimidated and had come into his own. He ran up and down the court for forty minutes, and after the first fifteen the conservatives were just holding their sides and wheezing. Nobody there was thinking about abortion or right-to-privacy—it was just, ‘Look at Harry go!’ ”

### **Bakke v. California (1978)**

Bakke wasn’t the only one standing up to be heard; this was Lewis Powell’s coming-out party as a player. He surprised everyone with his finesse, so fluid and graceful—almost courtly, in his Southern way, the way he ran the floor, dishing assists, getting everyone their points. But every time the defense collapsed on him and dared him to hit from outside, he arced shots that would melt in your mouth. Marshall was baiting him the entire game—understandable when you consider that the case threatened affirmative action—but Powell wouldn’t bite, even after being elbowed again and again. Nobody remembers him hitting the rim the entire game.

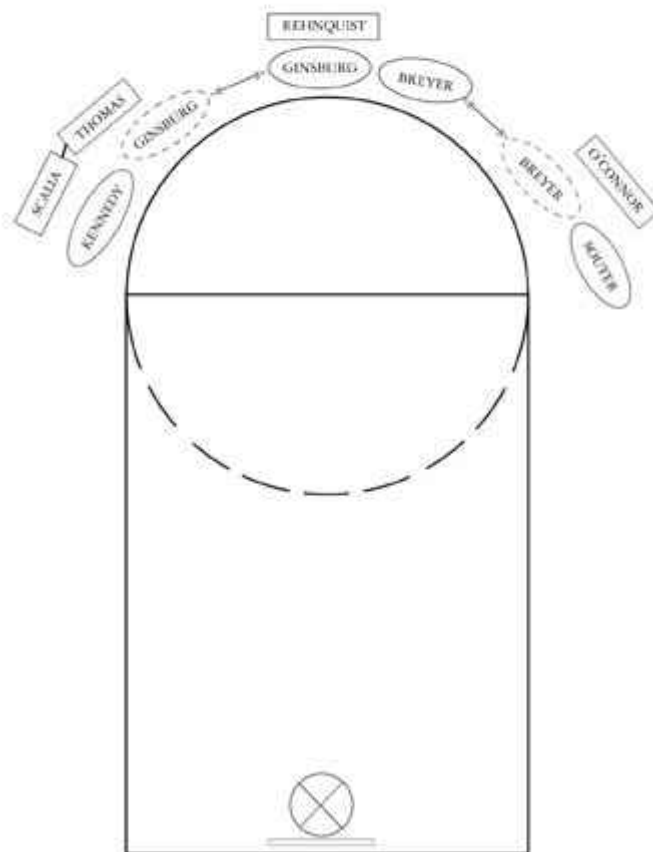
### **Bowers v. Hardwick (1986)**

Was a Georgia law against sodomy in violation of the Constitution? Perhaps more to the point, why couldn’t Byron “Whizzer” White realize he didn’t have it anymore as an athlete? His teammates voted him MVP to keep him happy, even though he was cherry-picking the entire game. Brennan, whom White was supposed to be guarding, was scoring from all over, but all Whizzer cared about was his own total. His teammates were banking on his hints that he was about to retire and thought giving him the honor would speed him out the door. It still took seven long years.

As you can see, the games have their own rich history, sometimes even overlapping with the Official Truth that made it into textbooks. Oliver Wendell Holmes actually did make the notorious statement, “Three generations of imbeciles are enough,” but he was not, as widely believed, referring to the state-sanctioned sterilization of a retarded woman. He directed it at a referee, the grandson of an official whose incorrect interpretation of the rule book gave Chief Justice Roger Taney an extra throw in the Dred Scott horseshoe match. (The ref was a bit touchy about the whole subject; nobody wants to hear that their granddad prolonged slavery, so Holmes got tossed.) And, yes, Potter Stewart did say “I know it when I see it,” but he was not talking about pornography, he was arguing with a ref about what constitutes traveling. The official did not accept his definition and responded, “Why don’t you try playing defense and see how you like it?”

