

Itinerant Judges on a Part-Time Court:
The U.S. Supreme Court, 1790-1860

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Chapter 2

Itinerant Judges on a Part-Time Court

Thanks for reading this paper, which is a draft of what will be the second substantive chapter in a book about the history of the U.S. Supreme Court. This chapter is about what the early (1790-1860) Court was like. It doesn't discuss any of the Court's cases—that's coming in later chapters.

Before looking at the Supreme Court's early cases, it will be useful to examine the Court as an institution. Who were the justices? How were they chosen? What was their work like? In all these respects, the Court of the early 19th century looked very different from today's Court.

I

Thirty-four people served as Supreme Court justices before the Civil War. All were white men. There would be no non-white justice until Thurgood Marshall in 1967 and no female justice until Sandra Day O'Connor in 1981. This uniformity in race and gender was typical of top government positions during the era. There would be no non-white members of Congress until after the Civil War and no women in Congress until the early 20th century. The first non-white member of the cabinet took office in 1966, and while the first woman joined the cabinet in 1933, there would not be a second until 1975. The demographics of the legal profession were similar. Before the Civil War there were no women lawyers and only a handful of black lawyers.¹ In the 19th century there was no realistic possibility of anyone but a white man being appointed to the Supreme Court.

All 34 of the antebellum justices were Christians, but Christianity was not the absolute qualification that race and gender were. Judah Benjamin, a prominent Jewish lawyer from New Orleans who argued several commercial cases in the Court, declined President Millard Fillmore's offer of nomination to the Court in late 1852, because he had just been chosen to represent Louisiana in the Senate.² (Eight years later, when Louisiana seceded, Benjamin would resign from the Senate to become the Confederate attorney general.) Apart from Benjamin, however, every other person seriously considered for the Court during this period was Christian. There would not be another Jewish nominee until Louis Brandeis in 1916. To this day, every nominee has been either Christian or Jewish.

Thirty-three of the 34 justices were Protestant. The exception was Chief Justice Roger Taney, appointed in 1835, who was Catholic. In an era when there was considerable prejudice against Catholics, Taney's nomination by President Andrew Jackson aroused a great deal of opposition. The *Catholic Telegraph* complained with good reason of "panic invectives against Mr. Taney"

¹ Joseph Gordon Hylton, "The African-American Lawyer: The First Generation," *University of Pittsburgh Law Review* 56 (1994): 108.

² Eli N. Evans, *Judah P. Benjamin: The Jewish Confederate* (New York: The Free Press, 1988), 83; Catharine MacMillan, "Judah Benjamin: Marginalized Outsider or Admitted Insider?", *Journal of Law and Society* 42 (2015): 162-63.

and “hackneyed slander against Roman Catholics” in the press.³ The Protestant religious periodicals were especially egregious. “Roger B. Taney is a Jesuit, a member and a sworn supporter of an order founded for political purposes, whose grand aim is to grasp at all the wealth and power in the universe,” gasped the *Religious Intelligencer*. “Is it not known that the principles of this order are diametrically opposed to every principle of liberty and justice?”⁴ There would not be another Catholic justice until Edward White was appointed in 1894.

The average age of a new justice was 48, a few years younger than the average age of recent appointees.⁵ The youngest were Joseph Story and William Johnson, who were both appointed at 32, while the oldest were Thomas Johnson and Gabriel Duvall, who were appointed at 58. The justices were in office for an average of 17 years. The shortest-serving was Thomas Johnson, who quit after a few months when he realized that riding circuit was too hard for a 58-year-old man. The longest-serving included, as one might expect, the justices who had been appointed while still young, including Story and John Marshall, who were both on the Court for 34 years (Marshall was appointed at the age of 45).

Because justices were expected to come from the circuit to which they would be assigned, the justices were evenly distributed among regions of the country. The 34 justices came from 16 different states, during a period that began with only 11 states and ended with 33. Virginia produced the most justices, but that was only five. New York and Maryland followed with four, and Massachusetts and Pennsylvania had three. As the country expanded westward, so did the Court, with justices appointed from the then-western states of Ohio, Kentucky, Tennessee, and Alabama.

One consequence of the Court’s regional balance is that there were always several justices from states with slavery. Of the 34 antebellum justices, 19 came from states where slavery was lawful until the Civil War. To that figure we can add John Jay of New York and William Paterson of New Jersey, who were both slaveowners while on the Court, because their home states had not yet abolished slavery. All or nearly all the justices from the southern states likewise owned slaves, including John Marshall and Roger Taney, who occupied the chief justice’s seat from 1801 to 1864. As John Quincy Adams complained in 1842, “from the commencement of this century, upwards of forty years, the office of Chief Justice has always been held by slaveholders.”⁶ This consistent representation of slaveowners on the Court would have a considerable influence on the Court’s decisions.

Twenty-four of the 34 justices had been lower court judges at some point in their careers before joining the Court. Most of the 24 had been judges in the state courts, which is not surprising considering how few lower federal judges there were in the years before the Civil War. More surprising may be the fact that the justices without prior judicial experience were often the ones who were most respected for their ability as judges, including John Marshall and Joseph Story,

³ “Persecution of Roman Catholics,” *Catholic Telegraph* 4 (1835): 338.

⁴ “Roger B. Taney: A Papist and a Jesuit,” *Religious Intelligencer* 20 (1836): 739.

⁵ The seven justices appointed between 2005 (John Roberts) and 2020 (Amy Coney Barrett) were on average 51 years old when they were appointed.

⁶ Josiah Quincy, *Memoir of the Life of John Quincy Adams* (Boston: Phillips, Sampson and Co., 1858), 386.

the Court's intellectual leaders. The lesson may be, not that experience is unhelpful, but that as a lawyer one can acquire a vicarious experience in judging without being a judge oneself.

More important than prior judicial experience during this period was prior experience as an elected official. Twenty-eight of the 34 antebellum justices held elective office at some point in their careers before joining the Court. Twelve had been members of Congress. Many more held state offices, including three who were former governors—John Rutledge of South Carolina, William Paterson of New Jersey, and Levi Woodbury of New Hampshire. Several also held cabinet positions, including two secretaries of state (Jay and Marshall), two secretaries of the treasury (Taney and Woodbury), two attorneys general (Taney and Nathan Clifford), two secretaries of the Navy (Woodbury and Smith Thompson), and one postmaster general (John McLean). Today, politics and the judiciary tend to be two separate career paths. The last Supreme Court justice with experience as an elected official was Sandra Day O'Connor, who sat in the Arizona state senate from 1969 to 1974. The last appointment of a justice who had previously served in Congress took place in 1949, when Harry Truman appointed his former Senate colleague Sherman Minton. In the early 19th century, by contrast, political office was the most common path to the Supreme Court, more common than service as a judge on a lower court.

The fact that justices usually came to the Court from the world of politics meant that nominees were people whose political views were already well known. Nominees were closely affiliated with a political party. They had taken public positions on contested political issues. Unlike today, when the Senate, the press, and the public must infer the political views of nominees from scraps of evidence scattered throughout the nominees' prior lives, the ideologies of 19th-century nominees were no secret. Everyone knew what a prospective justice stood for.

For example, when John Marshall died in 1835 and Andrew Jackson nominated Roger Taney to take his place, there was no doubt about Taney's political views. He had spent most of the previous four years in Jackson's cabinet, as attorney general and secretary of the treasury. In the latter position, as a recess appointee, he removed federal deposits from the Bank of the United States and transferred them to state banks, a step so controversial that when the Senate returned from recess it refused to confirm Taney as treasury secretary. Earlier he had been in the Maryland state senate and had served as the state's attorney general. Taney's politics were widely known. "The President will nominate a Democratic Chief Justice—and thus, we hope, give some opportunity for the good old State Rights Doctrines of Virginia of '98-'99 to be heard and weighed on the Federal Bench," the *Richmond Enquirer* predicted. "We believe that Mr. Taney is a strong State-Rights man."⁷ It was generally understood that Taney's loyalty to Jackson was the main reason Jackson appointed him as chief justice. Taney "was a sound lawyer of many years practice," remarked Senator Oliver Smith. But "Chief Justice Taney, it was said, received his appointment from Gen. Jackson as a reward for his services in removing the

⁷ *Richmond Enquirer*, 24 July 1835, 3.

deposits from the Bank of the United States.”⁸ A New York newspaper agreed that Taney’s appointment “was unquestionably given on political consideration.”⁹

Because so many justices came to the Court from the world of politics, it was not unusual for justices to think about leaving the Court for a political office. We saw in chapter 1 that John Jay resigned as chief justice in 1795 to become governor of New York and that William Cushing was a candidate for governor of Massachusetts in 1794. They were not alone. Smith Thompson ran for president in 1824 and for governor of New York in 1828. John McLean was a candidate for president in 1848, 1856, and 1860. His biography is appropriately subtitled “A Politician on the United States Supreme Court.”¹⁰ “For many years I hoped to have the pleasure to see you in the Presidential Chair,” one admirer wrote to McLean toward the end of his career. “That hope I suppose I must now abandon.”¹¹

When justices came to the Court from political office, they were often on familiar terms with the president, and indeed some had spent many years advising the president. These relationships tended to continue, but only in an informal way. The Court established very early that it would not give the president formal legal counsel. In 1793, President George Washington asked the Court for advice concerning the war between Britain and France. Washington wanted the United States to remain neutral in the war, but a 1778 treaty with France suggested that French ships had to be given certain privileges in American ports. The situation raised legal questions “of considerable difficulty,” Secretary of State Thomas Jefferson explained in a letter to the justices. These “questions depend for their solution on the construction of our treaties, on the laws of nature & nations, & on the laws of the land.” President Washington “would therefore be much relieved if he found himself free to refer questions of this description to the opinions of the Judges of the supreme court.”¹²

At the time it was not clear whether the Court had the power to render advisory opinions—i.e., opinions in response to legal questions posed by the President or Congress, as opposed to opinions deciding litigated cases. Some of the state courts had that power, and indeed some still do. In England, the courts had been giving advisory opinions for a long time.¹³ But Washington and his cabinet recognized the uncertainty in whether the new federal courts could do likewise. At the constitutional convention, there had been a proposal that “Each Branch of the Legislature, as well as the supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions,” but this proposal had been rejected.¹⁴ Jefferson was accordingly careful to ask the justices “whether the public may, with propriety, be availed of their advice on these questions?”

⁸ O.H. Smith, *Early Indiana Trials; and Sketches* (Cincinnati: Moore, Wilstach, Keys & Co., 1858), 156-57.

⁹ “The Judges of the U.S. Supreme Court,” *New York Evangelist* 8 (1837): 28.

¹⁰ Francis P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* (Columbus: Ohio State Univ. Press, 1937).

¹¹ Herman Lincoln to John McLean, 28 Dec. 1854, McLean Papers, reel 11.

¹² Thomas Jefferson to the Justices, 18 July 1793, DHSC, 6:747.

¹³ Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (New Haven: Yale Univ. Press, 1997), 10-50.

¹⁴ Farrand, 2:334.

The justices' answer was a firm no. "The Lines of Separation drawn by the Constitution between the three Departments of Government," they explained, "and our being Judges of a court in the last Resort[,] are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to."¹⁵ The Supreme Court would not give advisory opinions. The Court has held to this view ever since.

But while the Court, as an institution, would not give legal advice to the president, that did not stop individual justices from providing their counsel or even greater assistance. Jay often gave informal advice to Washington about a wide range of matters, including—in one letter alone—Indian policy, the definition of federal crimes, the utility of federally-funded post roads, the need for forts in the west, and the importance of securing an adequate supply of timber for ships.¹⁶ In later years, other justices were trusted advisors to presidents. Taney, for instance, was so close to Jackson that he continued advising Jackson even after he became chief justice.¹⁷ President James Polk had a similar relationship with Justice John Catron. The two had been close for years before they became national figures. They had been young Tennessee lawyers involved in state politics at the same time, and they married women from the same family. Catron continued to be one of Polk's confidants when Polk became president. When this kind of informal advice concerned legal matters, it could resemble advisory opinions. In 1822, for example, President James Monroe vetoed a bill to extend the National Road because he believed the Constitution did not authorize the federal government to build roads. In response, Justice William Johnson wrote to Monroe that he and the other justices thought the federal government *did* have the authority to build roads.¹⁸

When there was a vacancy on the Court, it was generally understood that the president's nominee would be someone within the pool of qualified lawyers with political views matching those of the president's party. Albert Gallatin put it well when Justice Alfred Moore resigned in 1804: Moore's replacement would have to be "a republican & a man of sufficient talents."¹⁹ Two years later, when William Paterson died, Joel Barlow urged Jefferson to replace him with Pierpont Edwards, Connecticut's federal district judge, because the appointment "would be Particularly & highly advantageous to the republican interest in Connecticut, where they stand in great need of as much aid from the government as it is convenient to afford them."²⁰

This matter-of-fact focus on the political loyalties of a prospective justice was well illustrated in 1810, when William Cushing, the last of the original justices, announced his intention to retire. Cushing was 78 years old and had been in poor health for some time. The other six justices were

¹⁵ Justices to George Washington, 8 Aug. 1793, *DHSC*, 6:755.

¹⁶ John Jay to George Washington, 13 Nov. 1790, Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay* (New York: G.P. Putnam's Sons, 1890-1893), 3:405-08.

¹⁷ Andrew Jackson to Roger Taney, 13 Oct. 1836, Andrew Jackson Papers, reel 49, http://hdl.loc.gov/loc.mss/maj.01096_0174_0177.

¹⁸ Donald G. Morgan, *Justice William Johnson: The First Dissenter* (Columbia: Univ. of South Carolina Press, 1954), 122-24.

¹⁹ Albert Gallatin to Thomas Jefferson, 15 Feb. 1805, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/01-42-02-0413>.

²⁰ Joel Barlow to Thomas Jefferson, 28 Sept. 1806, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/99-01-02-4325>.

evenly divided between the two parties, with three Federalists who had been appointed by Washington or Adams (John Marshall, Samuel Chase, and Bushrod Washington) and three Republicans who had been appointed by Jefferson (William Johnson, Henry Brockholst Livingston, and Thomas Todd). Cushing's departure would give the Republicans a majority on the Court for the first time.

