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The Most Insignificant Justice: Further Evidence

Frank H. Easterbrook†

Professor David Currie's seminal¹ study of the insignificance of members of the Supreme Court² raises more questions than it answers.³ Did Justice Duval[l]⁴ ever *concur* without opinion?⁵ Did the Justices display the same patterns in private law cases, or in privateer cases, as in constitutional cases? The masters of quiet observation in constitutional matters may have been biding their time and saving their influence, the better to dominate their Brethren in land tenure disputes. Did any of the candidates leave a significant, and thus disqualifying, legacy of influential opinions in any field? Professor Currie's narrow focus on constitutional decisions may obscure rather than illuminate the broader patterns of insignificance.

In reading Professor Currie's work, I became concerned that

† Professor of Law, University of Chicago, a title I shall not be able to keep if I write many more articles in this vein. I am indebted to R.H. Helmholz for pointing out a spelling error in an earlier draft. Several of my other colleagues offered similarly helpful advice about this project—most often to publish it under someone else's name—but as usual I disregard their sage counsel. The Law and Economics Program of the University of Chicago Law School provided no support for the research and writing of this article and is not responsible for any of the conclusions expressed here. Neither am I.

¹ It is customary to call things you like "seminal," and I follow that convention here, if only because seminal seemed more hopeful than "terminal."

² Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466 (1983).

³ It may not answer any questions, but the cliché in the text is mandatory when dealing with seminal studies.

⁴ I use the form Duval[l] because Currie's discussion, *supra* note 2, at 468, did not persuade me that Duvall, or for that matter Duval, is the proper spelling. Although most of the Court's Reporters listed the man as Duvall, Peters started out with Duval, see 1 Pet. xi (1828), before switching to Duvall, see 2 Pet. ix (1829). The practice varied from edition to edition. The original report of *The Atalanta*, 16 U.S. (3 Wheat.) 409, 433 (1818), states that "Mr. Justice TODD and Mr. Justice DUVALL did not sit in this cause," but the second edition of the report changes this to "Mr. Justice TODD and Mr. Justice DUVAL did not sit in this cause." Perhaps Duval[l]'s literary executor, lacking anything to do, tried to set the record straight but, because LEXIS had not yet been invented, could not find all occurrences of the name. Perhaps, too, there were really two separate people, a Duvall and a Duval, who took turns sitting quietly on the Court in order to confuse historians. I see no need to resolve these questions, and so I use Duval[l] throughout.

⁵ On this important question, see the last entry in Appendix C.

its air of calm, serious, dispassionate scholarship, its obvious thoroughness, and its scientific precision might discourage later scholars from pursuing these important questions. I also became worried that Currie had slighted—even overlooked!—the legitimate claims of others to the honors he bestowed on Gabriel Duval[l]. Could it be that Currie's efforts were simply pseudo-science employed in the pursuit of some predetermined plan to award Duval[l] the coveted prize without serious consideration of candidates so shrouded in obscurity that they escaped proper attention even in a contest of insignificance? Could it be that Currie's use of objective indicators, such as PPY, IPP, and EHH?, was intended to divert attention from the restricted scope of the study and the proper limits on the reliability of the conclusions? Could it even be that Professor Currie's work is simply a subtle method of defending the propertied classes from scrutiny by an enlightened intelligentsia? To find insignificance embedded in our early post-revolutionary history may dull the revolutionary appetite, and to read articles like Currie's may divert time from preparation for the next revolution.⁶

I therefore attempted to incite my colleagues to carry Professor Currie's preliminary study to fruition. Alas, few of them wanted to learn the complete truth about Gabriel Duval[l] and his rivals. My curiosity could not be slaked without learning more, however, and if no one else would do the work, I would have to do it. Besides, I comforted myself, this would be at least as enlightening as spending an equal amount of time playing video games.⁷ So I set off to find more evidence.

The first step was to determine the universe of cases within which to judge insignificance. Professor Currie chose early constitutional law, which was not only fitting, because it is his specialty,

⁶ Pseudo-science in defense of class interests is of course rampant in legal work. For proof of this see Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 675 (1983) ("The social sciences they perverted into the source of argumentative ploys with which to give arbitrary though stylized policy discussions the blessing of a specious authority."). It's a shame that Unger does not offer us any examples of the work "they" have "perverted"; we probably could learn a lot from "them." It is safe to say, however, that Unger did not have Currie as a target, if only because he had not seen Currie's work.

⁷ Compare R. DUBREN, *THE VIDEO MASTER'S GUIDE TO CENTIPEDE* (1982) (video games) and E. ZAVISCA & G. BELTOWSKI, *BE A HOME VIDEO GAME SUPERSTAR: SECRETS TO THE BEST GAMES FOR YOUR ATARI VCS* (1983) (same) with J. GOEBEL, 1 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1971) (early Supreme Court) and G. HASKINS & H. JOHNSON, 2 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1981) (same). Cf. Atari, Inc., *MISSILE COMMAND* (1980) (not available on LEXIS); Herzel & Schmidt, *SEC Is Probing "Double Pac-man" Takeover Defense*, Legal Times, Apr. 18, 1983, at 25, col. 1 (double PAC-MAN defense to tender offers).

but also simple for him, because he has recently surveyed all of the constitutional cases of the Court's first century.⁸ I agree with the "early" part of the choice: Justices who sat after the Civil War have been handicapped in the quest for True Insignificance by law clerks, secretarial staff, typewriters, and the fact that the problems they faced are more likely to be important, or worse, remembered, today (and hence the Justices more likely to be Significant).

I am less inclined, though, to go along with the limitation to constitutional law. It was a small part of the early docket, a part especially likely to appeal to Chief Justices and therefore likely to show the Associate Justices at their best (that is, at their most silent) in this contest. The Associate Justices were more likely to mar their records by writing in some other area. My first response was to add securities and antitrust law to Currie's list and see how the Justices rated with a broader set of cases. It soon became clear, however, that the set of all constitutional, antitrust, and securities law cases and the set of all constitutional cases before 1865 are the same. To conduct any inclusive survey, then, I would have to add diversity, admiralty, and general federal question cases, and so I did. I have examined (or at least counted) every opinion written in every field through December Term 1863, Chief Justice Taney's last, in a relentless search for the trivial, the transient, the taciturn, and the tergiversating.

Any survey of insignificance of course raises the question of comparability with earlier surveys. Professor Currie is not the first to inquire into the accomplishments of our least distinguished Justices, and a Justice could not truly be said to be insignificant if he has achieved recognition elsewhere. Indeed, a Justice recognized twenty years ago as the "most insignificant" probably no longer could lay claim to that title: he would be the possessor of a title ("Most Insignificant Justice") that would set him apart from other Justices who had done equally little but escaped such notice. The award of the much-coveted, prestigious Most Insignificant Justice title disqualifies the incumbent from repeating in a later survey.⁹

⁸ The first three of these articles, even more seminal than his piece on insignificance, have appeared in this *Review*. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819 (1981); Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982); Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887 (1982). More to come.

⁹ Dean Gerhard Casper dissents from this analysis. He believes that the (in)significance of Justices is fixed by what the Justices themselves do, and that recognition of their (non)accomplishments cannot alter their relative position. The rest of my colleagues have

The most interesting of these surveys is one from 1970, which classified the Justices into five categories: Great, Near Great, Average, Below Average, and Failure.¹⁰ The survey is far from satisfactory. The respondents were not told what the ratings mean, and the curious segmentation of the results—most nineteenth-century Justices are lumped into Average, while twentieth-century Justices are pushed to the extremes—suggests that the respondents had not heard of many of the Justices and gave us their opinions on Currie's BVD (Benightedness of View) scale rather than on more appropriate measures of excellence.

