Affirmation Bias? Supreme Court Decision-Making in the Circuit-Riding Century

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This article quantitatively analyzes the effect of circuit riding on judicial decision-making, particularly affirmation rates. From 1790 to 1891, the Supreme Court Justices served as circuit judges as well as Justices, a system that allowed for the possibility of the Justices reviewing their own circuit opinions on appeal to the Supreme Court. Despite encapsulating the formative period of the Court, the "Circuit-Riding Century" is understudied in the literature, and there is a dearth of materials relating to the practice. I introduce three theoretical explanations for the effect of circuit riding on Supreme Court affirmation rates: the circuit Justice's fear of reversal by his brethren, protecting the legitimacy of the Court, and the circuit Justice as an advocate. All three explanations lead to the same hypothesis: cases heard by Justices on circuit were more likely to be affirmed by the Supreme Court than cases that do not feature a Justice. In order to test my hypothesis, I constructed two groups, the experiment group (containing cases heard by Justices on the circuit level) and the control group (consisting of cases from state courts and the D.C. Circuit, which did not have a Justice assigned) in order to do a Welch's t-test on the difference of affirmation rates between the two groups. I then used three case studies to elucidate my theoretical explanations. Though the difference between affirmation rates is not statistically significant, this thesis is the first study to provide a concrete, positive answer to the speculated effect of circuit riding on Supreme Court decision-making.

I. Introduction

A central component of modern judicial ethics is the recusal of a judge or Justice from a case in which she has a conflict of interest. For example, newly-appointed Justice Elena Kagan recused herself from the cases she helped develop in her previous role as Solicitor General in the Obama Administration. The Supreme Court's decision in *Caperton v. A. T. Massey Coal Co.*[1] held that a West Virginia state Supreme Court Justice should have recused himself,, due to the probability of bias resulting from a conflict of interest, from a case as a matter of due process. Scholars, such as Leslie Abramson,[2] Debra Bassett,[3] Jeremy Miller,[4] and Margaret McKeown[5] have argued recusal is necessary for impartial and unbiased judgment.

This modern prevalence of judicial recusal has not always been the norm. From 1790 to 1891, Supreme Court Justices had to "ride circuit."[6] Justices were each assigned to a federal circuit and were required, along with a district judge from that circuit, to sit in panel as circuit judges. If a circuit case, heard by a sitting Supreme Court Justice, was appealed to the Supreme Court, the Justice could have heard the case again, potentially affecting the outcome of the Court's decision. "[T]he structure of the original court system was flawed in conception and hence problematic from the outset…Though a district judge, when sitting on a circuit court, could not vote on an appeal from his own decision, no similar provision prevented a Supreme Court Justice from voting on an appeal from a circuit court decision in which he had participated," a practice that would be considered an anathema by judges today.[7] John Frank notes that it was an "odd system…insofar as it permitted appeals from the circuit court to the Supreme Court, it permitted appeals

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1: 556 U.S. 868 (2009).

2: See Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges,* 28 Val. U. L. Rev. 543, 543-61 (1994).

3: See Debra Lyn Basset, *Recusal and the Supreme Court,* 56 Hastings L. J. 657 (2005).

4: See Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance),* 33 Pepp. L. Rev. 575 (2005).

5: M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System,* 30 Rev. Litig. 653 (2011).

6: The terms "riding circuit" (verb), "circuit riding" (noun), and "circuit-riding" (adjective) refer to the same practice but are grammatically distinct.

7: Daniel J. Meltzer, *The Judiciary's Bicentennial,* 56 U. Chi. L. Rev. 423, 424 (1989).

from, among others, [Circuit Judge Philip Pendleton] Barbour to [Supreme Court Justice Philip Pendleton] Barbour."[8] Though some Justices chose to recuse themselves so on their own accord, like Chief Justice John Marshall did for *Stuart v. Laird,*[9] most Justices did not do so in appeals from lower court decisions in which they participated.

II. History

Article III of the Constitution created the judicial branch, the last to be established by the Framers. Section One mandated that"[t]he judicial Power of the United States, shall be vested in one Supreme Court," while providing Congress with the power to create "such inferior Courts as [it] may from time to time ordain and establish."[10] Immediately following ratification, Congress used this power to pass the Judiciary Act of 1789.[11] The Act, written primarily by future Chief Justice Oliver Ellsworth, set the number of Justices of the Supreme Court at six—one chief Justice and five associate Justices—while also creating 13 judicial districts in 11 states.[12] Each judicial district consisted of both a circuit court and a district court.

