



JUSTICES AT WORK, OR NOT

NEW SUPREME COURT STATISTICS AND OLD IMPEDIMENTS TO MAKING THEM ACCURATE

Ross E. Davies, Craig D. Rust & Adam Aft

Printing annual new editions of all our Supreme Court trading cards is not an option. We cannot afford it. But we will do our best every year to (a) put out new cards and (b) update the statistics on cards already in circulation. Updates of our John Roberts and John Paul Stevens cards are in Appendix B, page 236 below. We expect to issue at least two new cards this year.

—*The Editors*

THERE IS NO SUCH THING as an accurate record of the labors of the 112 (so far) Justices of the Supreme Court. And that makes the development and presentation of accurate “Supreme Court Sluggers” statistics a never-ending adventure.¹ Which is not to say that the official records of the Court’s work – the reports of its decisions and opinions (in the *U.S. Reports*), and the minutes of its proceedings (in the Court’s *Journal*) – are dangerously unreliable; indeed, for recent years they seem to be very nearly perfect. Rather, it is to say that imperfections do exist and, roughly speaking, the farther back in time you go, the more

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¹ Updated and corrected data are recorded in new spreadsheets posted in the trading-card section of the *Green Bag*’s website at www.greenbag.org.

incomplete and uneven you will find those records to be. It is a tendency that also holds for records of the Justices' work in chambers, on circuit, and in the lower federal courts, and for records of their work as members of inferior courts before their elevation to the Court. Unofficial reports and other sources, though occasionally useful for filling gaps, are sometimes faulty and often incomplete.²

So, in a world without a perfectly reliable source of information from which to develop the statistics on the back of the "Supreme Court Sluggers" cards, it should come as no surprise that this year's trading-card updates include not only new data from the Court's most recently completed term (October Term 2009), but also corrections to data from the more distant past. Correction of older data is likely to be a perennial feature of this project.³

As the *Green Bag* digs into ever-older records to produce trading cards of past members of the Court, this problem will get worse. Consider two sets of 19th-century examples (fleshed out below),

² The potential for and reality of diverse forms of confusing, inaccurate reporting are on display in the official and two leading unofficial reports of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), and *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 258 (1897). In the *U.S. Reports*, there is no clue in the case reported at page 226 that Justice David Brewer wrote one dissenting opinion that applied to both cases. The dissent is fairly easy to spot, however, if one is reading the book that is volume 166 of the *U.S. Reports* because the report of the first case ends on page 258 and is immediately followed by the second case. Brewer's dissent begins right there on page 258, and his intent is obvious from his opening line: "I dissent from the judgments in these cases. . . ." On Lexis, however — where one is reading not a book but a single case accessed from a database — Brewer's dissent is coupled only with the case at page 258, although it retains the plural-form opening line quoted above, suggesting that somewhere out there is another judgment to which it applies. A Lexis user reading the case at page 226 would have no clue to the existence of the dissent. Even less helpfully, on Westlaw (another database), it is coupled only with the case at page 226, and it appears West revised the dissent to eliminate the plural-form clue to its applicability to another case: "I dissent from the judgment in this case. . . ." Amazing — is this opinion optimization run amok?

³ Defects in "Sluggers" statistics are not, of course, entirely the fault of reporters of decisions. Two other factors loom especially large. First, we are imperfect: we miscount, misread, mistype, and so on. Second, databases and secondary sources designed to aid study of the Court are not perfect either — a reality reflected in the fact that they sometimes give different numbers for the same metrics.

dealing with two basic questions we must answer about each case included in the “Sluggers” statistics: (1) when was it decided – that is, to which term of Court should statistics about that case be assigned – and (2) who participated – that is, to which Justices should credit of some sort be given for this piece of the Court’s work? In a distressingly large and uncertain number of cases, a just-look-it-up-online researcher will find the wrong answer, and even a look-it-up-in-the-*U.S.-Reports* researcher will get it wrong some of the time.