Still, the survey is not useless. We may disqualify at once the eight who were rated as failures. These worthies are not insignificant. After all, the respondents in the survey had heard of them and knew enough to object to them. We also may disqualify those rated below average. Again, at least twenty percent of the respondents had heard of them, so they flunk the EHH? test. Moreover, the below average category appears to be filled with Justices who met premature deaths or resigned shortly after being named; whatever else is true of these short-lived Justices, they have no better claim to true insignificance than the seven people who were nominated, were confirmed by the Senate, and refused to serve.¹¹ Indeed they have less: the six below average Justices at least did *something*, whereas scores of years passed without the seven refusers contributing a single significant opinion. We must, then, find the Most Insignificant Justice among those rated average, signifying that the respondents had no opinions about them one way or the other. Justices Clifford, Duval[I], Livingston, McKinley, and Todd, among Currie's other candidates, can be found there.

not objected to the analysis in the text and therefore agree with me. *Qui tacet consentire videtur*. BROOM, A SELECTION OF LEGAL MAXIMS 85 (10th ed. 1939). (A translation of the maxim is on file with *The University of Chicago Law Review*.)

¹⁰ See *infra* Appendix E.

¹¹ John Jay, Chief Justice from 1790-1794, was confirmed as Chief Justice again in 1800 but refused to rejoin the Court. The others refused Associate Justiceships: Robert Hanson Harrison in 1789; Levi Lincoln in 1811; John Quincy Adams in 1811; William Smith in 1837; Edwin M. Stanton in 1869 (Stanton's refusal took an extreme, but perhaps necessary, form—he died four days after the confirmation); Roscoe Conkling in 1882.

One might add to the list Associate Justice William Cushing, who was nominated and confirmed as Chief Justice in 1796 but refused to assume that post, pleading old age. That did not prevent him, however, from spending another 14 unproductive years on the Court as Associate Justice. His single fortunate act of declining the post disqualifies him from being Most Insignificant: had Cushing taken the job, John Marshall never would have become Chief Justice, and we would be living in a much changed nation. Cushing also had an OPO, see *infra* Appendix A, three times that of Duval[I] and Todd, and he wrote a number of significant opinions before John Marshall became Chief Justice.

Perhaps, though, this assumes that only Justices who are insignificant for a long time are entitled to the honor. Some men achieve insignificance; others have insignificance thrust upon them.¹² On what grounds are we to reject the claims of those who were appointed at age fifty-five, were expected to serve twenty years, and were silent for most of that period because of premature resignations or death? Are we to disfavor these contestants, to deny them the prize merely because others, equally inept, lingered on and cast a few votes in their declining years? (I am willing to assume, but only for the sake of argument, that such Justices as Gabriel Duval[l] had better years from which to decline.)

In other words, why are we to assess insignificance *ex post* rather than *ex ante*? Why not assume that a Justice who left the bench prematurely would have continued to produce at the same lethargic pace for his expected life span? A broad, representative spectrum of legal and economic commentators, discussing a large number of questions, have proven beyond question that *ex ante* analysis is the appropriate way to look at legal matters.¹³ That this view has been so widely accepted supports its application here as well. A short but incredibly productive spurt of utter silence might be more insignificant, especially in promising years of the same, than a long career full of whispering. On an *ex ante* approach we might award the honors to Alfred Moore by acclamation. Justice Moore, who delivered one brief opinion¹⁴ during his four placid

¹² This is a Famous Quotation and therefore should be attributed to this article as follows: Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481, 485 & n.12 (1983).

¹³ *E.g.*, Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 302-04 (1983) (criminal procedure); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 323-30, 345-49 (insider trading, secret agents, evidentiary privileges, and the production of information); Easterbrook & Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 703-14 (1982) (corporate control transactions); Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 342-44 (1980) (antitrust).

¹⁴ The *Eliza*, 4 U.S. (4 Dall.) 37, 39 (1800). Some might say that the elegance of the opinion disqualifies Moore. The case involved a claim for salvage of a U.S. vessel captured in March 1799 by a French privateer and retaken in April by the claimant. A statute permitted a salvage award of one-half of the value of the vessel if it had been in the hands of an "enemy," and the question was whether the French privateer was an "enemy." Moore wrote:

It is, however, more particularly urged, that the word "enemy" cannot be applied to the French; because the section in which it is used, is confined to such a state of war, as would authorize a recapture of property belonging to a nation in amity with the United States, and such a state of war, it is said, does not exist between America and France. A number of books have been cited to furnish a glossary on the word enemy; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the

terms, showed every promise of setting a standard of passive irrelevance for centuries to come; only his resignation prevented him from fulfilling his pledge.¹⁵

Nonetheless, the *ex ante* approach to assessing insignificance seems fraught with danger. A Justice who starts out his career in quiet observation, and so might achieve true insignificance if his health permits a long tenure, also might have a stroke, change of heart, or even a political conversion and begin spewing forth bilge, thus turning himself from an historical footnote to a rollicking calamity. To make matters worse, a Justice who resigns or dies before his time has by that very step done something out of the ordinary—in other words, he has committed a Significant Act by upsetting political expectations. He wrecks the plan crafted by the President who appointed him, and he mobilizes the President and the Senate at a moment's notice. We are in the big leagues¹⁶ of insignificance here. So many Justices have a plausible claim to be the Sultan of Sloth, the Titan of Torpor, that a single significant act in a judicial career is disqualifying. Thus the early-departers are out of the running.¹⁷

This approach also disqualifies Justice Clifford, one of Professor Currie's favorites. Clifford attracted attention, lots of it, by his preposterous irrelevancies and obstreperous posturing. He was certainly not invisible, and invisibility is the hallmark of True Insig-

history of nations. But if words are the representatives of ideas, let me ask, by what other word, the idea of the relative situation of America and France could be communicated, than by that of hostility or war? And how can the characters of the parties engaged in hostility or war, be otherwise described, than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, that they should be called enemies; for it is by that description alone, that either could justify or excuse the scene of bloodshed, depredation and confiscation, which has unhappily occurred . . .

Id. at 39. Lest these unfortunately well-turned sentences disqualify Moore, I ask: who is more insignificant, a Justice who writes well but maintains a selfish and withdrawn silence, or a Justice who writes poorly but, with the public interest at heart, allows his colleagues to carry the burden of expression?

¹⁵ Two other Justices delivered but one opinion each (*see infra* Appendix A): Chief Justice Rutledge, whose brief *seriatim* opinion in *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 169 (1795), is so trivial that it is sometimes said that he wrote nothing at all, and Thomas Johnson, who got off an opinion of less than half a page in 1792, *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405 (1792), before deciding to take things easy by resigning.

These are both impressive achievements, but they do not rival Moore's. His OPY (opinions per year) of 0.25 is considerably lower than that of Rutledge (1.00) or Johnson (0.50), *see infra* Appendix A, and we must assume in an *ex ante* analysis that Moore would have maintained this lead had he remained on the Court.

¹⁶ Whether of baseball, as Professor Currie suggests, or of tag-team wrestling, as a less kind observer might think, I leave to the reader.

¹⁷ So the sport might turn out to be track rather than baseball or wrestling.

nificance. To have a reasonable claim to the title, one high on the Inanities Per Page (IPP) scale must be low on the Pages Per Year (PPY) scale, or some other measure of frequency of output. IPP is useful only as a tie-breaker among Justices with similarly meager levels of expression. With Clifford falls Henry Baldwin, a long-surviving Justice who alternated between periods of sullen quietude, sometimes delivering oral opinions but refusing to allow the Reporters to publish them, and bilious but absurd writings.¹⁸ Baldwin's work is of no conceivable significance, and he had no effect on his colleagues or on the course of decisions,¹⁹ but the Justice was sufficiently colorful that he cannot be taken seriously in this contest.