Levi Lincoln, who had been attorney general during Jefferson's first term as president, quickly wrote to President James Madison: "I need not state to you how important it is in the opinion of republicans that his successor should be a gentleman of tried & undeviating attachment to the principles & policy which mark your's [sic] and your Predecessor's administration."²¹ As it happened, Cushing died before he could carry out his intention to resign. As his obituary put it, "the great Arbiter of events anticipated his intention, and gave him his final discharge."²² The Republicans rejoiced at this good fortune. "The Judiciary is (I hope) destined to experience a radical Reform," exulted William Claiborne. "Cushing is dead, & in his Successor we may expect to find correct principles."²³ Jefferson agreed that "the death of Cushing is therefore opportune as it gives an opening for at length getting a Republican majority on the supreme bench."²⁴ He told Madison: "Another circumstance of congratulation is the death of Cushing." For ten years, he complained, the Court had turned itself "into a political body to correct what they deem the errors of the nation." But now "the death of Cushing gives an opportunity of closing the reformation by a successor of unquestionable republican principles."²⁵

Cushing was from Massachusetts, so by custom his replacement would likewise have to be from New England. Recommendations concerning a successor poured in, all of which discussed the political views of the person in question. Elbridge Gerry suggested the Boston lawyer George Blake, because of "the pointed opposition of the Anglo-federal party to him, resulting ... from his firmness & decision on all great republican points & measures."²⁶ Jefferson suggested appointing Levi Lincoln. "Federalists say that [the Federalist judge Theophilus] Parsons is better," he acknowledged, "but the criticalness of the present nomination puts him out of question." Lincoln was preferable, he advised, because of his "political firmness, & unimpeachable character."²⁷ Henry Smith urged Madison not to appoint David Howell, the federal district attorney for Rhode Island. "If political fidelity & consistency be considered as qualifications," Smith confided, "this gentleman's pretensions are light indeed," because "he

²¹ Levi Lincoln to James Madison, 12 Apr. 1810, *Founders Online*, <https://founders.archives.gov/documents/Madison/03-02-02-0378>.

²² "Biography: Memoirs of William Cushing," *Philadelphia Repertory* 1 (1810): 169.

²³ William C.C. Claiborne to Thomas Jefferson, 10 Oct. 1810, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/03-03-02-0101-0001>.

²⁴ Thomas Jefferson to Caesar Rodney, 25 Sept. 1810, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/03-03-02-0073>.

²⁵ Thomas Jefferson to James Madison, 15 Oct. 1810, *Founders Online*, <https://founders.archives.gov/documents/Madison/03-02-02-0734>.

²⁶ Elbridge Gerry to James Madison, 22 Sept. 1810, *Founders Online*, <https://founders.archives.gov/documents/Madison/03-02-02-0683>.

²⁷ Thomas Jefferson to Albert Gallatin, 27 Sept. 1810, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/03-03-02-0077>.

pertinaciously supported all the anti-republican measures of Mr. Adam's [sic] administration.”²⁸ Jefferson expressed a similarly dark view of Joseph Story, the Speaker of the Massachusetts House of Representatives and a former member of Congress. Story was a “pseudo-republican,” Jefferson insisted.²⁹ He was “unquestionably a tory.”³⁰ The Massachusetts Congressman Ezekiel Bacon even assumed that Story would not be a realistic candidate for this reason. Bacon asked Story to support Gideon Granger, the Postmaster General, whose main merit was his loyalty to the Republican party. As Bacon pointedly put it, Granger’s claims to a seat on the Court “appear to me in every point of view much stronger than those of any other one in N. England *who would be likely to obtain it.*”³¹

It took Madison four tries to fill the vacancy left by Cushing. He first offered the position to the 61-year-old Levi Lincoln, who turned it down because he was going blind. Lincoln “had determined never again to go out into the bustle of society,” his obituary would report a few years later, “and he adhered to his resolution.”³² Madison then nominated Alexander Wolcott, a longtime customs official in Connecticut with no apparent qualifications other than a career of partisanship on behalf of the Republican party. Although the Republicans held an overwhelming majority in the Senate, they refused to confirm Wolcott because he was so clearly unqualified. Madison, seeking to avoid a similar embarrassment, turned to a much more highly regarded New England Republican, John Quincy Adams, who was then serving as ambassador to Russia. The Senate unanimously confirmed Adams—so quickly that word reached Adams only afterwards. When he learned about his new job, Adams turned it down, because he had his eye on other positions; he would later become secretary of state and of course president. By this point, more than a year had elapsed since Cushing’s death. Madison finally offered the seat to Joseph Story, despite Jefferson’s suspicions about him. The Senate confirmed Story a few days later.

As the protracted effort to replace Cushing suggests, having the right political views was necessary to becoming a justice, but not sufficient. One also had to come from the same part of the country as the justice who needed replacing, and one had to have enough intellectual gravity to earn the respect of the relatively small community of leading lawyers and members of Congress. It took some good luck for all three of these requirements to be satisfied at the same time. Some of the most distinguished state court judges of the early Republic never had the opportunity to be placed on the Supreme Court, because the wrong party held the presidency when their turn came around.

Lemuel Shaw, for example, was the highly regarded chief justice of the Massachusetts Supreme Court from 1830 to 1860. But Story occupied New England’s seat on the Court from 1812 to 1845, the prime years of Shaw’s career. When Story died and the New England seat opened up

²⁸ Henry Smith and others to James Madison, 1 Oct. 1810, *Founders Online*, <https://founders.archives.gov/documents/Madison/03-03-02-0705>.

²⁹ Thomas Jefferson to Henry Dearborn, 16 July 1810, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/03-02-02-0456>.

³⁰ Thomas Jefferson to James Madison, 15 Oct. 1810, *Founders Online*, <https://founders.archives.gov/documents/Madison/03-02-02-0734>.

³¹ Ezekiel Bacon to Joseph Story, 8 Oct. 1810, Story Papers, reel 1.

³² “Levi Lincoln,” *National Recorder* 3 (1820): 303.

for the first time in more than thirty years, the Democrat James Polk was the president, and Shaw was a Whig.³³ He received no consideration for Story's seat, which went to the Democratic Senator Levi Woodbury. As New Hampshire's Democratic congressman Edmund Burke observed in urging Polk to nominate Woodbury, the appointment "would be very gratifying to the Democratic party of New England at least, and I believe, of the whole country."³⁴ The Boston Democrat David Henshaw reminded Polk that as most political appointments "are for but short periods, their influence will be proportionably limited; but the appointment of a Judge is much more important" because of the longer term of office.³⁵ By the time Woodbury died and the seat opened again, the Whig Millard Fillmore was in office, but now Shaw was 70 years old. The seat went instead to Benjamin Curtis, who was only 41. "I am desirous of obtaining as long a lease, and as much moral and judicial power as possible, from this appointment," Fillmore explained. He wanted to appoint a Whig of "a good judicial mind, and such age as gives a prospect of long service."³⁶

James Kent of New York, another state judge held in extraordinarily high esteem within the profession, suffered from the same bad timing. Kent was a Federalist and then a Whig, but during the period when Kent was the right age to be put on the Court, a president of the opposing party was in office each time New York's seat opened up. In 1806, Jefferson appointed Henry Brockholst Livingston. When Livingston died in 1823, James Monroe was president. Monroe's attorney general, William Wirt, urged him to overlook party loyalties and appoint Kent. "I know that one of the factions in New York would take it in high dudgeon," Wirt acknowledged. "But Kent holds so lofty a stand every where for almost matchless intellect and learning, as well as for spotless purity and high-minded honor and patriotism, that I firmly believe the nation at large would approve and applaud the appointment." Wirt recognized that his request seemed unrealistic. "I am not so visionary," he assured Monroe, "as to suppose that the thing which is best in the abstract can, in the present state of parties, or perhaps in any state of them which we can hope for under our Government, be always safely and prudently done." But Wirt insisted that the Court "should be set apart and consecrated to talent and virtue, without regard to the shades of political opinion."³⁷ Monroe ignored Wirt's advice and appointed Smith Thompson, Monroe's secretary of the navy. By the time Thompson died in 1843, Kent was 80 years old.

During this period the Senate acted on nominations to the Court with a speed that would be unimaginable today. When the Senate confirmed a nominee, confirmation typically took place within a few days of nomination. Jefferson's three nominees, for example, were all confirmed within four days or less. Senate confirmation took place so quickly that some nominees learned of their appointment only after they had already been confirmed. This speed was possible because the Senate did not hold public hearings on appointments to the Court. Because the

³³ Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (New York: Harper & Row, 1967), 91.

³⁴ Edmund Burke to James Polk, 7 Apr. 1845, Herbert Weaver et al., eds., *Correspondence of James K Polk* (Knoxville: University of Tennessee Press, 1969-2017), 9:257.

³⁵ David Henshaw to James Polk, 13 Sept. 1845, *Correspondence of James K Polk*, 10:229.

³⁶ Millard Fillmore to Daniel Webster, 10 Sept. 1851, Benjamin R. Curtis, ed., *A Memoir of Benjamin Robbins Curtis, LL.D.* (Boston: Little, Brown, and Co., 1879), 1:155.

³⁷ John P. Kennedy, *Memoirs of the Life of William Wirt* (Philadelphia: Lea and Blanchard, 1849), 2:153-55.

nominees were normally men whose political views were well known, the Senate could simply discuss them in closed session, if at all, and then vote.

The Senate refused to confirm eleven nominees during this period.³⁸ Eight of the eleven were appointed late in the administration of a president who was of a different party from the Senate majority, when senators could hope that a president of their own party would take office very soon. In December 1828, the lame duck president John Quincy Adams nominated John Crittenden to fill the seat vacated by the death of Robert Trimble, but the Jacksonian majority in the Senate took no action on the nomination, so the vacancy could be filled by Andrew Jackson when he took office in early 1829. In 1844 and 1845, outgoing president John Tyler was so unpopular with the Senate's Whig majority that the Senate refused to confirm four of his nominees. In the closing months of the Fillmore administration in 1852-53, the Democratic majority in the Senate turned down three of Fillmore's nominees, including one of their own colleagues, the North Carolina senator George Badger. These eight unsuccessful nominations were *all* the nominations made by a president in an election year when the Senate was controlled by the opposing party. By contrast, Senates controlled by the opposing party confirmed all three nominations made by presidents earlier in their terms—Robert Trimble (1826), James Moore Wayne (1835), and Benjamin Curtis (1851).

The remaining three rejected nominees were John Rutledge (1795) and Oliver Wolcott (1811), whose fates we have already seen, and George Woodward (1845-46), who was nominated by a Democratic president (Polk) but was nevertheless rejected by a Democratic-majority Senate because he was opposed by Simon Cameron, the Democratic senator from Woodward's home state of Pennsylvania, and by James Buchanan, Polk's secretary of state, who was also from Pennsylvania.

The justices sometimes tried to time their retirements to ensure the appointment of a like-minded successor. Of course, this was not always possible. The justices were a group of middle-aged and elderly men in an era when medicine could do little to prolong anyone's life. Like everyone else, they might fall ill or die without much advance notice. After only two years on the Court, for example, Robert Trimble died unexpectedly at the age of 52 of what was then called a bilious fever. James Wilson ended a distinguished career by suffering a stroke at 55 shortly after his release from debtors' prison, where he was sent when his speculations in land turned out poorly. Even when death or poor health did not come suddenly, the absence of any pension was a powerful reason not to retire for all but the most affluent justices. Henry Baldwin, for instance, died penniless in 1844 after fourteen unhappy years on the Court, during most of which he suffered from mental illness.³⁹ His obituary charitably emphasized his pre-judicial career, when,

³⁸ This figure includes negative votes as well as refusals to hold any vote until the Senate's session expired. The number of nominees refused by the Senate would be twelve if we include Roger Taney, whose initial nomination in January 1835 to succeed Gabriel Duvall was not voted upon by the Senate, which had an anti-Jacksonian majority. Jackson renominated Taney to succeed John Marshall as chief justice when the next Congress convened, at which time the Senate had a Jacksonian majority. The number would be thirteen if we also include Jeremiah Black, whom the Senate rejected in February 1861, during the waning days of the Buchanan administration, when several of the southern states had already seceded and thus no longer had senators.

³⁹ David N. Atkinson: *Leaving the Bench: Supreme Court Justices at the End* (Lawrence: University Press of Kansas, 1999), 32-33.

not yet “fevered with the malady which afflicted him some years afterwards, his mental faculties were in the full play of their mature strength.”⁴⁰ Had Baldwin wished to retire from the Court, he could not have afforded to.

But when justices were fortunate enough to be able to plan their resignations, one factor they considered was the party who would choose their replacements. In the summer of 1831, for instance, John Marshall was nearing his 76th birthday. His health was failing.⁴¹ He confided to Joseph Story that in deciding when to retire, he was considering the 1832 presidential election. “You know how much importance I attach to the character of the person who is to succeed me,” he reminded Story. “Calculate the influence which probabilities on that subject would have on my continuance in office.”⁴² Marshall’s meaning would have been clear to Story. He did not want Andrew Jackson, the incumbent president, to name his replacement, so he would retire only if Jackson were not reelected. As it turned out, Jackson won the 1832 election. Marshall died in office in 1835.

Story himself faced the same decision a few years later. When William Henry Harrison won the 1840 presidential election, Story was 61 years old. He had been on the Court for nearly thirty years. According to his son, Story would probably have retired during Harrison’s administration, but Harrison died only a month into his term as president. He was succeeded by Vice President John Tyler, “but Mr. Tyler’s views and wishes were quite different from those of General Harrison, and from the party which he was elected,” Story’s son recalled. To make matters worse, Tyler was reported to have vowed that if he could fill a vacancy on the Court, “no one should be appointed who was of the school of Story.”⁴³ Story hung on until the 1844 election, when he hoped Henry Clay would be the winner. “If Mr. Clay had been elected,” he told a friend soon after, “I had determined to resign my office as Judge, and to give him the appointment of my successor. How sadly I was disappointed by the results of the late election I need not say.”⁴⁴ From Story’s perspective, James Polk, the new president, was little better than Tyler. Like Marshall, Story would die in office before the next presidential election.

Even when justices did not admit to timing their resignations for political reasons, contemporaries often believed that they did. In William Cushing’s last years on the Court, Republicans alleged that he was clinging to office, despite “the failure of his powers, lest a Republican should succeed him.”⁴⁵ Gabriel Duvall was said to have delayed his departure from

⁴⁰ “The Late Mr. Justice Baldwin,” *Pennsylvania Law Journal* 6 (1846): 4.

⁴¹ Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Co., 1996), 512-13.

⁴² John Marshall to Joseph Story, 26 June 1831, Herbert A. Johnson, ed., *The Papers of John Marshall* (Chapel Hill: University of North Carolina Press, 1974-2006), 12:93.

⁴³ William Wetmore Story, ed., *Life and Letters of Joseph Story* (Boston: Charles C. Little and James Brown, 1851), 2:523.

⁴⁴ Joseph Story to Ezekiel Bacon, 12 Apr. 1845, *Life and Letters of Joseph Story*, 2:527.

⁴⁵ David Howell to James Madison, 26 Nov. 1810, *Founders Online*, <https://founders.archives.gov/documents/Madison/03-03-02-0033>.

the Court for several years, despite being so deaf that he could not hear a word of oral argument, until he was assured that Roger Taney would be his replacement.⁴⁶

But if party politics played a role in the selection of justices, so too did that elusive quality called “merit.” Each of the major political parties included a great many lawyers, but contemporaries would have considered the vast majority of them unqualified to serve on the Court. One had to have achieved a level of prominence—as a lawyer, a judge, or an elected official, and more likely in two or even all three of these categories—to be in the pool of plausible candidates. The 34 justices appointed before the Civil War were, on the whole, a distinguished group of people.