OBSCURE ANSWERS TO “WHEN?” AND “WHO?” IN THE *U.S. REPORTS* AND ELSEWHERE

In bygone days, reporting the Court’s decisions was a loosy-goosy business, at least when compared to modern practices. For example, as Anne Ashmore explains in the introduction to her valuable study, *Dates of Supreme Court Decisions and Arguments*,

The dates of decisions do not appear beneath the case name in the first 107 volumes of the *U.S. Reports*. Beginning in 1854 (58 U.S.) the *Lawyers’ Edition of the Supreme Court Reports* includes the date, though there are some errors and omissions.⁴

And to add to the confusion and uncertainty,

Some dates do appear in the *U.S. Reports*, either in the margin or in the body of the opinion. One edition of a particular volume may have dates while another edition does not. These dates sometimes differ from the dates found in the Minutes [of the proceedings of the Supreme Court].⁵

Moreover, opinions were not published in chronological order. Indeed, it would have been impossible to do so because some of the Justices were irregular – sometimes extremely irregular – about handing in final versions of their opinions for publication. And so it was not at all uncommon for opinions from one Term to show up in a volume of the *U.S. Reports* that appeared from its title page (and

⁴ Anne Ashmore, *Dates of Supreme Court Decisions and Arguments* 1 (2006).

⁵ *Id.*

from the lack of a date of decision attached to each opinion) to be dedicated to opinions of another Term.

Take, for example, *Myer v. Car Co.*, the first case in volume 102 of the *U.S. Reports*. The title page of volume 102 announces that it contains “Cases Argued and Adjudged in the Supreme Court of the United States. October Term, 1880.” But *Myer* was an October Term 1879 case, argued on April 14 and 15, 1880, and decided on May 10.⁶ A search in Westlaw’s Supreme Court database limited to the dates of October Term 1880 reveals that West is, understandably but mistakenly, relying on the *U.S. Reports*: the search results include *Myer*. But a similar search in Lexis places *Myer* right where it belongs: May 10, 1880. Lexis is, wisely, following Ashmore. In fact, Lexis appears to have inserted Ashmore’s dates of Supreme Court decisions into its own database.

Which suggests that Lexis is a pretty reliable source for the dates of opinions. But is it equally reliable on the question of judicial participation? Has Lexis gone to the trouble of accurately reporting which Justices participated in which cases, as well as when those cases were decided? Unfortunately, the answer is no.

Take, again, volume 102 of the *U.S. Reports* as an exemplar. Its front matter has a page devoted to judicial absences, which includes this announcement:

Mr. Justice Hunt, by reason of indisposition, took no part in deciding the cases reported in this volume.

There is no indication in the individual opinions themselves in volume 102 that Hunt was not a participant in the work of the Court recorded there. Nor, alas, is there any indication of that fact in Lexis’s Supreme Court database (or in Westlaw’s). Only a researcher who looks at the book and its front matter itself has any chance of knowing who was actually voting on the cases in volume 102.

And this is not just a West-and-Lexis problem. We know of no database that accurately incorporates all the available data on when each Supreme Court decision was handed down and who was in-

⁶ *Id.* at 152.

volved in each piece of that work. So, it seems that for the careful researcher seeking to compile an accurate record of the actual work performed by each member of the Supreme Court, there is no substitute for looking at every page (including the front matter and back matter) of every volume the *U.S. Reports*, with Ashmore's *Dates of Supreme Court Decisions and Arguments* (or Lexis) at hand as well.

But even that is not enough. Mistakes make their way into reports of decisions, and not all those mistakes are corrected in ways that are readily detectable. Some may not be corrected at all.

THE SOMETIMES ERRONEOUS AND SOMETIMES UNCORRECTED *U.S. REPORTS*

Like most, perhaps all, members of the Supreme Court, Chief Justice Melville W. Fuller (1888-1910) did not participate in every case dealt with by the Court during his years of service. But it can be difficult to identify exactly which cases he did not participate in. In some instances it may be all but impossible to do so.