Enough has been said to produce a narrow field. Justices whom Professor Currie found to be significant even though short of words have committed disqualifying acts. On the other hand, the Justices who sat silently through term after term of constitutional decision making—Cushing, Duval[l], Livingston, McKinley, and Todd—are still in the running. I exclude Cushing because he committed a single significant act in his life.²⁰ Some other way

¹⁸ In the 1832 Term Baldwin dissented four times but refused to surrender the texts to the Reporter. *E.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 595-96 (1832). In 1839 he clung unyieldingly to a concurrence. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 597 (1839). In 1838 he joined both a majority opinion affirming a judgment on the merits and a dissenting opinion pointing out that the Court lacked jurisdiction and had erred on the merits to the extent they were before it. *Beaston v. Farmers' Bank*, 37 U.S. (12 Pet.) 102, 139 (1838). In some terms he was silent (for example, 1833, 1834, 1841), but in others he wrote as many as nine opinions for the Court (1836) or dissented as frequently as 12 times (1838), usually, and mercifully, without opinion.

¹⁹ Perhaps this understates Baldwin's contribution to our jurisprudence. He was a trend-setter in the tone of his work, helping the Court along in the transition from comradeship to combat, from valor to vitriol, as a way of doing business. *Compare Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101, 107 (1807) (W. Johnson, J., dissenting) ("In this case I have the misfortune to dissent from the majority of my brethren. . . . I feel myself much relieved from the painful sensation resulting from the necessity of dissenting from the majority of the court, in being supported by the opinion of one of my brethren, . . .") with *FERC v. Mississippi*, 102 S. Ct. 2126, 2149 (1982) (O'Connor, J., dissenting) ("the Court's 'choice' is an absurdity") and *id.* at 2139 n.27, 2141 n.30 (opinion of the Court) (the dissent's arguments "are little more than exercises in the art of *ipse dixit*" and "are substituted for useful constitutional analysis"). On the current role of majority opinions, see *Dobbert v. Florida*, 432 U.S. 282, 311 (1977) (Stevens, J., dissenting) ("I assume that [the majority opinion in] this case will ultimately be regarded as nothing more than an archaic gargyle. It is nonetheless distressing to witness such a demeaning construction of a majestic bulwark in the framework of our Constitution."). On the current role of dissenting opinions, see *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176-77 n.10 (1980) ("The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.").

²⁰ See *supra* note 11.

must be found to decide among the rest. One possible indicator is the treatment of these candidates by scholars of the Court.

Professor Currie refers us to Beveridge's biography of Marshall²¹ for evidence about Duval[I]. Why stop there? Baker's later, and therefore better, biography of Marshall also furnishes evidence.²² Baker refers to Cushing eleven times, to Duval[I] fifteen times, to Livingston eight times, and to Todd only five times (two of which simply point out that Todd was absent from the bench for the *Dartmouth College* case, the occasion of Duval[I]'s impertinent dissent). (McKinley did not serve with Marshall.) Several of the references to Cushing and Livingston are complimentary, but Baker says of Todd only that he did not "appear 'to want talents,'"²³ doubtless meaning that he had talents and was trying, successfully, to get rid of them. Todd was a "'dark complexioned, good-looking, substantial man.' Little else could be said about him regarding his years on the bench."²⁴ Duval[I], on the other hand, "became distinguished for holding on to his seat for many years after he had become aged and infirm because he was fearful of who would replace him, thus inaugurating what has become a popular tradition for subsequent Supreme Court Justices."²⁵ Aha! Something "distinguished"! Is this the one Significant Act that disqualifies Duval[I]?²⁶

Or take the work of another observer of the early Court, Henry Abraham, who had the following to say about Duval[I]:

Duval [sic] . . . proved to be a competent if unexciting jurist, fulfilling Madison's expectations on grounds of both political compatibility and legal acumen. He had served with distinction on his state's highest court for six years. . . . Looking

²¹ A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1919), cited in Currie, *supra* note 2, at 468.

²² L. BAKER, *JOHN MARSHALL: A LIFE IN LAW* (1974).

²³ *Id.* at 538 (quoting letter from Joseph Story to Samuel P.P. Fay (Feb. 25, 1808), reprinted in 1 *LIFE AND LETTERS OF JOSEPH STORY* 168 (W. Story ed. Boston 1851)).

²⁴ *Id.* at 674 (quoting description of the Court by a New York newspaper correspondent).

²⁵ *Id.* at 539.

²⁶ See also the Haskins & Johnson treatment of Marshall's first 15 years, G. HASKINS & H. JOHNSON, *supra* note 7, at 681-87, which refers 20 times to Livingston, 18 times to Cushing, 6 times to Todd, and only 3 times to Duval[I]. The authors view Livingston and Cushing as substantial figures. See, e.g., *id.* at 391. One reference to Duval[I] says that he left a "modest" mark. *Id.* at 392. Five of the six references to Todd report his absence or presence on some important date but say no more; the sixth calls his contribution "minimal," *id.* at 391, and points out that, in light of the hopes President Jefferson had for his appointee, "the lack of strongly voiced dissent [to Marshall's Federalist views] must have surprised his contemporaries as much as it perplexes historians and biographers," *id.*

every inch the legendary jurist, he spent almost twenty-five workmanlike, quiet years on the bench.²⁷

This is either an unwarranted libel of President Madison, who appointed Duval[I], or a conclusion that Duval[I] is not qualified for the post of Most Insignificant Justice. Abraham finds Brockholst Livingston (of the "tomblike silence"²⁸) "to be an able, thoughtful, delightfully humorous, and learned member of the Court during his seventeen years there."²⁹ Abraham does not grace us with any of Livingston's better jokes, but the spirit is obvious. McKinley is portrayed as "colorless,"³⁰ an apparent assertion that albinism and its complications were responsible for his frequent absence from the bench, and Todd is said to have "established but a modestly distinguished record on the Court."³¹ Clifford, according to Abraham, was "an able lawyer and legal scholar who had been a distinguished representative in both the Maine and United States lower houses. . . . Clifford served on the Court competently and diligently but without particular distinction."³²

Perhaps all this just shows that before beginning work on his book Abraham had acquired a word processor with a free supply of encomiums and had set out to minimize his costs of writing.³³ Nonetheless, his views should give us pause. What are we to make of these two divergent stories: Abraham's, in which no Justice is below average, or Currie's, in which at least seventy percent of the Justices are below average and a good fifty percent are in the bottom quintile?

We could look at the treatment of these contenders by their contemporaries, but that provides scant evidence. They were all such wallflowers that they escaped much contemporary notice. True, Jefferson did say of his appointees (William Johnson, Livingston, and Todd) that they served among "a subtle corps of sappers and miners" consisting of a "crafty chief judge" and "lazy or timid associates."³⁴ This might be thought to disqualify Livingston

²⁷ H. ABRAHAM, JUSTICES AND PRESIDENTS 82 (1974).

²⁸ Currie, *supra* note 2, at 470.

²⁹ H. ABRAHAM, *supra* note 27, at 77.

³⁰ *Id.* at 102.

³¹ *Id.* at 78.

³² *Id.* at 105.

³³ It appears that he used some discretion, however. In describing McKinley, for example, he called him only "colorless," *supra* text accompanying note 30, refraining from the remainder of the litany, odorless and tasteless.

³⁴ Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *reprinted in* 15 WRITINGS OF THOMAS JEFFERSON 297-98 (A. Lipscomb & A. Bergh eds. 1905). Does this make

and Todd; to be called "subtle" by a man as subtle as Thomas Jefferson is damnation in this contest. But reflection discloses that Jefferson called the Court "subtle," and John Marshall dominated the Court; Johnson, Livingston, and Todd were merely "lazy or timid" and so still in the running. Anyway, Jefferson was obviously writing in anger, with little concern for the facts. In addition to Marshall, the Court then comprised Bushrod Washington, William Johnson, and Joseph Story, none of whom was lazy, timid, or doltish. Jefferson's darts must have been directed to Livingston, Todd, and Duval[1]. Relative to the expectations of the Republican Presidents for these men to recapture the Court from the Federalists Marshall and Washington, they are among history's biggest disappointments.