The early justice who enjoys the highest reputation today is John Marshall, the chief justice from 1801 to 1835. One can get a sense of Marshall’s renown simply by reading the titles of some of his recent biographies: “Definer of a Nation.” “The Man Who Made the Supreme Court.” “The Chief Justice Who Saved the Nation.” “The Great Chief Justice.” “The Heroic Age of the Supreme Court.”⁴⁷ Marshall’s public image was just as lofty a century ago, when the U.S. Senator-turned-historian Albert Beveridge won the Pulitzer Prize for his fawning four-volume biography of Marshall. “He appears to us as a gigantic figure looming, indistinctly, out of the mists of the past,” Beveridge gushed in his first volume. In the preface to volume three, the volume in which Marshall begins serving on the Court, Beveridge extolled his “great Constitutional opinions,” which “were nothing less than state papers and of the first rank.”⁴⁸

In Marshall’s own day, his legal skills were held in the same high esteem, although contemporary opinions of his statesmanship, like that of any public figure, could depend on the political party to which one belonged. The Virginia lawyer William Wirt called Marshall “a universal genius,” by which he meant that Marshall had “applied a powerful mind to the consideration of a great variety of subjects.” Marshall did not *look* impressive, Wirt conceded. He was “tall, meagre, emaciated; his muscles relaxed, and his joints so loosely connected, as not only to disqualify him, apparently, from any vigorous exertion of body, but to destroy every thing like elegance and harmony in his air and movement.” But Wirt thought Marshall “deserves to be considered as one of the most eloquent men in the world; if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp, until the hearer has received the conviction which the speaker intends.”⁴⁹ Another admirer was John Adams, the president who appointed Marshall, first as secretary of state and then as chief justice. Shortly before his death, Adams wrote Marshall a

⁴⁶ Artemus Ward, *Deciding to Leave: The Politics of Retirement from the United States Supreme Court* (Albany: State Univ. of New York Press, 2003), 60. Andrew Jackson did nominate Taney to replace Duvall, but the Senate adjourned before voting on the nomination. Marshall died soon after, and Jackson nominated Taney a second time to replace Marshall. This time he was confirmed by the Senate. Duvall would be succeeded by Philip Barbour.

⁴⁷ Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Co., 1996); Richard Brookhiser, *John Marshall: The Man Who Made the Supreme Court* (New York: Basic Books, 2018); Harlow Giles Unger, *John Marshall: The Chief Justice Who Saved the Nation* (Boston: Da Capo Press, 2014); Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996); R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State Univ. Press, 2002).

⁴⁸ Albert J. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin, 1916-1919), 1:v, 3:v.

⁴⁹ William Wirt, *The Letters of the British Spy* (Richmond: Samuel Pleasants, Jr., 1803), 20-22.

letter in which he compared Marshall with four leading English judges of the 17th and 18th centuries, judges who were then familiar names to American lawyers. “There is no part of my life that I look back upon with more pleasure, than the short time I spent with you,” Adams told Marshall. “And it is the pride of my life that I have given to this nation a Chief Justice equal to Coke or Hale, Holt or Mansfield.”⁵⁰

Even Thomas Jefferson, who detested Marshall and considered him the very opposite of a statesman, acknowledged Marshall’s skill as a judge and a lawyer. Jefferson complained of “the rancorous hatred which Marshal[l] bears to the Government of his country,” and “the cunning and sophistry within which he is able to enshroud himself.” He accused Marshall of “twistifications in the case of Marbury” and other cases, which “shew how dexterously he can reconcile law to his personal biasses [sic].”⁵¹ But Jefferson could recognize a quality opponent. “When conversing with Marshall, I never admit anything,” he told Joseph Story. “So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry, you must never give him an affirmative answer, or you will be forced to grant his conclusion. Why, if he were to ask me whether it were daylight or not, I’d reply, ‘Sir, I don’t know, I can’t tell.’”⁵²

Of course, there were other skilled lawyers of Marshall’s era whom no one remembers today. His present-day fame rests in part on his personal qualities, but even more on three facts about his environment. First, and most obviously, Marshall was the chief justice for 34 of the Court’s first 45 years. Because the Court decided few cases before he arrived that would prove to be important for later generations, Marshall would eventually be associated with virtually all the Court’s foundational cases.

Second, on the primary constitutional issue the Court confronted during Marshall’s tenure—the relative powers of the federal government and the states—Marshall tended to side with the federal government, which turned out to be the winning position in the long run. We will look at these cases in the next chapter, but for now it is enough to note that Marshall’s opinions in these controversies helped create the vision of the United States that is by and large taken for granted today, according to which the federal government’s regulatory power far exceeds that of the states. For most modern readers, Marshall’s side of the debate seems the more sensible one, because it is much closer to our world than the state-oriented arguments of his opponents.

Third, and perhaps most important, Marshall joined the Court near the end of an important transition in the way the Court announced its opinions. In the Court’s earliest years, the justices followed English practice in announcing their opinions “seriatim.” Each justice would express an opinion in each case, even when all the justices agreed on the outcome. After Oliver Ellsworth

⁵⁰ John Adams to John Marshall, 17 Aug. 1825, *Founders Online*, <https://founders.archives.gov/documents/Adams/99-02-02-7989>.

⁵¹ Thomas Jefferson to James Madison, 25 May 1810, *Founders Online*, <https://founders.archives.gov/documents/Madison/03-02-02-0435>.

⁵² This quotation comes from the law school notes of Rutherford Hayes, who heard Story quote Jefferson when he was one of Story’s students at Harvard Law School in 1843. Charles Richard Williams, ed., *Diary and Letters of Rutherford Birchard Hayes* (Columbus: Ohio State Archaeological and Historical Society, 1922), 1:116. Jefferson had died seventeen years earlier, so it is possible that Story had embellished the quotation in his memory.

became chief justice in 1796, the Court gradually began to adopt the practice it has followed ever since, in which a single opinion, designated as an opinion of the Court, speaks for the majority or all of the justices. There were still some *seriatim* opinions under Ellsworth's leadership, but by 1800 the Court usually issued a single opinion, often delivered by Ellsworth himself. Indeed, in one case that year, when, in Ellsworth's absence, the Court reverted to its earlier *seriatim* practice, Justice Samuel Chase was caught unprepared. "The Judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by the president [that is, the chief justice]," Chase apologized, "and therefore, I have not prepared a formal argument on the occasion."⁵³

The practice of speaking with a single voice continued to be the norm after Marshall became chief justice. Under Marshall, in each case the Court typically published just one opinion, designated as the opinion of the Court. Justices who disagreed normally did not publicize their disagreement. They published dissenting opinions only in the cases they considered the most important. As Smith Thompson prefaced one such dissent, "it is with some reluctance, and very considerable diffidence, that I have brought myself publicly to dissent from the opinion of the Court in this case; and did it not involve an important constitutional question relating to the relative powers of the general and State governments, I should silently acquiesce in the judgment of the Court, although my own opinion might not accord with theirs."⁵⁴

A greatly disproportionate number of the Court's opinions were delivered by Marshall himself. During Marshall's tenure, he delivered 547 opinions of the Court. All the other justices combined delivered 574. The skew was greatest before 1811, when Marshall out-opined all his colleagues together by 133 to 17. Once Story joined the Court in 1812, the numbers grew less disproportionate, largely because Story himself delivered many of the Court's opinions. But Marshall still had the greatest share, typically between a third and a half of the opinions of the Court each year.⁵⁵ There does not appear to be any surviving documentary evidence of the original authorship of most Marshall Court opinions, but this tally is so lopsided that virtually all scholars have concluded either that many of the opinions delivered by Marshall were actually written by other justices or, at the very least, that even if Marshall was the Court's principal writer, the opinions that bear his name reflect not merely his own work but rather that of the justices collectively.

The only justice on the Marshall Court who wrote a significant number of dissents was William Johnson of South Carolina, whose time on the Court, from 1804 to 1834, was nearly coterminous with Marshall's. Our view of the Court's abandonment of *seriatim* opinions and its practice of normally not publishing dissenting opinions has been heavily influenced by correspondence from the early 1820s between Johnson and Thomas Jefferson, both of whom were fierce political opponents of Marshall.⁵⁶ At the time, Jefferson was even more exasperated than usual with

⁵³ *Bas v. Tingy*, 4 U.S. 37, 43 (1800).

⁵⁴ *Brown v. Maryland*, 25 U.S. 419, 449-50 (1829).

⁵⁵ Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership," *University of Pittsburgh Law Review* 36 (1975): 800.

⁵⁶ Mark R. Killenbeck, "No Bed of Roses: William Johnson, Thomas Jefferson and the Supreme Court, 1822-23," *Journal of Supreme Court History* 37 (2012): 95-124.

Marshall and with the Court. In the preceding few years, the Court had issued several important opinions buttressing the power of the federal government and restricting that of the states, in cases such as *McCulloch v. Maryland* (1819) and *Cohens v. Virginia* (1821). In a letter to Johnson, Jefferson vented his anger at Marshall for, among other things, the abandonment of seriatim opinions. In Jefferson's view, the Court displayed to the public a false unanimity in the opinions Jefferson so strongly resented. The publication of a single opinion "is certainly convenient, for the lazy the modest & the incompetent," Jefferson complained. "It saves them the trouble of developing their opinion methodically, and even of making up an opinion at all." Jefferson thought the Court should return to the seriatim practice, which "shews whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself instead of pinning it on another's sleeve."⁵⁷

Johnson enthusiastically agreed. He recalled that "while I was on our State-bench I was accustomed to deliver my seriatim Opinions in our appellate Court." When he was appointed to the U.S. Supreme Court, however, he was "surprised to find our Chief Justice in the Supreme Court delivering all the Opinions in Cases in which he sat, even, in some Instances when contrary to his own Judgment & vote." Johnson was told that this was because "he is willing to take the Trouble, & it is a Mark of Respect to him. I soon however found out the real Cause." In truth, Johnson told Jefferson, it was a sign of the weakness of the other justices: "Cushing was incompetent, Chase could not be thought to think or write—Patterson [sic] was a slow man & willingly declined the Trouble, & the other two Judges you know are commonly estimated as one Judge." (This last comment was a dig at Bushrod Washington, who tended to vote the same way as Marshall.) When Johnson published his first dissenting opinion, he recalled, "during the rest of the Session I heard nothing but Lectures on the Indecency of Judges cutting at each other." He stopped publishing dissents for a while. Eventually "I got them to adopt the Course they now pursue, which is to appoint some one to deliver the Opinion of the Majority, but leave it to the Discretion of the rest of the Judges to record their Opinions or not." Johnson explained that he would be happy to return to seriatim opinions "if it would compel incompetent Men to quit the Bench," but he feared that the only result would be that the more enterprising justices would ghost-write opinions for the others: "Others would write their Opinions merely to command their Votes."⁵⁸

Jefferson returned to this theme a few months later. "The very idea of cooking up opinions in Conclave begets suspicion that something passes which fears the public ear," he worried. By making the Court look bad, the single-opinion practice might "produce at some time abridgement of tenure, facility of removal, or some other modification" to the Court's independence. If each justice would instead declare "his opinion seriatim and publicly," the public would be able to see

⁵⁷ Thomas Jefferson to William Johnson, 27 Oct. 1822, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/98-01-02-3118>.

⁵⁸ William Johnson to Thomas Jefferson, 10 Dec. 1822, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/98-01-02-3203>.

that “he uses his own judgement independently and unbiassed by party views, and personal favor or disfavor.”⁵⁹

Historians have sometimes followed Jefferson and Johnson in crediting (or blaming, depending on one’s view) John Marshall for causing the Court to switch from announcing *seriatim* opinions to issuing a single opinion for the Court. But in Jefferson and Johnson’s eagerness to criticize Marshall, they overstated Marshall’s role in changing the Court’s practice. The Court had gone most of the way toward abandoning *seriatim* opinions before Marshall became chief justice. And the custom of not publishing separate opinions was probably not due to any browbeating by Marshall. He had no authority over the other justices, all of whom had life tenure just like he did. If they had wanted to write separately, they could have, with no negative consequences. Nor was it likely due to the incompetence of the other justices, who were all accomplished lawyers before they joined the Court. As justices they were older men, but the quality of their work could hardly have dropped off so quickly. Marshall’s colleagues, other than Johnson, must have agreed with him that the Court should speak with a single voice and that the voice should normally be Marshall’s.

The Court’s published opinions are its only visible output. When we look back at the Marshall Court’s cases, we see a great many opinions under Marshall’s name and much fewer under the name of anyone else. It is easy to be fooled into thinking Marshall was doing nearly all the work, because today an opinion bearing a justice’s name is understood to have been the work of that justice. Marshall’s reputation hardly needs inflating, but it has been artificially inflated by his role as the Court’s most frequent spokesman.

This same practice has artificially *deflated* the reputations of some of Marshall’s colleagues. Justices are known primarily through the opinions that bear their names, so we know little about the justices who delivered few of the Court’s opinions during Marshall’s tenure. Gabriel Duvall, who was Marshall’s colleague for 23 years, is credited with only twelve opinions of the Court during his entire career. Thomas Todd has similar statistics: nineteen years with only fourteen opinions. Bushrod Washington, Henry Brockholst Livingston, and Smith Thompson are likewise obscure figures today, despite long tenures on the Court, because they are credited with few opinions by today’s standards. As Thompson’s biographer discovered, “upon learning that the author is engaged in writing a biography of Smith Thompson, the usual response of listeners, in varying degrees of politeness, is, ‘Who is Smith Thompson?’”⁶⁰ Had justices like these lived in an era with different opinion-writing (or opinion-crediting) practices, we would know much more about them.⁶¹

⁵⁹ Thomas Jefferson to William Johnson, 4 Mar. 1823, *Founders Online*, <https://founders.archives.gov/documents/Jefferson/98-01-02-3373>.

⁶⁰ Donald Malcolm Roper, *Mr. Justice Thompson and the Constitution* (New York: Garland Publishing, 1987), iii.

⁶¹ For a lighthearted debate over which justice was the least significant, a debate founded on the erroneous premise that the contributions of 19th-century justices can be evaluated by counting the number of the opinions credited to them, see David P. Currie, “The Most Insignificant Justice: A Preliminary Inquiry,” *University of Chicago Law Review* 50 (1983): 466-80 (choosing Duvall); Frank H. Easterbrook, “The Most Insignificant Justice: Further Evidence,” *University of Chicago Law Review* 50 (1983): 481-503 (choosing Todd).