On the "difficult" front there is, for example, volume 142 of the *U.S. Reports*, which covers part of October Term 1891. Several cases reported there contain a note indicating Fuller's nonparticipation, including *Pearce v. Rice*, *Knight v. U.S. Land Association*, and *Convers v. Atchison, Topeka and Santa Fe Railroad Co.*⁷ But most cases have no such note, presumably indicating that Fuller did participate in them. That presumption would be wrong, however, with respect to at least one case: *Gisborn v. Charter Oak Life Insurance Co.* features an "opinion of the court" by Justice David Brewer, and no mention of nonparticipation by any member of the Court.⁸ A "Correction" on page iv of *U.S. Reports* volume 144 reads as follows:

In Volume 142, at the foot of page 338, at the end of *Gisborn v. Charter Oak Ins. Co.* add "THE CHIEF JUSTICE took no part in this decision."⁹

⁷ 142 U.S. 28, 43 (1891); 142 U.S. 161, 216 (1891); 142 U.S. 671, 676 (1892).

⁸ 142 U.S. 326 (1892).

⁹ 144 U.S. iv (1892).

Thus, in order to accurately record Fuller's participation (or non-participation) in one case reported in volume 142 of the *U.S. Reports*, a researcher must also pick up volume 144 and read the front matter. For how many other Justices and other cases are there similar errors, with corrections elsewhere in the *U.S. Reports*? Our guess is that no one knows. We expect to, someday fairly soon.

On the "all but impossible" front there is, for example, volume 137 of the *U.S. Reports*, which covers part of October Term 1890. In that volume, there are cases featuring notes indicating nonparticipation by other members of the Court, but none mentioning Fuller. And so presumably Fuller participated in every case reported in volume 137. Again, that presumption would be wrong with respect to least one case: *Preston v. Prather* consists of an "opinion of the court" by Justice Stephen J. Field, with no mention of nonparticipation by any member of the Court,¹⁰ even though Fuller did not participate. This time, however, there was no correction.

After receiving what he thought was the preliminary print of the portion of *U.S. Reports* volume 137 containing *Preston*, Fuller wrote to Reporter of Decisions J.C. Bancroft Davis:

Mar. 1, 1891

Dear Mr. Davis

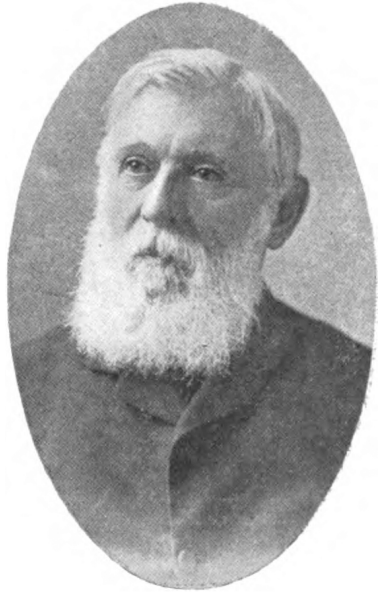
The 4th part of vol. 137 has just come to hand. I did not sit in *Preston v Prather*, p. 604 & if it be possible by a slip inserted at the beginning or otherwise to state that fact I wish you would have it done. The reason I took no part in the decision of that case was that I was of counsel for plaintiff in a similar action brought against the same parties on the same cause of action This escaped me when you sent proofs the other day. It is quite enough if an erratum can be added anywhere or in any way.

Yours truly
MWFuller¹¹

¹⁰ 137 U.S. 604 (1891).

¹¹ Melville W. Fuller to J.C. Bancroft Davis, Mar. 1, 1891, in Melville Weston Fuller Papers, Library of Congress, Manuscript Division, Box 4 (reproduced in Appendix A below at pages 230-231).