If Jefferson's peevish remarks do not steer us to the Most Insignificant, what of the Court's treatment of its own? Then, as now, the death or retirement of a Justice was noticed in the pages of the *United States Reports*. Thomas Todd is the recipient of a particularly telling eulogy. The customary warm and gracious tribute to his service appeared in the *United States Reports* after his death—fourteen years after his death!³⁵ What to make of the delay? Did no one notice his absence?³⁶ Or did it just take fourteen years to find someone willing (or able) to say anything warm and gracious in public about Justice Todd? That the remarks are attributed to an anonymous "judicial friend" suggests something of this sort. (I put to one side the possibility that Todd continued to sit in the fourteen years after his death, albeit with the same effect on our jurisprudence as his work in the seventeen years before his death, and then wrote his own eulogy. This would be a Significant Act, but some things are too fantastic to take seriously.³⁷)

Father Jefferson, and not Brother Currie, the source of the epigram, "John Marshall and the Six Dwarfs"? *Contra* Currie, *supra* note 2, at 469 & n.23. *But see* W. DISNEY, *SNOW WHITE AND THE SEVEN DWARFS* (1938) (Dwarfs named Dopey, Bashful, Sneezzy, Grumpy, Sleepy, Happy, and Doc).

³⁵ See 38 U.S. (13 Pet.) iii (1839).

³⁶ This is plausible. Todd was absent for the entire 1808, 1819, and 1825 Terms and most of the 1809, 1813, and 1815 Terms. His death merely continued this pattern of absence.

³⁷ On the other hand, Justice Trimble had an opinion published posthumously, *Hollingsworth v. Hollingsworth*, 29 U.S. (4 Pet.) 466, 470-79 (1830), and Justice Brandeis had a whole volume of opinions published posthumously, A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957). (Query: How could the opinions be "unpublished" when they appeared in the very volume bearing that title?) In recent years two circuit judges have cast deciding votes from the grave. *Hillsdale College v. Department of HEW*, 696 F.2d 418 (6th Cir. 1982) (2-1 decision, with Lester Cecil "voting" with the "majority" 20 days after his death); *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979) (2-1

The evidence from contemporary reports is too spotty to be the basis of an informed judgment. Thus I was compelled to do what professors of law dread: turn to the facts. I surveyed the decisions of the Supreme Court through the end of Chief Justice Taney's service, collecting the data necessary to make a definitive judgment about significance. How many opinions did each Justice write? How long were they? How many dissents did each write, and how many other dissents were noted by the Reporters or by other Justices? How many opportunities did each Justice have to express opinions? In early years the Court heard fewer than ten cases per Term, but in later years it heard more than eighty. Insignificance is relative, and an output sufficient to hold one's own in 1800 might be deemed trifling for a Justice sitting in 1850.

These data are collected in Appendix A. They show, as one might expect, that as the years went by the Justices became more vocal (more opinions), more wordy (longer opinions), and more contentious (more dissents). The data also offer insights into the insignificance of the contenders. Gabriel Duval[l], far from uttering simply "DUAL, Justice, dissented,"³⁸ wrote eighteen opinions, fifteen of these for the Court. Thomas Todd, although silent in constitutional matters, wrote fourteen opinions, twelve for the Court. Brockholst Livingston was even more active, producing forty-nine opinions, including seven dissents; several of these forty-nine concerned important issues of the day. His activities on the Court, together with Currie's admission that Livingston wrote significant opinions on circuit,³⁹ disqualify him from further consideration. And even John McKinley, fabled for his absence from the bench,⁴⁰ was a producer (of sorts) when he showed up for work. He wrote twenty-two opinions during the eleven Terms he attended, and as Appendix D shows, a number (a *small* number) of these

decision, with Harold Leventhal "voting" with the "majority" and filing a concurring opinion 37 days after his death), *cert. denied*, 447 U.S. 921 (1980).

³⁸ *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 713 (1819) (4th ed. 1883). See also Currie, *supra* note 2, at 470 & n.33 (noting different versions in different editions).

³⁹ Currie, *supra* note 2, at 470.

⁴⁰ McKinley missed the 1840, 1843, and 1848 Terms because of illness, and he failed to attend many arguments when he was in Washington. His absences became sufficiently notorious that when McKinley was absent from the January 1850 Term, Howard duly noted McKinley's illness, only to retract sheepishly in the next volume. Compare 49 U.S. (8 How.) iii n.* (1850) with 50 U.S. (9 How.) iii (1851) ("ERRATUM. The note in the eighth volume, stating that 'Mr. Justice McKinley was prevented, by indisposition, from attending the Court during the January term, 1850,' is incorrect; as Mr. McKinley was engaged during that period in holding an important session of the U.S. Circuit Court at New Orleans.").

opinions were in significant cases.⁴¹

The most useful measure of significance (other than a detailed examination of every opinion) is OPO, or opinions per opportunity. This index compensates for the fact that the earlier Justices had fewer opportunities to express themselves simply because the Court heard fewer cases. The OPO of most members of the early Court was quite high, with Jay achieving an OPO of 0.38 (three opinions in eight cases), and even the maligned Thomas Johnson, who wrote but seventeen lines in his career, had an OPO of 0.17 (one opinion in six cases). John Marshall, who dominated the Court for more than thirty years, achieved the highest sustained OPO of 0.30.

If we disregard Alfred Moore, a four-Term flash-in-the-pan of nonproductivity, we find that the OPO index suggests two serious contenders for the title Most Insignificant Justice: Thomas Todd and Gabriel Duval[I]. Todd has an OPO of 0.022, or approximately one opinion for every forty-six opportunities (14 of 647, to be exact). Duval[I] has an even better OPO of 0.019 (18 opinions in 962 opportunities, or 1 per 53). It is almost a dead heat. On the basis of PPY (pages per year) things look much the same. Todd is slightly ahead with 2.66 PPY, compared with Duval[I]'s 2.76 PPY. The rate of dissent also is remarkably similar, with Todd registering 0.18 dissents per Term, Duval[I] 0.17 per Term. These numbers are hard to put in perspective, so consider this: Duval[I], Todd, Jay, Rutledge, Moore, Blair, Thomas Johnson, and Wilson, combined, wrote less in their entire careers than Justice Byrnes wrote in his single term.⁴²

These fine figures are the product of hard work. Todd, who reached the Court five years ahead of his archrival Duval[I], acted quickly to make the most of the lead, doing nothing whatsoever the first two years. He wrote less than a page in the first six. Duval[I], on the other hand, was conscious of the need to preserve

⁴¹ McKinley's dissenting opinion in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), supporting a position he had taken on circuit, is probably enough by itself to disqualify him from further consideration. So, too, is his opinion in *The Passenger Cases*, 48 U.S. (7 How.) 283, 452 (1849), which was necessary to allow the Court to achieve a majority. Although it is true that McKinley "made no significant contribution to legal thinking in any form" and that "[w]hen he died in 1852 he had not made any notable imprint on the work of his profession," C. SWISHER, 5 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 67 (1974), one can lose the laurels of the Most Insignificant Justice by the lesser act of *writing* in a significant case.

⁴² Byrnes, who sat only for the 1941 Term, wrote 16 opinions with a total of 142.8 pages. At least one of Byrnes's opinions is Significant: *Edwards v. California*, 314 U.S. 160 (1941).

his insignificance: he lasted nine Terms after Todd's death, and the final five of these produced no written words. Had Duval[l] left behind anything at all from those years, Todd would have walked away with the prize for insignificance. It is only Duval[l]'s premature resignation that prevented him from becoming, through endurance, a clear victor. Duval[l] retired (formally, anyway) in 1835 at the age of eighty-two; he lived to be ninety-one. Just think of the years of silence of which his selfish act deprived us!