The meager published output of some of the early justices could make them mysterious figures even to contemporaries. “Little seems to be known of his powers as an advocate or a lawyer,” one observer said of Bushrod Washington after Washington had been on the Court for nearly two decades, “and that little does not tend to place him much beyond the grade of mediocrity.”⁶² Yet those who knew Washington thought otherwise. “Nothing about him indicates greatness; he converses with simplicity and frankness,” Joseph Story remarked in 1808, a few years before he joined Washington on the Court. “But he is highly esteemed as a profound lawyer, and I believe not without reason. His written opinions are composed with ability, and on the bench he exhibits great promptitude and firmness in decision.” Story offered a conclusion that may have applied just as well to several of the more obscure justices: “It requires intimacy to value him as he deserves.”⁶³

It says a great deal about the fluky nature of appointments to the Supreme Court that Marshall, talented as he was, joined the Court only because he happened to be in the right place at the right time. Chief Justice Oliver Ellsworth resigned due to his poor health in late 1800, when John Adams had only a few more months as president. Adams offered the position to John Jay, the former chief justice, who was now the governor of New York. Jay declined in January 1801. If Adams waited much longer, Thomas Jefferson would be the one to make the appointment. Indeed, there was an even greater reason to hurry, because the bill that would become the Judiciary Act of 1801 was making its way through Congress. The Judiciary Act would reduce the number of seats on the Court from six to five, so if Adams were to appoint a new justice he would have to get the nominee confirmed by the Senate before the Judiciary Act took effect. John Marshall, as secretary of state, was the person who received Jay’s letter declining the nomination. As Marshall later recalled, “when I waited on the President with Mr. Jay[’]s letter declining the appointment he said thoughtfully ‘Who shall I nominate now?’” Marshall suggested William Paterson, who had served on the Court since 1793 and was second in seniority to William Cushing, who had already turned down the opportunity to be chief justice a few years earlier, when Ellsworth had taken the position. But Adams “said in a decided tone ‘I shall not nominate him.’ After a moment[’]s hesitation he said ‘I believe I must nominate you.’ I had never even heard myself named for the office and had not even thought of it.”⁶⁴ Marshall may well have been genuinely surprised, because his appointment would put a second Virginian on the Court. (Adams had appointed Bushrod Washington two years before. This would be the first time there were two justices from the same state. It would not happen again until 1864, when Salmon Chase joined his fellow Ohioan Noah Swayne on the Court, at a time when the southern states had seceded from the Union.) The lame-duck Federalist Senate confirmed Marshall in late January, only two weeks before Congress enacted the Judiciary Act. To be sure, Marshall was not in the same room as Adams by chance. He was secretary of state because he had already excelled as a Richmond lawyer, as a member of Congress, and as a diplomat, and

⁶² “Letters from Washington,” *National Register*, 30 May 1818, 338.

⁶³ Joseph Story to Samuel P.P. Fay, 25 Feb. 1808, *Life and Letters of Joseph Story*, 1:167.

⁶⁴ John Stokes Adams, ed., *An Autobiographical Sketch by John Marshall* (Ann Arbor: Univ. of Michigan Press, 1937), 30.

because he belonged to the same party as Adams. But it took an unlikely combination of events for Marshall to be appointed to the position he would come to personify.

Among Marshall's contemporaries on the Court, only Joseph Story has received comparable respect, both then and now.⁶⁵ Story served for nearly 34 years, from 1812 to his death in 1845. He was, by a wide margin, the most erudite American judge of his era. He was also the most industrious. He wrote more opinions on the Marshall Court than anyone but Marshall. While on the Court he taught each year at Harvard Law School, authored eleven major treatises on various areas of law, and published a variety of shorter works as well. Story did not wear his erudition lightly. His opinions and treatises were stuffed with Latin phrases and citations to English authorities. As John Chipman Gray, one of his successors at Harvard, ambivalently remarked a half-century after Story's death, "he was a man of great learning, and of reputation for learning greater even than the learning itself."⁶⁶

Story was nominally a Republican, appointed, as we have seen, by James Madison only after Madison's first three choices either declined the position or were rejected by the Senate. As a justice, however, he tended to take the same nationalist positions as Marshall, to the dismay of the Republicans and their Jacksonian successors. Jackson himself called Story "the most dangerous man in America."⁶⁷ As with Marshall, Story's opinions expressed a view of the federal government's authority much closer to the conventional view today, so his opinion have aged better than those of his more state-oriented colleagues.

Of the other justices appointed before the Civil War, the only one who is a familiar name today is Roger Taney, Marshall's successor as chief justice.⁶⁸ Taney served nearly as long as Marshall and Story, until his death in 1864, during the Civil War. Today Taney is mostly remembered for the infamous *Dred Scott* decision in 1857, but had he left the Court before then, he would be best known for opinions that often, but not always, turned away from the nationalizing trend of the Marshall years and reasserted the authority of state governments. The Court's movement in this direction was not due to Taney alone. He was just one of the six justices whom Andrew Jackson had the good fortune to appoint. Jackson's likeminded successor Martin Van Buren appointed two more, so during nearly all of Taney's tenure the Court had a solid Jacksonian Democratic majority.

Some of the other pre-Civil War justices are remembered primarily for things they did other than sit on the Supreme Court. John Jay, the first chief justice, was a diplomat, the governor of New York, and the author of some of the *Federalist* papers. James Wilson, another of the original six justices, was a signer of the Declaration of Independence, a participant in the Constitutional Convention, and one of the country's first law professors at the school that would later be the University of Pennsylvania. Benjamin Curtis, a justice in the 1850s, may be better known for his

⁶⁵ There are a few biographies of Story, the best of which is R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: Univ. of North Carolina Press, 1985).

⁶⁶ John Chipman Gray, *The Nature and Sources of the Law* (New York: Columbia Univ. Press, 1909), 239.

⁶⁷ *Life and Letters of Joseph Story*, 2:117.

⁶⁸ A biography of Taney is long overdue. The standard work is still Carl Brent Swisher, *Roger B. Taney* (New York: Macmillan, 1935).

work as a lawyer, including his successful defense of Andrew Johnson during Johnson's impeachment trial. Paterson, New Jersey, is named for William Paterson, but it was named before Paterson joined the Court, while he was still the state's governor. If anyone remembers Bushrod Washington, it is likely to be for being George Washington's nephew or merely for his unusual first name, which was his mother's family name.

Most of the 34 justices appointed before the Civil War are obscure figures today. Scarcely anyone remembers Samuel Nelson or John Catron, even though each spent 28 years on the Court. Justices who served for shorter periods, like Alfred Moore or Levi Woodbury, are even less known. There are no biographies of long-tenured justices like Thomas Todd, Gabriel Duvall, or Henry Brockholst Livingston. Apart from Marshall, Story, and Taney, the justices of the early Court have been largely forgotten.

II

Once the Court's opinions were announced, how did they become known outside the courtroom? The publication of court opinions in the early United States was a private commercial enterprise. Case reporters were literally reporters; they were lawyers who sat in court and took notes while the judges delivered their opinions orally from the bench. If the reporter was absent from court one day, opinions announced that day might never be published. If the reporter took poor notes, a published opinion might not accurately reflect what the judge had said. The reporter was not a government employee. He was an entrepreneur who hoped to earn money from sales of the opinions he reported.

Case reporting in the early Supreme Court was no different.⁶⁹ While the Court sat in Philadelphia in the 1790s, some of its opinions were collected and published by a young local lawyer named Alexander Dallas, in volumes that also included decisions of the Pennsylvania courts. Later in life, Dallas would have a distinguished career that culminated in two years as secretary of the treasury in the Madison administration, but his stint as a case reporter was less successful. He failed to report many cases. In the 1820s, the Philadelphia lawyer Peter DuPonceau recalled a significant admiralty case the Court decided in the 1790s that had never been reported. "I heard the argument & the decision, but it is forgotten," DuPonceau lamented. "There was no reporter at that day, & all who were present at the argument are, I believe, dead, except myself."⁷⁰ The cases Dallas did report sometimes included inaccurate accounts of justices' opinions and the arguments of counsel. Some mistakes were perhaps inevitable, because Dallas had to scribble notes as justices and lawyers were speaking, but the problem was made worse by the fact that Dallas was an advocate in some of the cases he was reporting. As one reviewer of his volumes noted, "he was necessarily therefore the hero of his own tale," who had to "resist the natural impulse to swell his own arguments, and contract those of his antagonists."⁷¹ And even when Dallas

⁶⁹ Craig Joyce, "The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy," *Michigan Law Review* 83 (1985): 1291-1391.

⁷⁰ Peter DuPonceau to Joseph Story, 19 July 1824, Story Papers, reel 1.

⁷¹ Book review, *Monthly Anthology, and Boston Review*, 1 Mar. 1808, at 160.

reported cases accurately, commercial considerations forced him to wait several years to accumulate enough cases to justify publication. The most important of the Court's early cases, *Chisholm v. Georgia*, was decided in 1793, but Dallas did not publish the justices' opinions until volume 2 of his reports appeared in 1798. By that time, *Chisholm* had been superseded by the Eleventh Amendment. Dallas's account of *Chisholm* was "no use as a precedent," a reviewer admitted, "yet it will afford matter for interesting observation in the judicial history of the United States."⁷² For all the flaws of Dallas's reports, however, they were the only reports of Supreme Court decisions in the 1790s, so lawyers must have been grateful to have them. They were better than nothing.

Dallas stayed behind in Philadelphia when the Court moved to Washington along with the rest of the federal government. The task of reporting the Court's decisions was taken up by William Cranch, who had recently been appointed by his uncle, John Adams, as circuit judge for the District of Columbia. (Cranch was "to me very much like one of my sons," Adams explained.⁷³) Cranch would remain a circuit judge for a remarkable 54 years, until his death in 1855. As a reporter of Supreme Court decisions, his job was made much easier by the Court's new practice, apparently instituted by John Marshall when he became chief justice, of producing written opinions in the most important cases. In these cases, one reviewer observed, Cranch's task became "merely that of a copyist."⁷⁴ Cranch was succeeded in 1815 by Henry Wheaton, a lawyer and judge from New York, who may be best remembered today for his later service as a diplomat in Europe and for his treatise on international law, which became the standard work in the field for much of the 19th century. Wheaton, like Cranch, benefited from the Court's practice of writing opinions rather than merely delivering them orally. "The duty of a reporter was formerly much more arduous and responsible, than it now is," reflected a reviewer of Wheaton's first volume of reports. "He was obliged to catch the words, as they fell from the lips of the judges, and to transfer them to his page." Under these circumstances, "it was not strange, that he should often err, and that many of the limitations and restrictions which accompanied the opinion should be omitted in the report." But opportunities for error had become much fewer. "Of late years," the reviewer continued, "the practice has been for the judges themselves, upon questions of any importance, to reduce their opinions to writing. Very little is left for the reporter, but to give a clear statement of the facts, and an accurate and faithful account of the arguments of counsel."⁷⁵

Case reporting had become simpler, but it was still a private enterprise in which the reporter earned income only from book sales, which gave rise to the perennial problem of delay. Even the most industrious reporter could not publish a volume until he found a publisher who thought the venture would turn a profit. But there was not much of a market for Supreme Court decisions in the early 19th century. "Law Reports can have but a limited circulation," John Marshall acknowledged. "They rarely gain admission into the libraries of other than professional gentlemen." And most lawyers found it more useful to have volumes of state court cases than

⁷² Book review, *American Review, and Literary Journal* 2 (1802): 27.

⁷³ John Adams to Charles Carroll, 10 Dec. 1794, Cranch Papers, box 2.

⁷⁴ "Review," *The Port-Folio* 4 (1804): 386.

⁷⁵ Book review, *North American Review and Miscellaneous Journal*, May 1817, at 113.

volumes of cases decided by the U.S. Supreme Court. Marshall was resigned to the fact that “only a few of those who practise in the courts of the United States, or in great commercial cities, will often require them.”⁷⁶ As Daniel Webster put it, despite the inherent interest of many of the Court’s opinions, “the number of law libraries, which contain a complete set of the Reports of the cases in the Supreme Court of the United States, is comparatively small.”⁷⁷

Because of this concern, Marshall and Story repeatedly asked Congress to provide compensation for the Court’s reporter. This effort bore fruit in 1817, when the job became a salaried position.⁷⁸ The former problems associated with reporting the Court’s cases “have been entirely avoided,” one happy lawyer remarked, “by the official station of the reporter,” who no longer had to worry about finding enough customers to make reporting worthwhile.⁷⁹ For many years, however, it would still be a part-time position. When Henry Wheaton left to become a diplomat in Denmark, the Maine lawyer Simon Greenleaf considered replacing him as reporter. Greenleaf was already the reporter for the Maine Supreme Court, while maintaining his law practice, and, as he explained to Story, he anticipated that he would “retain my practice in the U. States courts & perhaps in the Sup. Jud. Court of this state … & at the same time discharge that of Reporter in the Sup. Ct. of the U. States.” He expected that the job “must be much less laborious & more delightful than the drudgery to which a state reporter must submit.”⁸⁰ Greenleaf did not get the job—it went instead to the Philadelphia lawyer Richard Peters—but a few years later he would become one of the first professors at Harvard Law School. In 1843, when Benjamin Howard took over from Peters, he inserted in his first volume an advertisement for “his professional services, in arguing causes before the Supreme Court.” As Howard explained, he was already going to be in the courtroom each day, so clients could be sure that their cases would not be overlooked. “Cases are often brought up from distant courts,” Howard advised, “and from the uncertainty of the time at which they may be called, as well as the small amount in controversy, it is inconvenient or impossible for the counsel who argued them below to follow them. The daily presence of the Reporter in court will ensure his attention to any cases that may be confided to him.”⁸¹

Once the Court’s reporter was paid by the government, the reporting of the Court’s opinions became routine and dependable. In 1874, the government would take over the role of publisher as well. It no longer mattered so much who the reporter was, a fact that would be acknowledged when the reporter’s name was taken off the covers of the volumes. Early 19th-century lawyers cited the volumes of reports with names like “2 Cranch” for Cranch’s second volume or “3 Wheaton” for Wheaton’s third. After 1874, they stopped using the reporter’s name. William Otto’s first volume as the Court’s reporter in 1875 was not called “1 Otto.” It was “91 U.S.,” meaning the 91st volume of reports since Alexander Dallas had published his first volume back in 1790. The task of reporting the Court’s cases still required proofreading, proposing

⁷⁶ John Marshall to Dudley Chase, 7 Feb. 1817, *Papers of John Marshall*, 8:148.

⁷⁷ Daniel Webster, Book review, *North American Review and Miscellaneous Journal*, Dec. 1818, at 69.

⁷⁸ 3 Stat. 376 (1817).

⁷⁹ Book review, *The Analectic Magazine*, June 1819, 446.

⁸⁰ Simon Greenleaf to Joseph Story, 19 Oct. 1826, Story Papers, reel 1.

⁸¹ 42 U.S. v (1843).

corrections, and preparing brief summaries of the Court's opinions, but it became an anonymous job conducted behind the scenes. Everyone who read Supreme Court opinions in the 1790s knew Alexander Dallas's name. Today, only the very closest observers of the Court could identify the Court's reporter.