The Act provided congressional funding for district court judges for each of the districts but did not provide separate funding for circuit court judges. Instead, two of the recently-appointed Supreme Court Justices were also given circuit duties in each of the three circuits: the Southern, Middle, or Eastern Circuit. Chief Justice Charles Evans Hughes later reasoned, "At the onset it was expected that through their circuit work the Justices of the Supreme Court would be in close contact with the people. The Justices left their impressions upon the communities they visited, and these communities had their effect upon the Justices."[13] Other explanations for the establishment of this "odd system" include budget savings, the importance of having Supreme Court Justices adjudicate in federal cases, the spread of the tenets of federalism (as the Justices would quite possibly be the only federal officers that citizens

8: John P. Frank, Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784–1860 143 (1964).

9: 5 U.S. 299 (1803).

10: See U.S. Const. Art 3 § 1.

11: The Judiciary Act of 1789 Ch. 20, 1 § 73.

12: Districts for North Carolina and Rhode Island, which had not ratified the Constitution at the time, were added as these states entered the Union.

13: See *Remarks of Chief Justice Hughes at the Judicial Conference of the Federal Judges of the Fourth Circuit, Held at Asheville, North Carolina, on Thursday Morning, June 9, 1932* Minutes of the Second Annual Meeting of the Federal Judicial Conference of the Fourth Circuit 3 (1932).

would meet), ensuring the uniformity of federal law, and unifying the judicial branch.[14] Eventually, as Congress added new circuits, a single Justice was assigned to ride circuit within that circuit.[15]

An early case, *Stuart v. Laird*, challenged the constitutionality of circuit riding itself. The case came to the Supreme Court by a writ of error from Chief Justice Marshall's Fifth Circuit.[16] The case concerned the Judiciary Act of 1802,[17] which repealed the Judiciary Act of 1801.[18] The 1801 Act provided separately-commissioned circuit Justices, thus removing the burden of circuit riding from the Justices' plates. However, the 1801 Act was passed by the lame-duck Federalist Party on the eve of Thomas Jefferson's inauguration and signed into law by President John Adams. The new Democratic-Republican majority in Congress subsequently passed the 1802 Act, reinstating the practice of circuit riding, while also restructuring the federal judicial system into six circuit courts. The Marshall Court eventually ruled the Repeal Act to be constitutional, thus endorsing the practice of circuit riding and committing to carry out the practice for years to come.[19]

The Justices spent a considerable amount of time riding circuit, traveling thousands of miles per year. The job was arduous. Justice Thomas Todd's circuit duties forced him to be absent for five of the nineteen terms he was on the Supreme Court, and Justice William Paterson died from injuries sustained from a carriage accident *en route* to hold court on circuit.[20] In an attempt to alleviate the burden of riding circuit, Congress passed the Judiciary Act of 1869,[21] creating nine circuit judgeships, or one for each circuit. The Act significantly reduced the Justices' time on circuit, requiring each Justice to hold court within his circuit once every two years.

The 1869 Act did not completely alleviate the Justices of their circuit-riding duties, however. This finally occurred with the passage of the Judiciary

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14: Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753, 1762 (2002), and see Jean Edward Smith, John Marshall: Definer of a Nation (1996).

15: Congress eventually established ten circuits in the 1860s, with ten Justices needed to ride those circuits. Congress reduced the number of Justices to nine by the end of the decade, and the number of Justices has remained constant to this day.

16: As mentioned previously, Chief Justice Marshall recused himself from the proceedings once the case reached the Supreme Court. 5 U.S. at 299.

17: Also known as the Repeal Act. See Judiciary Act of 1802, Ch. 8, 2 § 156.

18: See Judiciary Act of 1801, Ch. 4, 2 § 89.

19: The case will be further discussed in the Case Study section, below.

20: Glick, 24 Cardozo L. Rev at 1798 (cited in note 14).

21: See Judiciary Act of 1869, Ch. 22 16 § 44.

Act of 1891,[22] which created the Circuit Courts of Appeals. The Act shifted the appellate caseload burden from the Supreme Court and old circuit courts to the new Courts of Appeals and made the federal district courts the judicial system's primary trial courts. With two circuit judges and a district judge from that circuit sitting on these newly established courts, the Supreme Court's "Circuit-Riding Century" came to an end.[23]

III. Literature Review of Circuit Riding

The "Circuit-Riding Century" was a significant period of the Court's history. Despite its contentious nature, the effect of circuit riding has not been fully explored in the literature. As noted earlier, there have been a number of scholars who have mentioned the possibility of a conflict of interest by having Supreme Court Justices ride circuit, but these scholars never attempted to expand upon this relationship by comparing circuit court and Supreme Court opinions themselves.[24] The literature mainly emphasizes the hardships that the Justices faced while riding circuit. The physical toll of traveling a large number of miles on unpaved roads, coupled with the emotional toll of being away from home, led Bernard Schwartz to label circuit riding as "the great albatross of the early Supreme Court."[25] Joshua Glick, noting the dearth of articles focusing exclusively upon the topic, provides a detailed history of court riding, as well as a useful bibliography, but fails to extend his analysis beyond a historical framework.[26] David Stras, Steven Calabresi, and David Presser argue for the reinstatement of circuit riding, as they postulate that it will give Justices more familiarity with local laws and statutes, something not

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22: See Circuit Court of Appeals Act 25 § 826. Commonly referred to as the "Evarts Act," after the bill's author, Senator William Evarts of New York.