Now there is always the possibility that the activities of these two Justices on circuit would enable us to overcome the inclination to treat them as the Tweedledee and Tweedledum of sloth. Alas, no help from that quarter. Duval[l] was as scrupulously silent on circuit as on the Supreme Court, and Todd left behind little but hints. His biographer tells us: "Unfortunately, most of his circuit opinions have disappeared."⁴³ Disappeared? Were they written in disappearing ink? Perhaps they were lost because no one wanted to preserve them or because they were unwritten as of the time of Todd's death.⁴⁴ At all events, by what lights may we call their disappearance "unfortunate"?

There seemed nothing left but to evaluate the work directly. This was not an arduous task; they left little to evaluate. At the same time, reading the collected works of Thomas Todd and Gabriel Duval[l] (Appendices B and C) was no picnic. These masters of insignificance did not leave behind a pile of small, but well-polished, gems. The opinions are graceless and plodding, saved only by their brevity.

The life work of Justice Todd may be summed up in two words: land tenure. Ten of his fourteen opinions (App. B, Nos. 4-13) involved land tenure disputes. He told us that a deed will not support a writ of entry unless the description of the lands is specific (Nos. 10, 13), that a patent issued by mistake will not support a writ of entry (No. 12), and on and on and on. He apparently acquired this interest while serving on the Supreme Court of Kentucky.⁴⁵ Having built up all this human capital, he saw no reason to abandon it, or acquire new knowledge, just because he had changed courts. He apparently took literally the charge that, as a Justice, he construe the Law of the Land.

⁴³ Israel, *Thomas Todd*, in 1 *THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 1789-1969*, at 410 (L. Friedman & F. Israel eds. 1969). For the rest of the available information on Todd, see the eulogy mentioned *supra* note 35 and accompanying text.

⁴⁴ But see *supra* note 37 and accompanying text.

⁴⁵ Israel, *supra* note 43, at 409.

Todd's remaining four opinions show only disdain for other subjects. He tossed off a laconic and murky dissent in an action on a bond (No. 1) and a laconic and murky concurrence on a jurisdictional point (No. 3). The Reporter attributed to him four unreasoned lines, designated as an "opinion for the Court" but probably just an oral remark, in *M'Kim v. Voorhies* (No. 2), a case holding that state courts may not enjoin the judgments of federal courts.⁴⁶ If Marshall indeed assigned Todd the opinion in this case, he presented Todd with a magnificent opportunity to disqualify himself from any contest of insignificance; the kindest thing to be said is that Todd dropped the ball.⁴⁷ Finally, there is Todd's last opinion (No. 14), which is a careful, if dull, statement of the "best evidence rule" and a delineation of the adverse inference that may be drawn if one in possession of evidence fails to produce it. The opinion is competent but no more.

Gabriel Duval[l] had broader interests. He wrote on commercial law (App. C, Nos. 1, 15), the rights of the United States to recover debts (Nos. 4, 5, 7, 13), admiralty (Nos. 6, 10, 12), jurisdiction (Nos. 2, 17), land law (Nos. 8, 11, 14), and statutory construction (Nos. 9, 10, 16). True, some of these opinions are unusual (for example, *M'Iver's Lessee v. Walker* (No. 8), in which the full opinion reads: "My opinion is that there is no safe rule but to follow the needle[, making full allowance for variation, according to practical observation]."⁴⁸), but they are in the main workmanlike.⁴⁹ They display a range of interests and even a competence that Todd carefully concealed.

Although only *M'Kim* among all of Todd's cases was potentially significant—and then because of the opinion's subject rather than its execution—at least three of Duval[l]'s opinions must be taken seriously. One is *The Frances & Eliza* (No. 12), holding that a statute did not require the forfeiture of a ship, bound from a British port, that landed in the United States, even though the landing apparently violated an embargo on British ships and

⁴⁶ Related problems continue to be litigated. *E.g.*, *General Atomic Co. v. Felter*, 436 U.S. 493 (1978); *General Atomic Co. v. Felter*, 434 U.S. 12 (1977).

⁴⁷ Compare *supra* text accompanying note 16 with *supra* text accompanying note 17.

⁴⁸ 13 U.S. (9 Cranch) 173, 179 (1815) (App. C, No. 8). The bracketed portion was added in later editions. Was Justice Duval[l]'s literary executor again afoot?

⁴⁹ They have their share of incomplete sentences and quirks, too. *See, e.g.*, *The Neptune*, 16 U.S. (3 Wheat.) 601, 607 (1818) (No. 10) ("That it [the vessel's register] was alleged to have been granted to the former owner by the collector for the port of Wilmington in North Carolina, and that it was lost."). But these cases are very old, and if whole opinions by Thomas Todd have disappeared it should not surprise us that the subjects and verbs in some sentences by Gabriel Duval[l] have vanished as well.

goods. The Court found the landing innocent because the ship used the prohibited port only for emergency provisioning. Yet five years earlier the Court, with Marshall, Washington, and Johnson in dissent, had held that a ship laden with rum from British Jamaica was forfeit for putting into New York, even though it was undisputed that the ship was driven in by a storm, with its keel broken and its rudder carried away.⁵⁰ In five short years Duval[1] accomplished what Marshall had been unable to do: he persuaded the Court to interpret the forfeiture statutes in light of their purpose rather than their letter.⁵¹ Duval[1]'s opinion was unanimous.

This is not, however, the ground on which Duval[1] ultimately forfeited the Mantle of the Most Insignificant. Duval[1] lost, rather, by writing in two slavery cases. There was then no surer way to attract attention. In *Mima Queen & Child v. Hepburn* (No. 3) Duval[1] filed a solitary dissent from a Marshall opinion. The plaintiff in the case sought a declaration of her freedom. She adduced hearsay evidence that her mother was free at the time of her birth. Marshall held that the evidence was properly excluded as hearsay and the plaintiff declared to be a slave. Duval[1] dissented, pointing out that because the mother was dead it was hearsay or nothing, and that because freedom was at stake the Court should not follow the customary rules of evidence. Here, it seems, Marshall and Story rate uncomfortably high on Currie's BVD scale, while Duval[1] acquitted himself well.

Then there is Duval[1]'s last opinion, in *LeGrand v. Darnall* (No. 18), holding (for a unanimous Court!) that a master's testamentary grant of real or personal property to a slave worked a manumission. Because only a free person could hold real property, the grant effected the freedom by necessary implication. Duval[1]'s presumption of freedom, unable to carry the day in *Mima Queen*, prevailed sixteen years later in *LeGrand*.

One more inquiry completes the story. Have any of Todd's or Duval[1]'s opinions attracted the attention of other judges? Any substantial degree of attention—or, worse, praise—might disqualify a candidate for this coveted award. I therefore did a citation check of each of the finalists' opinions. As one might expect, *Mima Queen* and *LeGrand* are much-cited cases, with citations to *Mima*

⁵⁰ The New York, 16 U.S. (3 Wheat.) 59 (1818), written by Brockholst Livingston for himself, Todd, Duval[1], and Story.

⁵¹ The cases are not technically in conflict. Duval[1]'s opinion interpreted a different statute, and the facts were interestingly different too. But the approach to statutory construction is what really divides the cases.

Queen continuing to appear today.⁵² Several of Duval[l]'s other cases also still are cited: in the last five years *Prince v. Bartlett* and *Walton v. United States* (Nos. 7, 13) have been cited in state courts.⁵³ On the other hand, no Todd opinion has been cited in any court since 1965, and the opinions that enjoyed any currency at all, such as *Preston v. Bowder* and *Robinson v. Campbell* (Nos. 5, 8) did so only for a brief time, and then only in state courts wrestling with the same land tenure matters Todd had addressed in his diversity cases. Todd's opinions in *Finley v. Lynn* and *Perkins v. Ramsey* (Nos. 1, 10) have never been cited by any court.

Enough, enough. Of the finalists, Todd and Duval[l], one disqualified himself by writing some significant opinions. True, Duval[l] tried to atone for this by remaining mute (he was deaf by then as well) after his opinion in *LeGrand*, but it was too late. His Significant Acts had disqualified him. The winner by default—in what other way can one win this kind of contest?—is Thomas Todd. Long may he reign.