But enough about justices running their mouths. Let's focus on overall athletic skills. Since this is the first written account to make it to the public, a lot of inside info on earlier justices has died with the men who knew it firsthand. But with most former clerks of the past few decades ... still alive, it's possible to piece together fairly accurate descriptions of the recent ones. The consensus is that, as in the outside world, the modern players have it all over their counterparts from sixty years ago. It's a markedly different game. Dunks are so common now that no one bats an eye. It's also impossible to ignore the influence that steroids have had on the players. (Needless to say, Supreme Court justices do not submit to drug tests.) Strength and conditioning regimens allow the players to bring off athletic displays that were unimaginable in the thirties and forties.

FIG. 3. The "S-T Zone" (for "Scalia-Thomas") has been used effectively by moderates to force turnovers. With Scalia and Thomas inseparable, moderates can use one man (usually Kennedy) to defend them both, leaving an extra moderate player for double-teams. In this example, Rehnquist has the ball on top, guarded by Ginsburg and Breyer. When he passes to a fellow conservative, one of the two slides over to double-team the recipient, with the other defender staying put. Lately, Rehnquist and O'Connor have been able to negate the defensive scheme with back-door cuts. (Stevens: abstaining.)



Still, steroids and conditioning only get you so far. As any sports fan knows, a lot depends on how well you play as a team and what you're willing to give after tip-off. After years of what they considered judicial overstepping by the Warren Court, conservative justices had high hopes for Warren Burger's boys. But when the games were on the line, the conservatives in the Burger Court just didn't want it as much.

Of course, they weren't helped by the fact that Burger was the worst player of all time. He was as bad as Ben Cardozo, but Cardozo could at least make free throws. Once, after

Burger missed his eighth consecutive shot from the line, White gave him a withering look and said, “Thank you, Nixon.”

Blackmun, though he had flashes of brilliance, was too often timid. White, of course, was still a formidable athlete when Kennedy appointed him, but he had lost a lot by the 1970s, even if he refused to admit it. (Marshall and Brennan constantly bickered over who got to guard him.)

The liberal holdovers from the Warren Court liked to torment the more conservative newcomers just to show who was boss. One example stands out in particular: It was said that Marshall, cantankerous in his final years, enjoyed taunting Scalia by mocking his fondness for hypothetical questions during oral argument. During one-on-one games that they played strictly for pride, every possession became an opportunity for Marshall to humiliate him: “What if one justice were to back in slowly—like this, say—dribbling the ball methodically, while his fellow justice stood there powerless to stop him? And what if the first justice then dunked over him, like ... this?”

As for scouting reports on the current nine:

Chief Justice William Rehnquist: Bad back, hates to reach low for balls. Tends to turn it over if you force him to go to his left. Still, no one is able to see the whole court better. Opponents often think he’s not even paying attention, and suddenly he’s stolen the ball from them.

David Souter: Finesse player; doesn’t like to bang. Moves well without the ball; it’s almost impossible to keep track of him. Drives defenders nuts and wears them out.

John Paul Stevens: Often wants to switch teams halfway through the game; it’s hard to count on him in the late minutes.

Anthony Kennedy: Nondescript and workmanlike out there, but within the first week on the Court, he had memorized the dead spots on the floor and began forcing dribblers into them.

Sandra Day O’Connor: Got pushed around at first, but now uses her speed, and elbows. Runs the point well.

Antonin Scalia: Real trash talker. Constantly comparing himself to Warren, Black, and the other “maestros.” Even the refs hate him.

Clarence Thomas: Was held in disdain by the other justices until his first game, when he let loose an eye-popping barrage of three-pointers. (The “Natural Law Fury from Above,” as he called it.)

Ruth Bader Ginsburg: One of the best passers ever. Hooks up with Breyer in no-look alley-oops.

Stephen Breyer: Well-liked because he refuses to play dirty, even after taking cheap shots. Boxes out well.

Anyway, there you have the truth; it's up to you to handle it as best you can. And remember: I'll be judged by history. I don't know where the Court will go from here, now that the secret's out. Will they continue issuing opinions detailing how the votes broke down with faux precision? Will people be so outraged that political pressures will force—God forbid—an actual Supreme Court that tries to thrash out legal decisions based on logic?

The best we can hope is that everyone will submit to the higher power and let the shots fall where they may. Because at those critical moments when time stands still, as six of the justices clear out of the lane and one stands alone on top, dribbling the ball and eyeing the lone defender, this country reaches its full potential, a nation defined not by the past but by the moment. As the justice jukes and then brushes past his opponent and begins his rise to the goal, we all are lifted with him, knowing one thing at heart: If he can finish, so can we.