Justices at Work, or Not



Melville W. Fuller, Chief Justice of the United States, 1888-1910 (left), and J.C. Bancroft Davis, Reporter of Decisions of the Supreme Court, 1883-1902 (right).

Davis was not optimistic:

[undated]

My Dear Chief Justice

I sent to Banks [Banks & Bros., the company with which the U.S. Government contracted for printing of the *U.S. Reports*] by the first mail to see if it is possible to do anything for you in *Preston v. Prather*. I am afraid that it will not be possible. They sent me the advance sheets a week ago in order to be able to strike off [that is, print] the whole edition of the volume instead of the 500 copies. The case printed by the clerk has no memorandum that you did not sit.¹² If it is so in the record the deputy in charge ought to have told me of it, and ought also to have seen that the case was so print-

¹² At the time, Court rules and practice called for the Justices to hand the finished versions of their opinions to the Clerk of the Court for processing, and for the Clerk to then deliver the opinions to the Reporter of Decisions for publication.

ed in the record. If we are not too late it will be possible on page 607 instead of

“Mr. Justice Field, after stating the case delivered the opinion of the Court”

to say

“Mr. Justice Field delivered the opinion of the Court. The Chief Justice took no part in the decision.”

I will have this made if possible: but, as I said before, I fear it is too late.

Very truly yours
JCBDavis¹³

Apparently Davis’s pessimism was justified. Volume 137 of the *U.S. Reports* does not indicate “anywhere or in any way” that Fuller did not participate in *Preston*. Strangely, neither does volume 138, or 139, or 140, or any other volume of the *U.S. Reports*. In fact, there seems to be no published correction anywhere. Not even the maniacally thorough researcher who marches through every page of every volume of the *U.S. Reports* (or of respected unofficial reporters such as the *Lawyers’ Edition* and the *Supreme Court Reports*) would learn that Fuller did not participate in *Preston*.

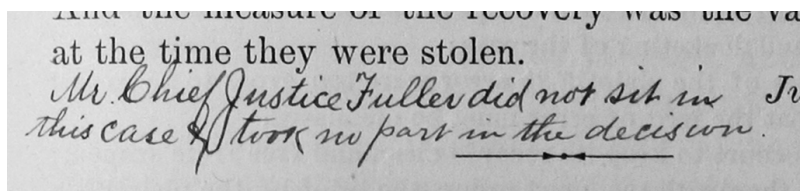
Thus, in order to accurately record Fuller’s participation (or nonparticipation) in one case reported in volume 137 of the *U.S. Reports*, a researcher must comb Fuller’s archived papers, and Davis’s. For how many other Justices and other cases are there similar errors, without corrections elsewhere in the *U.S. Reports*, but with underlying evidence of the errors buried elsewhere? Our guess is that no one knows. We hope to, someday, perhaps in the distant future.¹⁴

¹³ J.C. Bancroft Davis to Melville W. Fuller, undated, in J.C. Bancroft Davis Papers, Library of Congress, Manuscript Division, Box 46 (reproduced in Appendix A below at pages 232-234).

¹⁴ And then there is the unhappy suspicion that there might be erroneously-reported cases about which no evidence of error remains to be found.

Justices at Work, or Not

Catching and correcting errors of this sort is likely to be a matter mostly of relentless digging plus considerable luck, rather than savvy scholarship or clever sleuthing. And speaking of luck, we can only hope to run across more marginalia of the sort pictured below. This



is a seemingly antique inscription added by some unknown vandal to the end of Justice Field's *Preston* opinion, in a dusty old copy of volume 137 of the *U.S. Reports*, currently in the stacks on the first floor of the library at the George Mason University School of Law. Somehow, long ago, someone already knew what we discovered only recently about Fuller and *Preston*. Which probably goes to show that we are ignorant of some good sources of information about the Supreme Court, which in turn may be cause for optimism that we will be able to do more and better work gathering accurate "Sluggers" data in the future.