⁵² *E.g.*, *United States v. Pomponio*, 563 F.2d 659, 666 (4th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

⁵³ *E.g.*, *United States v. Wyoming Nat'l Bank*, 493 Pa. 441, 464, 426 A.2d 1098, 1110 (1981) (opinion in support of reversal) (citing *Prince*); *State v. Selig*, 635 P.2d 786, 789 (Wyo. 1981) (citing *Walton*). I am prepared to determine the half-life of the opinions of Todd and Duval[l], if that becomes necessary to yield a final judgment. See Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & Econ. 249 (1976).

APPENDIX A

THE OPINIONS OF THE EARLY JUSTICES

(1) Justice	(2) Terms	(3) NOP	(4) OPY	(5) PPY	(6) OPTY	(7) OPO	(8) DISOP	(9) DISV	(10) DPY
1. Jay	3	3	1.00	4.43	8	0.38	0	0	0
2. Cushing	18	18	1.00	1.39	281	0.064	0	0	0
3. Wilson	7	8	1.14	2.36	43	0.19	0	0	0
4. Blair	4	4	1.00	3.18	14	0.29	1	1	0.25
5. Iredell	8	12	1.50	9.05	50	0.24	4	4	0.5
6. T. Johnson	2	1	0.50	0.15	6	0.17	0	0	0
7. Paterson	12	18	1.50	7.53	137	0.13	1	1	0.08
8. J. Rutledge	1	1	1.00	0.40	2	0.50	0	0	0
9. S. Chase	14	11	0.79	3.28	267	0.041	1	3	0.21
10. Ellsworth	4	8	2.00	2.05	36	0.22	0	0	0
11. Washington	29	79	2.72	16.69	942	0.084	1	4	0.14
12. Moore	4	1	0.25	0.25	47	0.021	0	0	0
13. J. Marshall	33	373	11.30	83.44	1224	0.300	8	9	0.27
14. W. Johnson	29	163	5.62	40.18	1145	0.142	32	33	1.14
15. Livingston	16	49	3.06	13.25	599	0.082	7	10	0.63
16. Todd	17	14	0.82	2.66	647	0.022	1	3	0.18
17. Duval[I]	23	18	0.78	2.76	962	0.019	1	4	0.17
18. Story	34	267	7.85	62.58	1400	0.191	12	18	0.53
19. Thompson	20	101	5.05	34.46	865	0.117	12	15	0.75
20. Trimble	2	16	8.00	68.60	101	0.158	0	1	0.50
21. McLean	32	255	7.97	46.84	1806	0.141	33	59	1.84
22. Baldwin	16	51	3.18	36.90	701	0.073	13	39	2.44
23. Wayne	*30	136	4.53	42.45	1739	0.078	5	29	0.97
24. Taney	28	198	7.07	36.21	1646	0.120	10	31	1.11
25. Barbour	4	20	5.00	30.85	159	0.126	3	3	0.75
26. Catron	*27	185	6.85	47.50	1626	0.114	26	44	1.63
27. McKinley	15	22	1.47	7.46	758	0.029	3	9	0.60
28. Daniel	19	128	6.74	55.26	1199	0.107	37	85	4.47
29. Nelson	*20	168	8.40	66.30	1347	0.125	10	30	1.50
30. Woodbury	6	54	9.00	81.08	327	0.165	7	11	1.83
31. Grier	*18	150	8.33	37.08	1250	0.120	6	35	1.94
32. Curtis	6	56	9.33	59.46	460	0.122	8	10	1.67
33. Campbell	8	100	12.50	61.76	620	0.161	16	30	3.75
34. Clifford	*7	61	8.71	79.23	508	0.120	5	9	1.29
35. Swayne	*3	20	6.67	35.33	190	0.105	1	4	1.33
36. Miller	*2	18	9.00	45.20	116	0.155	3	5	2.50
37. Davis	*2	11	5.50	23.38	116	0.095	1	3	1.50
38. Field	*1	13	13.00	36.25	75	0.173	0	0	0

These data are derived from an exhaustive survey of the *United States Reports* through December Term 1863, Chief Justice Taney's last Term. I read all volumes through February Term, 1825 (23 U.S., 10 Wheat.) myself. My research assistants, Patrick Longan and Edward Wahl, completed the survey. The data presented here are largely consistent with the tabulations in A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 127-49 (1978), and supplement that work by adding page counts. Differences in the opinion

counts may be attributable to the choices described in the following notes.

NOTES: 1. The Justices are listed in order of appointment, with Rutledge, who was an Associate Justice during years the Court did not sit, counted only for his recess appointment as Chief Justice.

2. "Terms" denotes the number of annual sessions of the Court held while the Justice was eligible to sit. An asterisk before the number of Terms indicates that the Justice continued to sit with Chief Justice Chase (Taney's replacement). The additional Terms of these Justices are omitted from this survey. Some years, e.g., 1795, had more than one session but are counted as one Term. In 1850 the commencement of the Court's annual session was changed from January to December; I treat the December 1850 sitting as a Term separate from the January 1850 sitting. The use of the "Term" as a measure of length of service is more accurate than "years served" because Justices sometimes took their seats just after a sitting had ended, or died just before a sitting commenced. There were, moreover, no sittings in 1789, 1790, 1802, and 1811, and the 1791 sitting (which I do not count as a Term) entailed only three inconsequential docket-control acts. The omission of sittings, coupled with the time of appointment of each Justice, could cause "years of service" to overstate by several years the number of times the Justice could have met with the Court. "Terms" includes, however, meetings a Justice missed because of illness, "indisposition," or circuit riding. A judge may achieve insignificance by absence no less than by invisibility while in attendance.

3. "NOP" indicates the number of opinions the Justice wrote in his career. It includes all majority, seriatim, concurring, and dissenting opinions of any description. Even two-word opinions (e.g., "I dissent") are included. NOP does *not* include dissents that are noted by the Reporter (e.g., "Mr. Justice Baldwin dissented") or by a colleague (e.g., "I am comforted that Mr. Justice Todd joins me in these views."). A double asterisk in subsequent Appendices indicates such statements not qualifying as opinions. These are included, however, in column 9 (dissenting votes). The number of nondissenting opinions may be extracted by subtracting column 8 (dissenting opinions) from NOP. NOP also does *not* include short opinions, of a page or less, by the Chief Justice or (in the absence or disqualification of the Chief Justice) the senior Associate Justice announcing the judgment of the Court. These are treated as identical in principle to opinions headed "By the Court" or to dispositions summarized by the Reporter but not attributed to any Justice. The treatment is necessary because the practices of the early Reporters did not distinguish between short announcements by the presiding Justice and other ways of disposing of a case, and the Reporters do not seem to have had any consistent rule for choosing how to style such short dispositions. Although this treatment significantly reduces the number of opinions attributed to Chief Justices Marshall and Taney and cuts by a few the number attributed to Justices Washington (1812 Term) and Story (1836 Term), it does not otherwise affect the results.

4. "OPY," or opinions per year, is the number of opinions in a Justice's career (column 3) divided by the number of Terms served (column 2). It is a general measure of the Justice's activity.

5. "PPY," or pages per year, is the number of pages of text written by a Justice in his career divided by the number of Terms served (column 2). (One can generate the total number of pages by multiplying column 5 and column 2.) "Pages" means the number of pages in the *original* edition of each Reporter's volumes. In reprints the starred pagination was used. Each opinion's length was recorded to the nearest tenth of a page. No attempt has been made to convert page measurements to words. Although this might be desirable (the Dallas and Peters volumes, for example, contain more words per page than Cranch or Wheaton), this subtlety was unnecessary for current purposes.