III

Until the late 19th century, the justices sat in the nation's capital as the Supreme Court for only a couple of months each year. They spent most of the year riding around the country from city to city, conducting trials and hearing appeals as circuit judges.

It was obvious right away that riding circuit was a crushing obligation, requiring extensive travel under difficult conditions. John Blair complained in July 1790, after only a few months on the job, that his time was "constantly employed in riding."⁸² John Jay groused that riding circuit "takes me from my Family half the Year, and obliges me to pass too considerable a part of my Time, on the Road, in Lodging Houses, & Inns."⁸³ Most of the justices traveled alone, leaving their wives and children at home, but William Cushing was often accompanied by his wife Hannah. "We are traveling machines," Hannah Cushing told one of her relatives, with "no abiding place in every sense of the word."⁸⁴

The justices assigned to the southern circuit had the worst of it, because of the poor roads, the great distances between cities, and the meager accommodations along the way. "I suffered very much the first night, having to sleep in a room with five People and a bed fellow of the wrong sort," James Iredell told his wife in 1791.⁸⁵ Iredell was traveling through Salisbury, North Carolina, on his way to hold court in Augusta, Georgia. On another trip he reported from Richmond that "the town was so full that for three or four nights I was obliged to lodge in a room where there were three other beds."⁸⁶ On one journey to Savannah, Iredell found that the bridges across a swamp had all been washed away. "We got through the swamp with some difficulty, having in some places to plunge through very deep holes where the bridges had been," he explained. But the water soon grew too deep to continue, and Iredell had to turn back. The court session in Savannah had to be cancelled.⁸⁷ The constant travel wore on Iredell. "It is impossible I can lead this life much longer," he lamented. "To lead a life of perpetual travelling, and almost a continual absence from home, is a very severe lot."⁸⁸

Iredell repeatedly complained to his colleagues that his travel burden was greater than theirs. "I will venture to say no Judge can conscientiously undertake to ride the Southern Circuit constantly, and perform the other parts of his duty," he grumbled in a 1791 letter to Jay, Cushing,

⁸² John Blair to John Jay, 5 Aug. 1790, *DHSC*, 2:84.

⁸³ John Jay to Catharine Ridley, 1 Feb. 1791, *DHSC*, 2:126.

⁸⁴ Hannah Cushing to a relative, Jan. 1792, *DHSC*, 2:250 n.2.

⁸⁵ James Iredell to Hannah Iredell, 2 Oct. 1791, *DHSC*, 2:212.

⁸⁶ James Iredell to Hannah Iredell, 27 Nov. 1795, *DHSC*, 3:82.

⁸⁷ James Iredell to Hannah Iredell, 10 Apr. 1798, *DHSC*, 3:245.

⁸⁸ James Iredell to Hannah Iredell, 11 Mar. 1796, *DHSC*, 3:94.

and Wilson. “Besides the danger his health must be exposed to, it is not conceivable that accidents will not often happen to occasion a disappointment of attendance at the Courts. I rode upon the last Circuit 1900 miles; the distance from here and back again is 1800. Can any Man have a probable chance of going that distance twice a year, and attending at particular places punctually on particular days?”⁸⁹ Jay acknowledged that “your Share of the Task has hitherto been more than in due proportion,” but he did nothing about the inequity.⁹⁰ The following year, Iredell proposed rotating the circuits among the justices, to even out the workload. “I can no longer undertake voluntarily so very unequal a proportion of duty,” he complained.⁹¹ Again, Jay took no action. Rotating the circuits would have defeated one of the main purposes of the system—to ensure that a justice who decided cases in any given region of the country was a resident of that region who was familiar with local law. Perhaps more importantly, Jay and the other justices from the northern and central states could not have been eager to ride the southern circuit themselves. Iredell then turned to Congress, where he found success. Congress enacted a statute mandating that no justice, without his consent, would have to ride any given circuit until all the other justices had ridden that circuit.⁹² The justices further evened the burden by reaching an agreement among themselves to each give \$100 to whoever was assigned to the southern circuit, a meaningful sum at a time when the justices’ annual salary was just \$3,500 (\$4,000 for the chief justice).⁹³

Circuit-riding was hard enough to make some justices quit and to cause other lawyers to decline appointments to the Court. Robert Harrison, one of George Washington’s first six appointees, explained to Washington that he could not accept the position because “the duties required from a Judge of the Supreme Court would be extremely difficult & burthensome, even to a Man of the most active comprehensive mind; and vigorous frame.” Harrison was already in poor health. If he became a justice, Harrison worried, he would risk “the loss of my health, and sacrifice a very large portion of my private and domestic happiness.”⁹⁴ John Rutledge left the Court after only a year to become chief justice of the South Carolina Court of Common Pleas, in large part because of all the travel.⁹⁵ His replacement, Thomas Johnson, quit even sooner. Johnson apologized to Washington that “the Office and the Man do not fit. I cannot resolve to spend six Months in the Year of the few I may have left from my Family, on Roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed: My Time of Life Temper and other Circumstances forbid it.”⁹⁶ John Jay would have resigned in 1792 had he won New York’s gubernatorial election. He did resign in 1795 to become governor when he won that year’s election.⁹⁷ When his term as governor ended, Jay declined reappointment as chief justice because of “the fatigues incident to the office.”⁹⁸ John Blair of Virginia left after five and a half years,

⁸⁹ James Iredell to John Jay, William Cushing, and James Wilson, 11 Feb. 1791, *DHSC*, 2:132.

⁹⁰ John Jay to James Iredell, 16 Mar. 1791, *DHSC*, 2:154.

⁹¹ James Iredell to John Jay, 17 Jan. 1792, *DHSC*, 2:238.

⁹² 1 Stat. 253 (1792).

⁹³ James Iredell to James Wilson, 24 Nov. 1794, *DHSC*, 2:498; Blair to Cushing, 12 June 1795, *DHSC*, 3:61-62.

⁹⁴ Robert Harrison to George Washington, 27 Oct. 1789, *DHSC*, 1:36.

⁹⁵ James Haw, *John & Edward Rutledge of South Carolina* (Athens: University of Georgia Press, 1997), 224.

⁹⁶ Thomas Johnson to Washington, 16 Jan. 1793, *DHSC*, 2:344.

⁹⁷ Walter Stahr, *John Jay: Founding Father* (New York: Hambleton and London, 2005), 283-89.

⁹⁸ John Jay to John Adams, 2 Jan. 1801, *DHSC*, 1:147.

Alfred Moore of North Carolina after less than four, both because their poor health would no longer permit the rigors of travel.⁹⁹ It was a grueling job.

The justices persistently lobbied the other two branches of government to improve their lot. In the fall of 1790, after only a few months in office, they wrote a collective letter to President Washington pleading to be relieved from their circuit obligations.¹⁰⁰ Attorney General Edmund Randolph proposed the same relief to Congress.¹⁰¹ Nothing happened. A couple of years later the justices tried to formulate a proposal to Congress in which each justice would give up \$500 of his salary to help pay for the appointment of full-time circuit judges.¹⁰² The plan apparently foundered when Jay expressed reluctance to participate, which Iredell attributed to Jay's expectation that he would soon leave the Court to become governor of New York.¹⁰³ The justices nevertheless combined to send another round of letters to Washington and to Congress in the summer of 1792, again urging them to put an end to circuit riding. "We really, Sir, find the burthens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms," the justices informed Washington. "We cannot reconcile ourselves to the idea of existing in exile from our families."¹⁰⁴ To Congress, the justices lamented having "to pass the greater part of their days on the road, and at Inns, and at a distance from their families." They added that "some of the present Judges do not enjoy health and strength of body sufficient to enable them to undergo the toilsome Journies through different climates and seasons, which they are called upon to undertake." They doubted "that any set of Judges however robust, would be able to support and punctually execute such severe duties for any length of time."¹⁰⁵

In response, Congress cut the burden of circuit riding in half. The Judiciary Act of 1793 required the attendance of only one justice, not two, at each session of the circuit courts.¹⁰⁶ The grateful justices thanked Congress for this measure, which "afforded them great relief, and enabled them to pass more time at home and in studies made necessary by their official duties."¹⁰⁷

The law did not otherwise change the composition of the circuit courts, so it gave rise to a new problem. Each circuit court now consisted of only two judges—one district judge and one Supreme Court justice—which allowed for the possibility of a tie vote. To resolve such deadlocks, Congress provided that in the event of a tie, the case would be held over until the next year, when a different justice would arrive to hold circuit court. If the vote was tied again, the view of the two justices would prevail over that of the district judge. But this tiebreaking method

⁹⁹ DHSC, 1:56; "A Sketch of the Life and Public Services of the Late Hon. Alfred Moore," *Literary and Scientific Repository, and Critical Review* 1 (1820): 6.

¹⁰⁰ Justices to George Washington, ca. 13 Sept. 1790, DHSC, 2:89-91. It is not known whether this letter was ever sent to Washington. DHSC, 2:92.

¹⁰¹ "Report of the Attorney-General to the House of Representatives," 31 Dec. 1790, DHSC, 4:134.

¹⁰² Thomas Johnson to James Iredell, 9 Mar. 1792, DHSC, 2:244.

¹⁰³ James Iredell to Thomas Johnson, 15 Mar. 1792, DHSC, 2:247; Jay to Iredell, 19 Mar. 1792, DHSC, 2:249.

¹⁰⁴ Justices to George Washington, 9 Aug. 1792, DHSC, 2:288.

¹⁰⁵ Justices to Congress, 9 Aug. 1792, DHSC, 2:290.

¹⁰⁶ 1 Stat. 333 (1793); Wythe Holt, "'The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects': The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793," *Buffalo Law Review* 36 (1987): 301-40.

¹⁰⁷ Justices to Congress, 18 Feb. 1794, DHSC, 2:443.

broke down in 1802, when Congress ended the rotation of circuits and reverted to the original system under which each justice rode the same circuit year after year.¹⁰⁸ The solution from 1802 onward was to give the Supreme Court jurisdiction to hear cases in which the two circuit judges were divided.¹⁰⁹

By the late 1790s, as the caseload grew, even this halved obligation became burdensome. The justices obtained relief for a short time when Congress enacted the Judiciary Act of 1801, which established full-time circuit judges to staff the circuit courts. As we saw in the last chapter, however, this reform was swiftly undone by party politics, when the outgoing Federalists seized the opportunity to appoint all the new circuit judges and the incoming Republicans retaliated by repealing the law. The Court went on as before, with justices who spent most of their time riding circuit.

For decades thereafter, the justices continued in their dual roles. As the country expanded westward, Congress added new circuits, and each time the Supreme Court grew larger to accommodate a new circuit-riding justice. The Court grew to seven justices in 1807 when Congress created a new seventh circuit for Kentucky, Tennessee, and Ohio.¹¹⁰ The new position was filled by Thomas Todd, the chief justice of the Kentucky Court of Appeals. The Court acquired an eighth and a ninth justice in 1837, when Congress created two new circuits to encompass Michigan, Indiana, Illinois, Missouri, Arkansas, Louisiana, Mississippi, and Alabama.¹¹¹ The new justices were John Catron, the former chief justice of Tennessee, and John McKinley, a senator from Alabama. The Court reached its peak size of ten justices in 1863, when Congress added a tenth circuit for California and Oregon.¹¹² Abraham Lincoln appointed Stephen Field, the chief justice of California. In the era of circuit-riding, the size of the Court was dictated by the number of circuits.

These expansions of the Court all took place when a single party held the presidency and controlled both houses of Congress. During periods of divided government, neither party would authorize the creation of a new seat on the Court to be filled by its opponent. The 1807 expansion occurred in Jefferson's second term, when his party had large majorities in both houses. The 1837 expansion took place on the last day of Andrew Jackson's presidency, when Jackson's Democratic party controlled both houses. The results of the 1836 election were in, and it was known that the Democrat Martin Van Buren would succeed Jackson and that the Democrats would retain their majorities in both houses. The 1863 expansion occurred during the Civil War, when, in the absence of the southern states, both houses of Congress had large majorities from Lincoln's Republican party.

Riding the new western circuits was even more onerous than riding the old southern circuit had been, because the distances were even greater and the transportation and accommodations even

¹⁰⁸ 2 Stat. 159 (1802).

¹⁰⁹ Jonathan R. Nash and Michael G. Collins, "The Certificate of Division and the Early Supreme Court," *Southern California Law Review* 94 (2021): 733-85.

¹¹⁰ 2 Stat. 420 (1807).

¹¹¹ 5 Stat. 176 (1837).

¹¹² 12 Stat. 794 (1863).

more rudimentary. John McKinley had the worst of it.¹¹³ His Ninth Circuit required him to hold court sessions in Little Rock, Arkansas, beginning on the fourth Monday of March; in Mobile, Alabama, beginning on the second Monday of April; in Jackson, Mississippi, beginning on the first Monday of May; in New Orleans beginning on the third Monday of May; and in Huntsville, Alabama, beginning on the first Monday of June. Then he had to make the trip all over again in October and November. In between, of course, he was a Supreme Court justice who had to hear cases in Washington, DC, between January and March. In 1838, after his first year on the job, McKinley estimated that he had traveled 10,000 miles during the preceding year, by boat, stagecoach, and horseback. And McKinley had never even made it to Little Rock, which was just too hard to reach in the time allotted.¹¹⁴

In 1842 McKinley petitioned Congress to change this system. He “found the business of the circuit greatly beyond the physical capacity of any one man to perform,” he explained. Once his fall circuit was complete, he had so little time “to reach Washington so as to avoid the ice in the Ohio river” that some years he could not visit his family. When the Supreme Court session ended, he could not get back to his circuit in time for the first session. “Is it proper that a judge should have no time allowed him for attending to his private concerns? no time for relaxation? no time for reading and study?”, McKinley asked in despair. “Is it just to the suitors in the ninth circuit to deprive them of the services of the judge, by requiring more of him than he can possibly perform?”¹¹⁵ Congress took pity on McKinley and reorganized the circuits to even out the workload.¹¹⁶

Now the duty of traveling through the undeveloped old southwest fell to the newest justice, Peter Daniel of Virginia, who hated it just as much as McKinley had.¹¹⁷ On his way to hold court in Little Rock in 1851, Daniel found himself stuck in tiny Napoleon, Arkansas, on the Mississippi River. “I reached this delepidated [sic] and most wretched of wretched place at twelve o'clock today,” he complained in a letter to his daughter. He had been on a steamboat scheduled to reach Napoleon a few days earlier, but the captain had stopped at every town along the way in the hope someone would pay him to transport freight, and then he had lingered two whole days in Memphis, causing Daniel to miss the mail boat that would have carried him to Little Rock. “This miserable place consists of a few slightly built wood houses, hastily erected no doubt under some scheme of speculation, and which are tumbling down without ever having been finished,” he told his daughter. “To give an idea of the condition of things, I will state that the best hotel in the place, is an old dismantled Steam Boat.” While he waited for another boat to Little Rock, Daniel was “serenaded by muschetos [mosquitos], who are not deterred from their attack [by] the motion of my fingers, on which they constantly fasten.” Even worse than the mosquitos were “clouds of what in this region is called the Buffalo Gnat; an insect so fierce & so insatiate, that it kills the horses & mules bleeding them to death.” Another slow journey to Little Rock a couple

¹¹³ McKinley’s travails are sympathetically described in Steven P. Brown, *John McKinley and the Antebellum Supreme Court: Circuit Riding in the Old Southwest* (Tuscaloosa: University of Alabama Press, 2012), 112-91.