The Fuller-Davis letters, and unpublished and unofficial documents in general, present problems of their own. First, there are the matters of authenticity and authentication. Are they real or are they fakes, or perhaps genuine but altered artifacts? And how should we make those determinations? In the *Preston* case we are dealing with papers held and catalogued by a reputable institution – the Library of Congress – which we would like to think is sufficient to justify a presumption, albeit only a rebuttable one, of authenticity.¹⁵ Future

¹⁵ Cf., e.g., U.S. National Archives and Records Administration, *Press Release: National Archives Discovers Date Change on Lincoln Record* (Jan. 24, 2011), www.archives.gov/press/press-releases/2011/nr11-57.html (vis. Feb. 18, 2011) ("Archivist of the United States David S. Ferriero announced today that Thomas Lowry, a long-time Lincoln researcher from Woodbridge, VA, confessed on January 12, 2011, to altering an Abraham Lincoln Presidential pardon that is part of the permanent records of the U.S. National Archives."). For what little it might be worth, in the limited experience of the lead author of this Article, the handwriting and rhetori-

discoveries, if there are any, will have to be judged in their own contexts. Second, there is the question of completeness. Are there missing pieces that would change a story yet again? For example, in the *Preston* case, did Fuller send another letter later, informing Davis that the first letter had been a mistake, that he had in fact participated in *Preston*, and that there was thus no need for a correction? It would explain the absence of a correction. But we know of no such letter. It is a worrisome possibility, but all we can do is work with what we do know, be aware that there might be more to know, and take some consolation from the likelihood that our sophisticated readers share our awareness of that possibility.

Finally, there is the problem of authoritativeness. The *U.S. Reports* (and the *Journal*) are the Supreme Court's official version of the reality of the work of the Court, and of its meaning. Might that mean that as a matter of law, Fuller participated in *Preston*? In other words, is there a point at which ignoring the *U.S. Reports* is justified by a sufficiently clear disjuncture between the external reality of all we know and the more limited (although only rarely so, we fervently hope) internal reality of the *U.S. Reports*? On the question of whether Fuller participated in *Preston*, at least, we plan to ignore the *U.S. Reports*.

It is against the background of this kind of research, and the uncertainty and anxiety it inspires, that we present the latest developments in "Supreme Court Sluggers" statistics.

THE NEW (AND IMPROVED) DATA

Fortunately, we are not lonely travelers along this road to a complete record of the work of each Justice on the Court. The Supreme Court Database¹⁶ provides data for decisions from the Court's terms from 1946 to 2009. The Database is a vital resource for the *Sluggers* project, given the tremendous amount of work required to catalogue all opinions and accurately note all voting and

cal styles of the two letters in Appendix A below are consistent with a good deal of other correspondence attributed to the apparent authors of those letters.

¹⁶The Supreme Court Database, scdb.wustl.edu/index.php.

opinion authorship data.¹⁷ And so we have decided to utilize the Database whenever possible, both for future cards, and for updates to previously released ones. This means that, in addition to continuing to utilize the Database for our Justice John Paul Stevens trading card,¹⁸ we have also revised the previously-released Chief Justice John Roberts card to ensure that we are consistently gathering statistics from a standard set of sources throughout the *Supreme Court Sluggers* lineup.¹⁹ This consistency is essential to the integrity of the *Sluggers* project and our (and your) ability to compare the statistics of the various Justices. Of course, as our methods continue to evolve, we will keep followers of the *Sluggers* project updated so everyone always knows where our data comes from.

The Stevens card contains updates to reflect changes in data from May 31, 2010, until October 3, 2010. There were minor changes in the opinions written and joined to include the final opinions written in the 2009 term, and there were also 172 new citations by name. Even though Stevens retired from the Court in June 2010, we have continued and will continue to track his citations by name (the CN category on his *Sluggers* card) because his role as a member of the Court will always include his legacy – the ongoing influence of his work as measured, at least for now, exclusively via the CN metric.