6. "OPTY," or opportunities, gives the number of cases that (according to the Reporters, anyway) came before each Justice for disposition in his career. It includes not only cases disposed of by signed opinions but also cases disposed of "By the Court" and cases with dispositions noted by the Reporters but not otherwise attributed. It also includes matters of practice and procedure that were styled by the Reporters as cases. In some Terms almost all cases were disposed of by signed opinion. In others the number of unsigned (or short, see note 3 above) dispositions was substantial. In the 1809 Term, for example, 44 matters were

styled as cases by Cranch, and 23 of them were handled without signed opinion. As each Justice had an opportunity to record his views in each matter, however, the table includes all of them.

7. "OPO," or opinions per opportunity, is column 3 divided by column 6. It measures each Justice's proclivity to place his views in the written records.

8. "DISOP," or dissenting opinions, records the number of signed dissents a Justice filed in his career. See note 3 above. An opinion was counted as a dissent if it disagreed in any particular with the Court's disposition of the case. An opinion agreeing with the disposition but disagreeing with the reasons was counted as a concurrence.

9. "DISV," or dissenting votes, records the number of times a Justice was noted by anyone (the Reporter, a colleague, or himself) as having disagreed with the disposition of a case.

10. "DPY," or dissents per year, is column 9 divided by column 2.

APPENDIX B

THE OPINIONS OF THOMAS TODD (1808-25)

1. *Finley v. Lynn*, 10 U.S. (6 Cranch) 238, 252 (1810) (five-line partial dissent in an action on a bond among partners).

2. *M'Kim v. Voorhies*, 11 U.S. (7 Cranch) 279 (1812) (four-line opinion for the Court holding that a state court may not enjoin the judgment of a federal circuit court).

3. *Wallen v. Williams*, 11 U.S. (7 Cranch) 278, 279 (1812) (eight-line concurrence in a jurisdictional matter).

4. *Vowles v. Craig*, 12 U.S. (8 Cranch) 371 (1814) (2.2-page opinion for the Court holding that the seller under a warranty deed may not later recover land deeded, even though he is surprised when a survey shows the size of the parcel).

5. *Preston v. Browder*, 14 U.S. (1 Wheat.) 115 (1816) (3.4-page opinion for the Court holding that North Carolina law does not authorize entry to claim lands within Indian reservations).

6. *Danforth's Lessee v. Thomas*, 14 U.S. (1 Wheat.) 155 (1816) (2.8-page opinion for the Court repeating the holding of *Preston*).

7. *Ross v. Reed*, 14 U.S. (1 Wheat.) 482 (1816) (two-page opinion for the Court that under Tennessee law a warrant for land, filed with the state, is *prima facie* evidence of ownership).

8. *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212 (1818) (seven-page opinion for the Court interpreting several provisions of Tennessee's land law).

9. *Brown v. Jackson*, 16 U.S. (3 Wheat.) 449 (1818) (two-page opinion for the Court interpreting a deed in light of Kentucky's land laws).

10. *Perkins v. Ramsey*, 18 U.S. (5 Wheat.) 269 (1820) (seven-page opinion for the Court interpreting several provisions of Tennessee's land law).

11. *Clark v. Graham*, 19 U.S. (6 Wheat.) 577 (1821) (three-page opinion for the Court holding a deed invalid under Ohio land law because not executed in the presence of two witnesses).

12. *Miller v. Kerr*, 20 U.S. (7 Wheat.) 1 (1822) (5.3-page opinion for the Court holding that under Virginia's land laws a patent issued by mistake to a former soldier was insufficient to terminate the interest of a senior occupier).

13. *Watts v. Lindsey's Heirs*, 20 U.S. (7 Wheat.) 158 (1822) (4.8-page opinion for the Court holding that under Ohio's land laws a particular description of land was insufficiently precise to authorize entry against another party residing there).

14. *Riggs v. Tayloe*, 22 U.S. (9 Wheat.) 483 (1824) (4.2-page opinion for the Court holding that when one party to a contract loses his copy, the other party must produce his own or the first party would be allowed to introduce secondary evidence).

APPENDIX C

THE OPINIONS OF GABRIEL DUVAL[L] (1812-34)

1. *Freeland v. Heron, Lenox & Co.*, 11 U.S. (7 Cranch) 147 (1812) (4.2-page opinion for the Court holding that a foreign bill of account not objected to for two years permits an action on account stated, with burden on the defendant).

2. *Beatty v. Maryland*, 11 U.S. (7 Cranch) 281 (1812) (7-line [concurring?] opinion concerning the treatment of a final account of an administrator of an orphan's court).

3. *Mima Queen & Child v. Hepburn*, 11 U.S. (7 Cranch) 290, 298 (1813) (1.2-page dissenting opinion arguing for admissibility of hearsay evidence in suit to obtain declaration of freedom from slavery).

4. *United States v. January*, 11 U.S. (7 Cranch) 572 (1813) (three-page opinion for the Court holding that funds collected from a bankrupt federal revenue officer must be applied to the benefit of both of his sureties, not just the first).

5. *United States v. Patterson*, 11 U.S. (7 Cranch) 575 (1813) (1.1-page opinion for the Court holding that a bankrupt revenue officer's personal funds must be applied to discharge his debt to the Treasury).

6. *Crowell v. M'Fadon*, 12 U.S. (8 Cranch) 94 (1814) (three-page opinion for the Court holding that under the 1808 Embargo Act a collector may detain a vessel on suspicion of intent to violate the Act by unlawful entry, and that the suspicion need not be reasonable).

7. *Prince v. Bartlett*, 12 U.S. (8 Cranch) 431 (1814) (one-page opinion for the Court holding that the United States does not ordinarily have priority in claiming an insolvent's assets).

8. *M'Iver's Lessee v. Walker*, 13 U.S. (9 Cranch) 173, 179 (1815) (2-line [concurring?] opinion in land boundary case, reading: "My opinion is that there is no safe rule but to follow the needle[, making allowance for variation, according to practical observation].") (bracketed portion added in later editions of *United States Reports*).

9. *United States v. Tenbroek*, 15 U.S. (2 Wheat.) 248 (1817) (1.4-page opinion for the Court holding that the Act of July 24, 1813, imposing a tax on stills, does not tax spirits already distilled).

10. *The Neptune*, 16 U.S. (3 Wheat.) 601 (1818) (7.7-page opinion for the Court holding a vessel forfeit for use of a fraudulent certificate of registry, even though the fraud occurred before the statute requiring forfeiture was enacted).

11. *Boyd's Lessee v. Graves*, 17 U.S. (4 Wheat.) 513 (1819) 4.3-page opinion for the Court holding that an oral agreement to abide by a survey of land's borders is binding under Kentucky's land law even after more than 20 years).

***. Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 713 (1819) ("DUVALL, Justice, dissented.").

12. *The Frances & Eliza*, 21 U.S. (8 Wheat.) 398 (1823) (two-page opinion for the Court holding that a British ship is not liable to forfeiture for landing in the United States, despite the navigation act of 1818, if it touched in a prohibited port only for necessary provisioning).

13. *Walton v. United States*, 22 U.S. (9 Wheat.) 651 (1824) (6.5-page opinion for the Court holding that a particular statute was not repealed by implication, that a revenue collector's bond does not extinguish his personal liability to pay the proceeds, and that bills of exceptions were unnecessary in certain cases).

14. *Piles v. Bouldin*, 24 U.S. (11 Wheat.) 325 (1826) (6.5-page opinion for the Court holding that under Tennessee law the time required to obtain title to land by adverse possession is seven years).

15. *Rhea v. Rhenner*, 26 U.S. (1 Pet.) 105 (1828) (3.5-page opinion for the Court holding that under Maryland law a woman abandoned by her husband may buy and sell goods and

property in her own name and is liable for her debts, but may not alienate jointly held real property; thus a prior creditor prevails over a purported transferee of real property).

16. *Parker v. United States*, 26 U.S. (1 Pet.) 293 (1828) (5.2-page opinion for the Court holding that a military officer is not entitled to an extra living allowance while at his official duty station).