¹¹⁴ S. Doc. No. 50, 25th Cong., 3rd Sess. (1839), 32, 39.

¹¹⁵ S. Doc. No. 99, 27th Cong., 2nd Sess. (1842), 2-3.

¹¹⁶ 5 Stat. 507 (1842).

¹¹⁷ John P. Frank, *Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860* (Cambridge: Harvard University Press, 1964), 275-84.

of years later took so long that “in the same time I might have been to Liverpool & half way back.” He had been riding all the while “on very small and unsafe boats; filthy too beyond description & crowded with rude dirty people, & with scarcely any thing eatable.”¹¹⁸

And that was just the waterborne portion of the trip. To get to the western rivers from Washington, Daniel first had to endure an arduous westward journey by stagecoach. This part of the trip got easier when the railroads were built, but it could still be an ordeal. In the early 1850s, Daniel had to take a train from Washington to Wheeling. The Baltimore & Ohio Railroad promised “to convey passengers from Washington or Baltimore to Wheeling in nineteen hours,” Daniel griped, but “the speed of the Cars was generally slow—stoppages frequent, and the trip of 19 hours *promised* proved to be of two nights and a day. During all this time the travellers were confined to the cars without sleep and without food.”¹¹⁹ Adding insult to injury, the justices had to pay for their own travel expenses, unlike members of Congress, who received travel allowances.

And that was just the travel. When the justices finally arrived and held circuit court in remote western towns, they had to work in conditions markedly inferior to those back east. Statute books and case reports were scarce. Local lawyers were often unskilled. John Catron had spent his legal career in Tennessee, so he was accustomed to practice in the west, but even Catron was aghast when he presided over his first circuit session in Frankfort, Kentucky. “The most important causes are heard & decided without reference to a single book, and any knowledge where the law is to be found,” he complained. The most highly regarded lawyers in Frankfort had reputations based on “Stump oratory,” Catron sneered. “Whether the Judge is right or wrong they have no knowledge.”¹²⁰

Riding circuit was much easier in the northeast, where the cities were larger and closer together, and where working conditions were nicer. “My circuit is not only not unpleasant to me,” Joseph Story admitted to his brother-in-law, “but it is greatly preferable to a second annual journey to Washington.”¹²¹ Story was from Massachusetts, and his circuit brought him to Boston twice a year, as well as cities in Maine, New Hampshire, and Rhode Island. While in Boston he even found time to teach at Harvard Law School each fall and spring.¹²² When Congress was considering another bill to put an end to circuit-riding, Story urged Daniel Webster, who was then the chair of the House Judiciary Committee, not to do so. “You know very well my own notion as to the Judges of the Supreme Court performing such duties. I am quite sure it is a great advantage to them in quickening their diligence,” he told Webster. “I am sure that I am a better

¹¹⁸ William D. Hoyt, Jr., “Justice Daniel in Arkansas, 1851 and 1853,” *Arkansas Historical Quarterly* 1 (1942): 160-62.

¹¹⁹ William D. Hoyt, Jr., “Travel to Cincinnati in 1853,” *Ohio State Archaeological and Historical Quarterly* 51 (1942): 63.

¹²⁰ John Catron to James Polk, 8 May 1837, *Correspondence of James K. Polk*, 4:116.

¹²¹ Joseph Story to Stephen White, 17 Feb. 1819, *Life and Letters of Joseph Story*, 1:327.

¹²² Daniel R. Coquillette and Bruce A. Kimball, *On the Battlefield of Merit: Harvard Law School, The First Century* (Cambridge: Harvard University Press, 2015), 157-88.

Judge for my circuit labors.”¹²³ That was easy for him to say, John McKinley or Peter Daniel might have pointed out. Story didn’t have to slog through Arkansas and Mississippi.

One complaint about the justices’ circuit obligations was that the travel occupied so much of their time. Another was that they had to review their own decisions when a case was appealed from a circuit court to the Supreme Court. “The disadvantages of such a system in practice can hardly be estimated, except by those who have had some experience in them,” Henry Brockholst Livingston observed. Livingston had just that experience—eleven years on the Court, reviewing his own circuit decisions and those of his colleagues. He was well aware of how hard it was to consider both sides of a legal question once he had already decided the question on circuit. “It is certainly desirable that judges of an appellate court should form no opinion in an inferior tribunal,” Livingston insisted, “or otherwise, the benefit of consultation [with the other justices], without any previous bias, will be in a great measure lost.”¹²⁴

This concern did not figure nearly as prominently in the debates over circuit-riding as the complaint that circuit-riding took up too much of the justices’ time, because the Court was actually quite willing to reverse decisions of its own members as circuit judges. Between 1801 and 1835, the Court heard 519 such cases and reversed in 211 of them—a remarkably high reversal rate of 40%. Even John Marshall and Joseph Story, the intellectual leaders of the Court during this period, had their decisions reversed 26% and 38% of the time respectively.¹²⁵ Because the Court’s custom during most of this period was normally not to write dissenting opinions, we don’t know how often the justices themselves personally agreed with the reversal of their own decisions. It did happen sometimes. As Justice John McLean noted in 1853, “there are some cases to be found, where a judge writes the opinion of the court reversing his own decision on the circuit.”¹²⁶ But lawyers had visible proof that the Court as a whole was not deferential to individual justices’ circuit court opinions. That must have relieved much of the profession’s anxiety about the fairness of the system.

Bills to end circuit-riding were repeatedly introduced in Congress in the first half of the 19th century.¹²⁷ There was a great amount of debate, but none of the bills was enacted. Proponents of reform emphasized the difficulty of travel and the drain on the justices’ time entailed by riding circuit. “I am not quite convinced that riding rapidly from one end of this country to the other is the best way to study law,” scoffed Gouverneur Morris. “I am inclined to believe that knowledge may be more conveniently acquired in the closet than in the high road.”¹²⁸ Alexander Hamilton observed that stationary circuit judges could better handle the burgeoning caseload of the circuit courts than itinerant justices. “The necessity of visiting, within a given time, the numerous parts of an extensive circuit, unavoidably rendered the sessions of each Court so short,” he noted, “that

¹²³ Joseph Story to Daniel Webster, 4 Jan. 1824, *Life and Letters of Joseph Story*, 1:435-36.

¹²⁴ *United States v. Jacobson*, 26 F. Cas. 567, 570 (C.C.D.N.Y. 1817).

¹²⁵ David Lynch, *The Role of Circuit Courts in the Formation of United States Law in the Early Republic* (Oxford: Hart Publishing, 2018), 196-97.

¹²⁶ Undated manuscript filed at the end of the papers for 1853, McLean Papers, reel 11.

¹²⁷ Joshua Glick, “On the Road: The Supreme Court and the History of Circuit Riding,” *Cardozo Law Review* 24 (2003): 1753-1843.

¹²⁸ *Annals of Congress* 11 (1802): 82.

where suits were in any degree multiplied, or intricate, there was not time to get through the business.”¹²⁹ In his annual message for 1816, President James Madison urged Congress to end circuit-riding and appoint full-time circuit judges for these reasons.¹³⁰ The opposition press was quick to note that Madison and his party had opposed the identical measure back in 1801, when the Federalists were the ones appointing the judges.¹³¹ But Madison could not get the bill through Congress, even when both houses were controlled by his own party. “The demagogues in Congress as well as in the state legislatures are clamorous for economy & the abolition of what they conceive to be useless & unnecessary offices,” lamented Justice Thomas Todd. “I therefore almost despond of any change in the Judiciary within any short period.”¹³²

Concern about the justices’ workload grew more intense as the Court developed a backlog of cases awaiting argument in the brief period each year when the justices were all in Washington. Some years, travel accidents and delays prevented the justices from returning to Washington from their circuit duties in time for the beginning of the Court’s session, which further reduced the time available for hearing the cases that were piling up. The Court had to cancel the 1811 term for lack of a quorum, because William Cushing had died and had not yet been replaced, Samuel Chase was ill, and Thomas Todd and William Johnson were unable to get back to Washington in time. In 1829, the Court lost a full week because Robert Trimble had died and had not yet been replaced, William Johnson was seriously injured in a stagecoach accident, Smith Thompson was too ill to work, and John Marshall and Gabriel Duvall were late in returning from their circuits. At the start of the session, Joseph Story and Bushrod Washington were the only justices present. The newspapers feared “that the loss of a week’s time of the Court will have the effect to postpone, for a year or two the hearing of some of the causes now on the docket.” Indeed, had either Marshall or Duvall not arrived, or had one of the four justices present become sick, “the whole of the present term of the Court would have been lost.”¹³³ Nevertheless, Congress consistently declined the opportunity to relieve the justices of the burden of circuit riding.

One perennial obstacle to reform was that it would have required the appointment of a new cohort of circuit judges, at least one judge per circuit. At any given time, the political party that was out of power had no interest in handing this opportunity to its opponents. Meanwhile, there was always one party whose core ideological commitment was opposition to any increase in the power of the federal government at the expense of the states, including any strengthening of the capacity of the federal judiciary. Every attempt to end circuit-riding was therefore guaranteed to draw substantial political opposition. When Congress was considering such a measure in 1819, Joseph Story correctly predicted that it would fail. The Federalists would vote against it because “the new Judges will be exclusively selected from the Republican party.” And many Republicans

¹²⁹ “The Examination,” No. 6 (2 Jan. 1802), Harold C. Syrett, ed., *The Papers of Alexander Hamilton* (New York: Columbia University Press, 1961-87), 25:485.

¹³⁰ James D. Richardson, ed., *Messages and Papers of the Presidents 1789-1897* (Washington: Government Printing Office, 1896-99), 1: 577.

¹³¹ *Country Courier* [New York], 30 Dec. 1816, at 115.

¹³² Thomas Todd to James Madison, 27 July 1817, David B. Mattern et al., eds., *The Papers of James Madison: Retirement Series* (Charlottesville: University of Virginia Press, 2009-) 1:97.

¹³³ “Judiciary Intelligence,” *United States Intelligencer and Review* 1 (1829): 50.

would be opposed as well, because “among the Republicans, it is well known that there are many hostile in the highest degree to any scheme, which changes or gives more effect to the jurisdiction of the Courts of the United States.”¹³⁴ This political configuration would not change for many years to come.

The standard arguments in favor of circuit-riding, moreover, had not lost their appeal. The justices still needed familiarity with the laws of the states, especially in the many cases involving disputed western land titles that turned on state property law. “By compelling the Judges of the Supreme Court to hold the Circuits,” Martin Van Buren declared in the Senate while opposing reform in 1826, “the knowledge they have acquired of the local laws will be retained and improved, and they will thus be enabled, not only the better to arrive at correct results themselves, but to aid their brethren of the Court who belong to different Circuits.”¹³⁵ State law was printed in books obtainable in Washington, but members of Congress repeatedly insisted that reading books was no substitute for personal acquaintance with local conditions. The justices “might acquire abstract principles from the books, it was true,” acknowledged Representative James Bowlin of Missouri, “but it required more than that for the judges. … It required a practical knowledge of the operations of systems, which could only be obtained where they prevailed. Books could do much, but they could not do everything.”¹³⁶ This argument always had its skeptics, including Senator Andrew Butler of South Carolina, himself a former state judge, who mocked the notion “that it is an advantage to a judge to travel through a country, that he may imbibe something of the spirit of popular jurisprudence.” Butler concluded: “Sir, I would much prefer that he should imbibe the law in his library here.”¹³⁷

Some of the other claimed benefits of circuit-riding were less easy to dismiss. Daniel Webster, one of the leading Supreme Court advocates of the era, thought it was important for justices to sit regularly as trial judges so they could understand the practical effects of their decisions.

“However beautiful may be the theory of general principles,” Webster noted, “such is the infinite variety of human affairs, that those most practiced in them, and conversant with them, see at every turn a necessity of imposing restraints and qualifications on such principles.” Service as trial judges “will necessarily inspire Courts with caution,” he observed, “and, by a knowledge of what takes place upon the Circuits, and occurs in constant practice, they will be able to decide finally, without the imputation of having overlooked, or not understood, any of the important elements and ingredients of a just decision.”¹³⁸ Stephen Douglas thought the justices gained respect from the bar and the public by mingling with local lawyers and judges. Sitting aloof in Washington would make them “mere paper judges,” he predicted. “I think they will lose that weight of authority in the country which they ought to have.”¹³⁹ Senator William Allen of Ohio worried that if the justices no longer made regular visits to the rest of the country, they would develop what would much later come to be called an inside-the-beltway mentality. “What will be

¹³⁴ Joseph Story to Stephen White, 17 Feb. 1819, *Life and Letters of Joseph Story*, 1:327.

¹³⁵ *Register of Debates* 2 (1826): 416.

¹³⁶ *Congressional Globe* 30 (1848): App. 354.

¹³⁷ *Congressional Globe* 33 (1855): 212.

¹³⁸ *Register of Debates* 2 (1826): 878.

¹³⁹ *Congressional Globe* 33 (1855): 194.

the effect of the existence of a fixed, central tribunal, seated in this Capitol, composed of men who hold their places for life, cut off from all communication with the States and the people of the States?", Allen asked. The Court would become "a Washington city star chamber, under the influences which act upon the capital where the political powers of the nation are all concentrated."¹⁴⁰ There was never any shortage of arguments for retaining the justices' obligation to serve as circuit judges.

The main reason to end circuit-riding was to free up the justices' time for their Supreme Court cases. Many suggested that the same goal could be accomplished if the justices would simply work harder. If one counted only the time they spent in court, the justices did not seem to be working very hard at all. "Oh! What an amount of humbug there is in the world!", Allen sneered. While sitting in Washington, "these venerable gentlemen" did not commence court sessions until "eleven o'clock every morning, except on Saturday, when they take some relief from their labors." Allen "thought it not becoming in this Senate to extend the time for them to sit here and enjoy the dignity of indolence."¹⁴¹ The Connecticut Jeffersonian Abraham Bishop counted up the number of days a justice spent in scheduled court sessions, including the Supreme Court and the circuit court, and found that it totaled only 153 days per year, which Bishop considered proof that riding circuit was scarcely any burden.¹⁴² Lawyers knew that much of a judge's work—most notably the reading of records and briefs and the writing of opinions—took place out of court, but the justices seemed to have it easy in this respect as well. The Court had the luxury of printed records and skilled counsel, one critic insisted, "and thus it is that the labor of the judges of the Supreme Court is exceedingly small when compared to that to which the judges of the State courts are subjected."¹⁴³

Even if riding circuit *was* a burden, others suggested, it was a burden well worth bearing in light of all the good it did. "Even if each judge try but half a dozen criminal and patent cases a year," one lawyer reckoned, the work "more than repays him for the trouble and inconvenience; and the consequent mingling and association with the bar all over the circuit keeps up an acquaintance and understanding between it and the bench which we should be sorry to see at all lessened."¹⁴⁴ Because of views like these, bills to relieve the justices of their circuit court duties consistently failed to get through Congress.