Additionally, all of our opinion authorship data for the 2009 term now comes from the Supreme Court Database. While we had used the Database for all of Stevens's pre-2009 terms, at the time the previous version of his card was released the Database had not

¹⁷ We did, in fact, collect data ourselves in this manner for the initial Chief Justice Roberts trading card. See Ross E. Davies & Craig D. Rust, *Supreme Court Sluggers*, 13 GREEN BAG 2d 215, 219-23 (2010) (describing our initial, labor-intensive, search process).

¹⁸ See Ross E. Davies, Craig D. Rust & Adam Aft, *Supreme Court Sluggers: John Paul Stevens Is No Stephen J. Field*, 13 GREEN BAG 2D 465, 475-76 (2010).

¹⁹ Of course, no database is perfect, and in the process of reconciling our own manually collected numbers for Roberts with the data supplied by the Supreme Court Database, we spotted minor errors in both sets of data, which we have endeavored to correct in this update. The updated Roberts statistics are included in Appendix B.

been updated to include data from the 2009 term. As a result, we had manually collected data from the 2009 term, to make the initial card as up-to-date as possible at the time it was released. Once the Database was updated through the 2009 term,²⁰ we were able to bring our data collection methods for that term in line with the way we collected the 1975-2008 data.

Ever changing and evolving, the *Sluggers* project remains exciting and challenging as we continue to produce quality data and entertaining cards.



²⁰ The new Stevens card in Appendix B utilizes the data from the Supreme Court Database 2010 Release 02. As this article went to press, the Database had been updated again, to 2011 Release 01, on February 22, 2011. However, we did not incorporate the latest release into our numbers, because we the 2010 Release 02 had complete coverage of the 2009 term, and both the Roberts and Stevens cards have only been updated through that term.

APPENDIX A

Melville W. Fuller to J.C. Bancroft Davis, Mar. 1, 1891,
in Melville Weston Fuller Papers,
Library of Congress, Manuscript Division, Box 4,
and
J.C. Bancroft Davis to Melville W. Fuller, undated,
in J.C. Bancroft Davis Papers,
Library of Congress, Manuscript Division, Box 46.

Mar. 1, 1891

Dear Mr. Davis

The 4th issue of
Vol. 137 has just come
to hand - I did not sit
in Preston or Pratt, p. 604
as it is possible by a
slip made at the
beginning or otherwise to
state that I wish
you would have it over

The reason I took no part
in the decision of that case
was that I was & could
be plaintiff in a similar
action brought against
the same parties in the
same cause of action in
respect to the land & premises.

10578

This escape was when you
sent troops the other
day - It is quite enough
of an escape even to
cover anywhere or in any
way -

Yr. Ldy
J. M. Miller

1621 H STREET.

WASHINGTON.

My Dear Chief Justice

I send to Banks by the
first mail to see if it is possible
to do anything for you in *Preston*
v. Prather. I am afraid that
it will not be possible. They
sent me the advanced sheets
a week ago in order to be
able to strike off the whole
^{edition of the}
volume instead of the 500

Copies. The case as printed
by the clerk has no
Memorandum that you
did not sit. If it is ^{so} in
the record the deputy in
charge ought to have
told me of it, and ought
also to have seen that
the case was so printed
in the record. If we are
not too late it will be
possible on page 607 to

~~say~~, instead of

"Mr Justice Field, after stating the
Case delivered the opinion of
the Court"

to say

"Mr Justice Field delivered the
opinion of the Court. The Chief
Justice took no part in the
decision."

I will have this made if
possible: but, as I said before, I
fear it is too late.

Very truly yours
J. B. Davis

APPENDIX B

John G. Roberts, Jr., SUPREME COURT SLUGGERS (OT2010 edition)

and

John Paul Stevens, SUPREME COURT SLUGGERS (OT2010 edition).