17. *Nicholls v. Hodges*, 26 U.S. (1 Pet.) 562 (1828) (three-page opinion for the Court holding that the Court had jurisdiction of an appeal from a court administering a deceased's estate and then approving the executor's compensation).

18. *LeGrand v. Darnall*, 27 U.S. (2 Pet.) 664 (1829) (four-page opinion for the Court holding that under Maryland law a master's testamentary grant of property to a slave entitles the slave to his freedom by necessary implication).

** *Leland v. Wilkinson*, 31 U.S. (6 Pet.) 317, 319 (1832) ("Mr. Justice DUVALL and Mr. Justice M'LEAN concurred with Mr. Justice STORY.").

APPENDIX D

THE OPINIONS OF JOHN MCKINLEY (1838-52)

1. *M'Kinney v. Carrol*, 37 U.S. (12 Pet.) 66 (1838) (4.7-page opinion for the Court holding that writ of error does not lie when no federal question was raised in the state court).

2. *Beaston v. Farmers' Bank*, 37 U.S. (12 Pet.) 102 (1838) (6.3-page opinion for the Court holding that the statutory bankruptcy priority for debts due the United States applies to insolvent corporations and their transferees; Justice Story dissented, joined by Justices McLean, Baldwin, and Barbour, arguing that the statute did not apply to corporations and that the point had not in any event been raised below, as *M'Kinney* required).

3. *White v. Turk*, 37 U.S. (12 Pet.) 238 (1838) (1.6-page opinion for the Court holding, on the basis of recent precedent, that a circuit court may certify to the Supreme Court for decision only such legal questions as divide the court, and not the whole cause).

4. *Moncure v. Dermott*, 38 U.S. (13 Pet.) 345 (1839) (eight-page opinion for the Court holding that under Virginia law the bona fide discounting and sale of a bond cannot make the bond a usurious contract).

5. *Wilcox v. Hunt*, 38 U.S. (13 Pet.) 378 (1839) (1.7-page opinion for the Court holding that in a diversity suit tried in Louisiana, the Louisiana rule allowing hearsay proof of attestation of contracts applies).

6. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 597 (1839) (9.1-page solitary dissenting opinion, arguing that as a matter of constitutional law and "the law of nations" a corporation chartered in Georgia may not do business in Alabama even if Alabama's law permits the transaction).

7. *Smith v. Clapp*, 40 U.S. (15 Pet.) 125 (1841) (2.5-page opinion for the Court holding that there was diversity of citizenship and that the plaintiff properly recovered on a note under Alabama's law).

8. *Levy v. Fitzpatrick*, 40 U.S. (15 Pet.) 167 (1841) (three-page opinion for the Court holding that initial action to implement a confession of judgment clause is not, under Louisiana law, a final judgment from which a writ of error lies).

9. *United States v. Fitzgerald*, 40 U.S. (15 Pet.) 407 (1841) (3.8-page opinion for the Court holding that collector of customs could obtain a homestead patent on land, near the customshouse, that had not been reserved to the government).

** *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 517 (1841) ("Mr. Justice MCKINLEY dissented from the opinion of the court . . . and Mr. Justice STORY also dissented; both these justices considering the notes sued upon void.") (this was a significant slavery case).

10. *Nixdorff v. Smith*, 41 U.S. (16 Pet.) 132 (1842) (five-page opinion for the Court holding that the lower court must recompute an account between traders in a debt action).

11. *Amis v. Smith*, 41 U.S. (16 Pet.) 303 (1842) (5.2-page opinion for the Court holding

that a judge's requirement that one party post a bond in litigation is not a final, reviewable judgment, that a suit on a bond must name all the obligors, and that a Mississippi statute purporting to regulate the terms of bonds and to prohibit appeals from their forfeiture would not be applied in a diversity case).

12. *Randel v. Brown*, 43 U.S. (2 How.) 406 (1844) (10-page opinion for the Court holding that a lien lapses when inconsistent with the terms of a contract and that the subsequent possession is fraud).

13. *Barry v. Gamble*, 44 U.S. (3 How.) 32, 56 (1845) (1.3-page dissenting opinion, joined by Justices Story and Wayne, arguing that a land title was invalid because obtained before certain public lands had been opened).

14. *Dickson v. Wilkinson*, 44 U.S. (3 How.) 57 (1845) (two-page opinion for the Court holding that *res judicata* precluded an attempt to resist execution on a judgment).

15. *Croghan's Lessee v. Nelson*, 44 U.S. (3 How.) 187 (1845) (4.2-page opinion for the Court holding that when it was impractical to ascertain exact boundaries at the time of an initial entry onto public land, a court will reform the description to carry out the intent of the locator).

16. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845) (11.3-page opinion for the Court holding that as Alabama entered the Union on an "equal footing" with other states, it had full title to the tidewaters below the usual high water mark at the time of entry).

17. *Lane v. Vick*, 44 U.S. (3 How.) 464, 477 (1845) (6.9-page dissenting opinion, joined by Chief Justice Taney, arguing that the construction of a will by a state court was binding on the Supreme Court).

18. *Brown's Lessee v. Clements*, 44 U.S. (3 How.) 650 (1845) (nine-page opinion for the Court holding that the Surveyor General may not divide a section of land irregularly so that complete quarter-sections cannot be taken up) (Taney, Catron & Daniel, JJ., dissented, and it was overruled by *Gazzam v. Phillips*, 61 U.S. (20 How.) 372 (1857)).

19. *McFarland v. Gwin*, 44 U.S. (3 How.) 717 (1845) (1.5-page opinion for the Court holding that a marshal must complete, after the expiration of his term, the execution of a judgment commenced before the expiration).

20. *Hickey's Lessee v. Stewart*, 44 U.S. (3 How.) 750 (1845) (6.5-page opinion for the Court holding that the state courts could not award land within the bounds of the Spanish cession of 1795).

21. *Musson v. Lake*, 45 U.S. (4 How.) 262 (1846) (5.5-page opinion for the Court holding that a person demanding payment on a foreign bill of exchange must exhibit the bill).

22. *The Passenger Cases*, 48 U.S. (7 How.) 283, 452 (1849) (three-page seriatim opinion concluding that because Congress has unlimited power to exclude or tax entering aliens, states have no power to do so).

APPENDIX E

A RATING OF THE JUSTICES

"GREAT" (12)

Black	Frankfurter	Hughes	Story
Brandeis	Harlan I	J. Marshall	Taney
Cardozo	Holmes	Stone	Warren

"NEAR GREAT" (15)

Bradley	Field	W. Johnson	Taft
Brennan	Fortas	Miller	Waite
Curtis	Harlan II	W.B. Rutledge	E.D. White
Douglas	R.H. Jackson	Sutherland	

"AVERAGE" (55)

Baldwin	Davis	Lurton	J. Rutledge
Blair	Day	T. Marshall	Sanford
Blatchford	Duval[1]	Matthews	Shiras
Brewer	Ellsworth	McKenna	Stewart
Brown	Fuller	McKinley	Strong
Campbell	Goldberg	McLean	Swayne
Catron	Gray	Moody	Thompson
S. Chase	Grier	Murphy	Todd
S.P. Chase	Hunt	Nelson	Washington
Clark	Iredell	Paterson	Wayne
Clarke	Jay	Peckham	B. White
Clifford	L.Q.C. Lamar	Pitney	Wilson
Cushing	J.R. Lamar	Reed	Woodbury
Daniel	Livingston	Roberts	

"BELOW AVERAGE" (6)

Barbour	T. Johnson	Trimble	Woods
H.E. Jackson	Moore		

"FAILURES" (8)

Burton	Byrnes	Minton	Vinson
Butler	McReynolds	Van Devanter	Whittaker

SOURCE: A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 37-40 (1978), reporting the results of a survey of 65 law school deans and professors of law, history, and political science, in June 1970. Respondents were asked to rate the Justices on the five-category scale shown above but were given no further instructions. The Justices are listed alphabetically within each category.