Congress would eventually end circuit-riding, but not until after the Civil War. Until then, the justices spent most of their time serving as circuit judges rather than as members of the Supreme Court.

¹⁴⁰ *Congressional Globe* 30 (1848): 594.

¹⁴¹ *Congressional Globe* 30 (1848): 640.

¹⁴² Abraham Bishop, *Proofs of a Conspiracy, Against Christianity, and the Government of the United States* (Hartford: John Babcock, 1802), 157.

¹⁴³ *Congressional Globe* 30 (1848): App. 582.

¹⁴⁴ "Summary of Events," *American Law Review* 1 (1867): 207.

During the era of circuit-riding, some of the justices' most important opinions were written in the circuit courts, not in the Supreme Court.¹⁴⁵ A disproportionate number of the influential circuit opinions were written by Joseph Story. Story was the most learned of his colleagues and, at least as important, he took the greatest care to arrange for the publication of his opinions, at a time when circuit opinions were not published by the government. "If my fame shall happen to go down to posterity," Story once remarked, "my character as a Judge will be more fully & accurately seen in the opinions of the circuit Court than in the Supreme Court."¹⁴⁶ Other justices were less interested in publishing their circuit opinions. At the opposite extreme from Story was John Catron, who refused to publish any of his circuit opinions, because, he said, if an issue on which had written later reached the Supreme Court, he wanted to have an open mind and not be tempted to adhere to a position he had already taken in print.¹⁴⁷

The most well-known of Story's circuit opinions, because the most useful to other judges and the bar, were those that offered encyclopedic treatments of technical but fundamental points of law. For example, in *DeLovio v. Boit* (1815), Story provided a 27,000-word treatise on the scope of the federal courts' admiralty jurisdiction, a recurring issue that marked one important division of authority between state and federal courts. In *Sherwood v. Sutton* (1828), he authored a similarly exhaustive, if shorter, analysis of when a judge should start the clock on a limitations period where a fraud is so successful that it takes some time before the victim even realizes he has been injured. In *Folsom v. Marsh* (1841), a suit involving infringement of the copyright in the collected writings of George Washington, Story established the principles underlying the "fair use" doctrine of copyright law. Story's circuit opinions were quite influential in their day, and indeed some are still cited as authority two centuries later.¹⁴⁸

The justices were usually not together when they wrote their circuit opinions, but they sought each other's help by mail. In 1814, for instance, Bushrod Washington was in Philadelphia, working on his circuit opinion in *Golden v. Prince*, which raised the new and difficult question of whether the Constitution allowed a state to enact a bankruptcy law relieving debtors of their contractual obligations.¹⁴⁹ Washington wrote to John Marshall, who was in Richmond, for advice. The case presented "a question of considerable difficulty," Marshall replied. "I have not thought of the question long enough, nor viewed it in a sufficient variety of lights to have a decided opinion on it, but the biass [sic] of my mind at the moment is rather in favor of the validity of the law."¹⁵⁰ A few years later, Marshall was in a quandary of his own. He was in Richmond, having difficulty with an opinion in an admiralty case. "I have so little experience in admiralty proceedings," he wrote to Story, "that I sometimes doubt in cases which are probably

¹⁴⁵ David Lynch, *The Role of Circuit Courts in the Formation of United States Law in the Early Republic* (Oxford: Hart Publishing, 2018); Dwight F. Henderson, *Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801-1829* (Westport, Conn.: Greenwood Press, 1985).

¹⁴⁶ Quoted in R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 318.

¹⁴⁷ "The Late Mr. Justice Catron," *Legal Intelligencer* 23 (1866): 132.

¹⁴⁸ *DeLovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815); *Sherwood v. Sutton*, 21 F. Cas. 1303 (C.C.D.N.H. 1828); *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

¹⁴⁹ *Golden v. Prince*, 10 F. Cas. 542 (C.C.D. Pa. 1814).

¹⁵⁰ John Marshall to Bushrod Washington, 19 Apr. 1814, *Papers of John Marshall*, 8:35.

quite of common occurrence and are thought very plain by those who have much practice of that description.” Story, many of whose circuit cases arose in the active port of Boston, was an old hand at admiralty. He offered his advice, which Marshall adopted in his opinion.¹⁵¹

As circuit judges, the justices also presided over some of the most high-profile criminal trials of the era. Perhaps the most famous was the 1807 treason trial of Aaron Burr, the former vice president, who was accused of plotting to separate the western states and territories from the United States and to create a new nation under his control.¹⁵² The presiding judge was Chief Justice John Marshall, in his capacity as circuit judge. Marshall called the Burr trial “the most unpleasant case which has ever been brought before a Judge in this or perhaps in any other country.”¹⁵³ The case required difficult decisions about what constituted treason and how the offense could be proved, and it was as politically charged as a trial could be, because Burr had long been a rival of President Thomas Jefferson, who was the driving force behind the prosecution. When Burr was acquitted, in part because of legal rulings made by Marshall, the chief justice was burned in effigy.

Justices conducted several other criminal trials that were well-known at the time but have since been largely forgotten. When the celebrated mail robbers Joseph Hare, Lewis Hare, and John Alexander were convicted in Baltimore in 1818, the presiding judge was Justice Gabriel Duvall, serving in his capacity as circuit judge.¹⁵⁴ A few years later, when another group of notorious mail robbers was tried in Philadelphia, Justice Henry Baldwin was the judge.¹⁵⁵ When cases like these were in the headlines, the justices were probably more familiar to the public as circuit judges than for their work on the Supreme Court.

IV

The justices’ circuit obligations had important practical consequences for the Supreme Court. Because the justices were not in Washington very much, the Court had no building of its own. A courthouse would have sat vacant most of the year. In 1790, when New York was briefly the national capital, the Court sat in the Exchange Building, a covered marketplace with a meeting hall on the second floor. In Philadelphia, the temporary national capital in the 1790s, the Court shared space with the Pennsylvania state courts. When the capital moved to Washington in 1800, the new city included buildings for Congress and the president, but none for the Court. In January 1801, just as the Court was about to conduct its first session in Washington, the commissioners responsible for laying out the new city asked Congress if the Court could be

¹⁵¹ John Marshall to Joseph Story, 23 May 1831 (and editors’ note afterward), *Papers of John Marshall*, 12:67-68.

¹⁵² R. Kent Newmyer, *The Treason Trial of Aaron Burr: Law, Politics, and the Character Wars of the New Nation* (New York: Cambridge Univ. Press, 2012).

¹⁵³ John Marshall to Richard Peters, 23 Nov. 1807, *Papers of John Marshall*, 7:165.

¹⁵⁴ Edward J. Coale, *Trials of the Mail Robbers, Hare, Alexander and Hare* (Baltimore: Edward J. Coale, 1818).

¹⁵⁵ John Mortimer, *The Mail Robbers: Report of the Trials of Michael Mellon, the Lancaster Mail Robber; and George Wilson and James Porter Alias May, the Reading Mail Robbers* (Philadelphia: J. Mortimer, 1830).

given some space in the Capitol. Fortunately, Congress consented.¹⁵⁶ The Court moved into what Benjamin Latrobe, the Architect of the Capitol, called a “half-finished Committee room, meanly furnished, & very inconvenient.” In 1807, when the Senate needed this room, the courtroom was moved to the Capitol’s library, but in 1808, Latrobe reported, “the library became so inconvenient & cold that the supreme court preferred to sit at Lang’s tavern.”¹⁵⁷ Finally, in 1810, the Court moved into a more permanent courtroom in the Capitol building, directly beneath the Senate chamber. A few years later, when the Capitol was burned by British soldiers during the War of 1812, the Court had to move temporarily to its clerk’s own private home, an arrangement that one lawyer, the future literature professor George Ticknor, found “uncomfortable, and unfit for the purposes for which it is used.”¹⁵⁸ Once the Capitol courtroom was repaired, the Court would stay there until 1860.

The courtroom had a low arched ceiling and was broken up by pillars helping to support the Senate chamber directly above.¹⁵⁹ (The ceiling had to be low because the Senate chamber already existed when the courtroom was built beneath it. Construction of the courtroom was such a difficult project that the construction supervisor, John Lenhall, was crushed to death by tons of bricks when the ceiling collapsed during the first attempt to build it.¹⁶⁰) The justices sat at separate mahogany desks, lined up in a row, with the chief justice in the center. The windows were behind the justices, so during arguments the sun shone directly on the face of the attorney who addressing the Court. This necessitated curtains, which made the courtroom quite dark when they were closed. The Attorney General sat to the right of the justices, the clerk and the marshal to the left. There was a section for members of the bar, with desks and armchairs, and a separate section with cushioned chairs and sofas for members of the public. The justices had a private room off to the side, but it was not large enough for any work or even for the justices to put on their robes, so the justices had to enter and robe themselves while everyone watched.¹⁶¹

Tourists who visited the courtroom were usually disappointed. The English traveler Francis Hall thought it resembled a prison because it was so low and cramped.¹⁶² “It is by no means a large or handsome apartment,” agreed a Scottish visitor, “and the lowness of the ceiling, and the circumstance of its being under ground, give it a certain cellar-like aspect, which is not pleasant.” It left him with “the impression of justice being done in a corner.”¹⁶³ The courtroom’s poor

¹⁵⁶ *Documentary History of the Construction and Development of the United States Capitol Building and Grounds*, H.R. Rep. No. 646, 58th Cong., 2d Sess. (1904), at 94.

¹⁵⁷ Benjamin Latrobe to James Madison, 8 Sept. 1809, John C. Van Horne, ed., *The Correspondence and Miscellaneous Papers of Benjamin Henry Latrobe* (New Haven: Yale Univ. Press, 1984-88), 2:765-66.

¹⁵⁸ George S. Hilliard, ed., *Life, Letters, and Journals of George Ticknor* (Boston: James R. Osgood and Co., 1876), 1:38.

¹⁵⁹ “United States Supreme Court,” *Home Journal*, 23 Mar. 1850, 2.

¹⁶⁰ Benjamin Latrobe to Thomas Jefferson, 23 Sept. 1808, *Correspondence of Latrobe*, 2:665-66.

¹⁶¹ George Watterston, *A Picture of Washington* (Washington: William M. Morrison, 1840), 19; Oliver H. Smith, *Early Indiana Trials and Sketches* (Cincinnati: Moore, Wilstach, Keys & Co., 1858), 137; William Allen Butler, *A Retrospect of Forty Years 1825-1865* (New York: Charles Scribner’s Sons, 1911), 49-50.

¹⁶² Francis Hall, *Travels in Canada, and the United States, in 1816 and 1817* (London: Longman, Hurst, Rees, Orme, & Brown, 1818), 325.

¹⁶³ Thomas Hamilton, *Men and Manners in America* (Edinburgh: William Blackwood, 1833), 2:127.

lighting and ventilation were common objects of criticism.¹⁶⁴ One lawyer joked that while “wandering one day in the basement story of the Capitol, which resembles, in some respects, the crypt” of a cathedral, he “got lost amongst the numerous and stunted pillars which support the dome of the edifice.” When he opened a door looking for a way out, he found himself in the Supreme Court of the United States, where Daniel Webster was arguing a patent case.¹⁶⁵ Even the courtroom’s rare defenders were aware of the room’s poor reputation. “It is, indeed, small for such a Court,” a Boston lawyer acknowledged, “but certainly not so small, or so mean, as from report we expected to see it.” He concluded that “everything about it, is neat and legal looking—nothing gaudy or showy.”¹⁶⁶ Another lawyer felt “indignant, at first,” about the Court’s modest accommodations, “but I found the judges liked it, as they preferred to have no crowd in the galleries for the lawyers to talk to,” and “they are out of the way of the idlers about the rotunda.”¹⁶⁷ The courtroom was beneath the Senate, a journalist explained, but that only served to “symbolize a great truth—that the principles of *justice* and *rectitude* should be the basis of legislative enactments.”¹⁶⁸

When the Court was in session, the justices spent much of the day in this courtroom listening to lawyers. In the early 19th century, litigation before the Court consisted of oral presentations by the lawyers on each side, who normally did not file written briefs. The justices let lawyers go on at length. Argument was “full and thorough,” one lawyer noted. “Counsel are not interrupted and catechized like schoolboys.”¹⁶⁹ A single case could last for days.

Because of the time and expense required to travel to Washington from most parts of the country, a small group of local lawyers dominated practice in the Court. Several of the leaders of the early Supreme Court bar—in an era before there were any conflict-of-interest rules preventing government officials from representing private clients on the side—were prominent political figures. William Wirt, the attorney general between 1817 and 1829, appeared in the Court on behalf of paying clients far more often than he appeared on behalf of the United States. Daniel Webster, perhaps the most famous advocate in the country, argued in many of the Court’s celebrated cases while simultaneously representing Massachusetts in Congress.¹⁷⁰ Henry Clay appeared in several cases while representing Kentucky. As one admirer of Clay’s advocacy put it, a spectator at the Court “is constantly called upon to listen to arguments from senators and representatives, whose eloquence upon national topics has attracted the retainers of constituents with personal or pecuniary interests appealed before the highest legal tribunal of their country.”¹⁷¹ After years of listening to arguments from such well known people, Justice Gabriel

¹⁶⁴ Harriet Martineau, *Retrospect of Western Travel* (London: Saunders and Otley, 1838), 1:275; Casimir Bohn, *Bohn's Hand-Book of Washington* (Washington: Taylor & Maury, 1852), 35.

¹⁶⁵ Alexander Mackay, *The Western World, or, Travels in the United States in 1846-47* (Philadelphia: Lea & Blanchard, 1849), 1:197.

¹⁶⁶ “The Supreme Court of the U.S. in 1853-4,” *American Law Register* 2 (1854): 706.

¹⁶⁷ Robert F. Lucid, ed., *The Journal of Richard Henry Dana, Jr.* (Cambridge: Harvard Univ. Press, 1968), 1:241.

¹⁶⁸ *Christian Reflector*, 22 Apr. 1840, 68.

¹⁶⁹ Book Review, *North American Review* 15 (1823): 121-22.

¹⁷⁰ Maurice G. Baxter, *Daniel Webster & the Supreme Court* (Amherst: Univ. of Massachusetts Press, 1966).

¹⁷¹ “Henry Clay as a Lawyer,” *Monthly Law Reporter* 15 (1852): 181.

Duvall understandably advised his son that “a knowledge of the law, which can best be matured & perfected by practice, [is] the shortest & most certain road to fame.”¹⁷²

But this small group of Supreme Court practitioners also included some lawyers who were not famous, lawyers who gained renown for their legal work rather than for politics. The all-time record for most arguments before the Court—more than 300—is still held by Walter Jones, who never sought elective office. Jones racked up some of that total as U.S. Attorney for the District of Columbia in the first two decades of the century, because at the time the Supreme Court served as the equivalent of a state supreme court for the District, but most of his cases were in private practice. Jones was simply a talented lawyer who made the smart decision to move to Washington and open a law practice soon after the city became the national capital.¹⁷³

In an era when oratory was a form of entertainment, arguments often drew large audiences, especially when a famous lawyer was scheduled to speak. “The court-room was thronged” to hear William Wirt argue one case, he proudly told a friend. Among the spectators were “fifteen or twenty ladies” and “many members of Congress,” who heard Wirt deliver an address “four hours and half long!”¹⁷⁴ “It is the fashion for ladies to attend the Supreme Court when any interesting cases are to be argued,” one traveler reported, “and their entrée produces some sensation in the court. But the most strict order and decorum are observed, the most profound silence.”¹⁷⁵ A journalist likewise emphasized the utter silence in the courtroom. “Those who attend either for business or as mere spectators and auditors, are seemingly loath even to whisper to one another,” he observed, “and, though many persons were coming in or going out, I never heard the bailiff, or by whatever other name the officer in attendance is called, cry out ‘order’ or ‘silence,’ as such seem to do almost half their time in some ordinary courts.” The Court was “certainly the most dignified body that I ever saw.”¹⁷⁶

As the Court’s caseload grew, there was no longer time for such leisurely oral arguments. The Court amended its rules in 1821 to require lawyers to submit printed briefs summarizing the facts and the legal arguments before a case could be heard. In 1833, the Court even invited lawyers to submit cases entirely in writing, to be decided without any oral argument at all.¹⁷⁷ In 1848, the Court limited each lawyer to two hours of argument.¹⁷⁸ The style of litigation before the Court was gradually shifting, as oral performance began to give way to arguments presented in writing. This shift made it less necessary for an advocate to be in Washington, so it opened the Supreme Court bar to lawyers in other cities. At the same time, improvements in transportation made it easier for lawyers in other cities to come to the Court. There was no longer as much need to hire

¹⁷² Gabriel Duvall to Edmund Bryce Duvall, 6 Mar. 1816, Duvall Papers, box 1.

¹⁷³ Joseph Packard, “General Walter Jones,” *Virginia Law Register* 7 (1901): 233-38.

¹⁷⁴ William Wirt to Dabney Carr, 27 Feb. 1817, John P. Kennedy, *Memoirs of the Life of William Wirt* (Philadelphia: Lea & Blanchard, 1849), 2:15.

¹⁷⁵ I. Finch, *Travels in the United States of America and Canada* (London: Longman, Rees, Orme, Brown, Green, and Longman, 1833), 206-07.

¹⁷⁶ “Free Remarks,” *Niles’ Weekly Register*, 7 Apr. 1821, 82.

¹⁷⁷ 1843 Rules, rules 29, 40.

¹⁷⁸ 1850 Rules, rule 53.

a lawyer resident in Washington. By mid-century, Supreme Court practice was no longer dominated by a small group of local lawyers.

Because the justices of the early 19th century were in Washington for only a couple of months each year, few had a home or an office in the city. The justices lived together in a boardinghouse, where they ate their meals, discussed their cases, and wrote their opinions. They typically did not bring their wives or children with them. When Joseph Story arrived in Washington as a new justice in 1812, he loved the camaraderie. “We live very harmoniously and familiarly,” he told a friend. “We moot questions as they are argued, with freedom, and derive no inconsiderable advantage from the pleasant and animated interchange.”¹⁷⁹ He enjoyed his colleagues, “with whom I live in the most frank and unaffected intimacy. Indeed, we are all united as one, with a mutual esteem which makes even the labors of Jurisprudence light.”¹⁸⁰ Living and eating together broke down the wall between the justices’ personal and professional lives. “Two of the Judges are widowers, and of course objects of considerable attention among the ladies of the city,” Story told his wife after barely a month in Washington. “We have fine sport at their expense, and amuse our leisure with some touches at match-making. We have already ensnared one of the Judges”—it was Thomas Todd—“and he is now (at the age of forty-seven) violently affected with the tender passion.”¹⁸¹ The object of Todd’s passion was a widow named Lucy Washington, whose older sister was Dolley Madison, the first lady. When Todd married Washington, President James Madison became his brother-in-law.

The Court’s sessions in Washington settled into a routine: oral arguments in the Capitol courtroom during the day, followed by discussions of the cases among the justices in the boardinghouse each evening. “My time was never passed with more uniformity,” John Marshall told his wife in 1831. “I rise early, pore over law cases, go to court and return at the same hour and pass the evening in consultation with the Judges.”¹⁸² On one occasion in 1816 Marshall had to apologize for declining a dinner invitation, because, he explained, “the Judges have pledged themselves to each other to continue at home for the purpose of conferring on the causes under consideration, & I cannot absent myself from our daily consultation without interrupting the course of the business & arresting its progress.”¹⁸³

Sunday dinners were set aside for socializing with others. The future Senator Charles Sumner was a young Boston lawyer when he visited Washington in 1834. “All the judges board together,” he wrote home to his parents. “I dined with them yesterday, being Sunday. Judges Marshall, Story, Thompson, and Duval were present.” Sumner was impressed by the justices’ informality. “No conversation is forbidden, and nothing which goes to cause cheerfulness, if not hilarity. The world and all its things are talked of.” The only justice who did not join in the fun was Gabriel Duvall, who “is eighty-two years old, and is so deaf as to be unable to participate in

¹⁷⁹ Joseph Story to Nathaniel Williams, 16 Feb. 1812, *Life and Letters of Joseph Story*, 1:214.

¹⁸⁰ Joseph Story to Samuel Fay, 24 Feb. 1812, *Life and Letters of Joseph Story*, 1:215.

¹⁸¹ Joseph Story to Sarah Story, 12 Mar. 1812, *Life and Letters of Joseph Story*, 1:219.

¹⁸² John Marshall to Mary Marshall, 30 Jan. 1831, *Papers of John Marshall*, 12:16.

¹⁸³ John Marshall to John Randolph, 4 Mar. 1816, *Papers of John Marshall*, 8:127.

conversation.¹⁸⁴ A decade later, Richard Henry Dana, another young Boston lawyer, had a similar experience when he called upon Story at the justices' boardinghouse. Story "came down into the parlor, & brought with him Judges McLean & McKinley, who, he said, wished to see me," Dana noted with evident surprise. "These judges are the pleasantest set of fellows I met in Washington. Having no politics on their mind, & no fear of the people, & no ends to gain either in society or from the public, they are easy & natural, & having gone thro' a heavy day's work are very glad to relax themselves. We had a great deal of pleasant conversation, & loud laughing."¹⁸⁵

Like Story, Marshall placed great value on the justices' living together during the Court's annual session. While Marshall was chief justice, Bushrod Washington was the justice who lived closest to the national capital—he inherited Mount Vernon, the estate of his uncle George, after Martha Washington died in 1802—so the responsibility of finding a boardinghouse each winter fell to him. "If it be practicable to keep us together you know how desirable this will be," Marshall urged Washington one year. "If that be impracticable, we must be as near each other as possible. Perhaps we may dine together should we even be compelled to lodge in different houses."¹⁸⁶

This communal living arrangement began to break up in the late 1820s and early 1830s. John McLean, appointed to the Court in 1829, had been Postmaster General since 1823, so he and his family already lived in Washington. As Marshall remarked to Story in discussing the justices' accommodations, "our brother McLain [sic] will of course preserve his former position" rather than joining the other justices. William Johnson, who had previously boarded with his colleagues, apparently stopped doing so in the Court's 1832 term, perhaps emboldened by McLean's example. The other five justices stayed together for the time being.¹⁸⁷ "I suppose, that we shall be for the future separated, as (I cannot but believe) has been the design of some of our Brethren," Story complained to Marshall.¹⁸⁸ In later years, living arrangements continued to splinter. By the late 1830s, McLean and his wife had apparently left their house and were sharing a boardinghouse with Story, but Story's correspondence suggests that none of the other justices lived with them. "But for the companionship of Judge McLean, who lodged in a contiguous room, I should scarcely have known what to do," Story admitted after the 1838 term. "His friendship and society were a great solace to me."¹⁸⁹ In 1842, Story and the McLeans took rooms in the house of a family named White, again apparently without any of their colleagues.¹⁹⁰ "It will afford me the most sincere pleasure to board in the same house with Mrs. McLean & yourself next winter at Washington," Story wrote to McLean in the fall of 1843. "I give up all expectation that the judges will ever live together, as in former times."¹⁹¹

¹⁸⁴ Edward L. Pierce, ed., *Memoir and Letters of Charles Sumner* (London: Sampson Low, Marston, Searle, & Rivington, 1878), 1:137. Gabriel Duvall's name was often spelled "Duval." His family appears to have used both spellings, but the Court's reporters spelled it "Duvall," so that is the standard spelling today.

¹⁸⁵ *Journal of Richard Henry Dana, Jr.*, 1:245.

¹⁸⁶ John Marshall to Bushrod Washington, 29 Dec. 1814, *Papers of John Marshall*, 8:63.

¹⁸⁷ John Marshall to Joseph Story, 10 Nov. 1831, *Papers of John Marshall*, 12:124.

¹⁸⁸ Joseph Story to John Marshall, 29 May 1831, *Papers of John Marshall*, 12:68.

¹⁸⁹ Joseph Story to Charles Sumner, 15 Mar. 1838, *Life and Letters of Joseph Story*, 2:296.

¹⁹⁰ Joseph Story to Sarah Story, 16 Jan. 1842, *Life and Letters of Joseph Story*, 2:400-01.

¹⁹¹ Joseph Story to John McLean, 9 Oct. 1843, McLean Papers, reel 6.

The justices continued to live and work in boardinghouses and hotels, often in small groups, until the 1870s. In the early 1840s, John McKinley spent one term with John Catron and the McLeans in a home owned by a Mr. Treacle, another term sharing a boardinghouse with Story and the McLeans, and another in a boardinghouse with Story, the McLeans, and Chief Justice Roger Taney.¹⁹² An 1850 city directory listed Taney, Peter Daniel, and Robert Grier living at a boardinghouse called Brenner's; James Wayne, Catron, and Levi Woodbury at Gadsby's Hotel; McLean at a boardinghouse called Mrs. Carter's; and Samuel Nelson at one called the Potomac House.¹⁹³ When Benjamin Curtis arrived in Washington as a new justice in 1851, he moved into "Brown's new hotel," where the McLeans, the Catrons, and James Wayne also stayed. "There are some pleasant people in the house," Curtis happily reported.¹⁹⁴ When David Davis was appointed in 1862, he lived in a boardinghouse with several of his colleagues.¹⁹⁵ The justices would continue to share temporary accommodations in Washington for as long as their circuit responsibilities forced them to spend most of the year on the road.

The justices' living and working arrangements in Washington most likely contributed to their practice of speaking with a single voice in their opinions. They all worked, socialized, and ate together while they served on the Court. They were in one another's company all day and evening. They had to get along. As anyone who has lived with other people knows, publicizing disagreements is not always conducive to good relationships. It is telling that William Johnson, the first frequent dissenter, was also the first justice to break with the custom of living together in a boardinghouse while in Washington. Already a maverick at work, he became one in his choice of home as well.¹⁹⁶

Firsthand accounts of the Court's decision-making process in this period, other than Johnson's, emphasize the friendly collaboration of the justices. We have already seen Story's enthusiastic descriptions from the 1810s. John McLean, who was on the Court from 1829 to 1861, left a similar account, which he apparently wrote in 1853. "Before any opinion is formed by the court," he explained, "the case after being argued at the bar, is thoroughly discussed in consultation. Night after night this is done," back at the boardinghouse, "until the mind of every judge is satisfied, and then each judge gives his views of the whole case, embracing every point in it." Once a case had been fully discussed, "the chief justice requests a particular judge to write, not his opinion, but the opinion of the court." At a later meeting, after the opinion had been written, "it is read to the judges, and if it do not embrace the views of the judges, it is modified and corrected."¹⁹⁷ Living together seems to have encouraged the justices to downplay their differences and to speak with one voice most of the time.

¹⁹² Brown, *John McKinley*, 113-14.

¹⁹³ Edward Waite, *The Washington Directory, and Congressional, and Executive Register, for 1850* (Washington: Columbus Alexander, 1850), 138. John McKinley, who missed the 1850 term, was listed as absent from Washington.

¹⁹⁴ Benjamin Curtis to George Ticknor, 27 Dec. 1851, *Memoir of Benjamin Robbins Curtis*, 1:163-64.

¹⁹⁵ Willard L. King, *Lincoln's Manager: David Davis* (Cambridge: Harvard Univ. Press, 1960), 201.

¹⁹⁶ Donald G. Morgan, *Justice William Johnson: The First Dissenter* (Columbia: Univ. of South Carolina Press, 1954), 168-89.

¹⁹⁷ Undated manuscript filed at the end of the papers for 1853, McLean Papers, reel 11.

In many ways, then, the Supreme Court of the early 19th century was very different from the Court of today. It sat for only a couple of months each year because the justices had to spend most of the year out on their circuits, conducting trials. While in Washington, the justices lived, ate, and worked together. The Court had no courthouse and hardly any employees apart from the justices themselves. The justices came mostly from political offices, not lower courts. This was a Court that scarcely resembled the institution it would become.

On the other hand, there are some things about the Court that have not changed in two centuries. In particular, the political calculations that went into the selection of justices were much like those of today. Presidents tried to appoint, and senators tried to confirm, justices who belonged to their political party and who would implement their preferred views. Senate confirmation was virtually assured when the president's party controlled the Senate, but when the Senate was controlled by the opposing party, the Senate did not confirm any of the president's nominees during the final year of his administration. Justices tried, with varying success, to time their retirements to let presidents of their party appoint their successors. All of this looks quite familiar today. Ironically, the use of political considerations in selecting justices is the aspect of the Court that is most often deplored today as a modern innovation, in contrast to an imagined past in which justices were chosen on merit rather than politics. But there was never any such past. The political divides of the 19th century are easy to overlook today because they are not our divides. But they were just as important then as ours are now. The justices of the early 19th century, men like John Marshall and Joseph Story, were the objects of the same kind of result-oriented praise and criticism as are the justices of today. They were chosen for the same reasons as today's justices. If there is anything about the Court that has remained the same since the 1790s, this is it.