23: The old circuit courts were officially abolished by the Judicial Code of 1911. Today, each Justice is still assigned to a particular circuit, but this is merely anachronistic. As Justice Sandra Day O'Connor notes, "In essence, the [current] duties of the Circuit Justice typically range from consideration of routine requests for relief from formal filing requirements to stays of a lower court's mandate in controversial civil cases and of capital sentences." See Sandray Day O'Connor, *Foreword: The Changing Role of the Circuit Justice,* 17 U. Tol. L. Rev. 521, 526 (1986).

24: See, for example, Frank, Justice Daniel Dissenting (cited in note 8); Meltzer, 56 U. Chi. L. Rev. at 423 (cited in note 7); and O'Connor, 17 U. Tol. L. Rev. at 521 (cited in note 23).

25: Bernard Schwartz, A History of the Supreme Court 30 (1993). Appendix I contains a table of circuit distances travelled in 1839.

26: Glick. 24 Cardozo L. Rev at 1798 (cited in note 14).

possible under the current system that cloisters Justices in Washington.[27]

The studies by Kevin McGuire, Richard Vining, Christopher Zorn, and Susan Smelcer are perhaps the only quantitative studies to encapsulate this early period of the Court's history.[28] As McGuire acknowledges, "[L]ongitudinal knowledge of the Supreme Court is quite limited."[29] He finds that the early Court increased its institutional power only gradually, hypothesizing that the institution would be hardly recognizable to observers today. In their study of the determinants of resignation from the Supreme Court, Vining *et al* state, "As circuit riding was expected of all Justices in this period on an annual basis, our data provide little opportunity to assess the effect of its presence or absence among Justices' duties."[30] Despite focusing on the same period as this Article, these studies do not focus on the institution of circuit riding itself; Vining *et al* use the practice as a variable that possibly contributed to resignation from the Court in their multivariate analysis, while McGuire[31] cites circuit riding as an impediment to the Court's differentiation, an important step in institutional building.

As evidenced, these authors do not attempt to analyze the affirmation rates of the Justices riding circuit. Justices produced circuit opinions that could have been appealed to their brethren on the Supreme Court, and then, in turn, affected the Supreme Court's decisions and the content of American law. What influence did Justices riding circuit have upon Supreme Court decision-making? Would the decisions reached in seminal cases such as *Marbury v. Madison*,[32] *McCulloch v. Maryland,*[33] *Gibbons v. Ogden,*[34] and others have turned out differently if the Justices had not ridden circuit? This paper, thus, will quantitatively analyze circuit riding, seeking to discern the effect that circuit riding had upon Supreme Court affirmation rates. Were cases heard by Justices when they were on circuit more likely to be affirmed

27: See David R Stras, *Why Supreme Court Justices Should Ride Circuit Again,* 91 Minn. L. Rev. 1710 (2006), and Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal,* 90 Minn. L. Rev. 1386 (2005).

28: See Kevin T. McGuire, *The Institutionalization of the U.S. Supreme Court,* 12 Pol. Analysis 128 (2004), and Richard L. Vining, Christopher Zorn, & Susan Navarro Smelcer, *Judicial Tenure on the U.S. Supreme Court, 1790-1868: Frustration, Resignation, and Expiration on the Bench* 20 Stud. Amer. Pol. Dev. 198 (2006).

29: McGuire, 12 Pol. Analysis at 128 (cited in note 28).

30: Vining, Zorn, & Smelcer, 20 Stud. Amer. Pol. Dev. at 206 (cited in note 28).

31: McGuire, 12 Pol. Analysis at 130 (cited in note 28).

32: 5 U.S. 137 (1803).

33: 17 U.S. 159 (1819).

34: 22 U.S. 1 (1824).

than cases in which a Justice did not participate?

IV. Theory

The possibility of Justices' circuit court opinions being affirmed or reversed by their brethren on the Supreme Court may have had important implications for the decisions made by Justices, both on the circuit courts and the Supreme Court, from the period of 1790 to 1891. The Justices could have attempted to anticipate their brethren's policy positions and augment their circuit decisions. The Justices also could have resented having to travel so many miles on circuit and produced opinions that reflected their exhaustion and resentment. To tease out the possible implications, we must delve into the literature on judicial decision-making to set up our theoretical framework. The attitudinal model, espoused by Jeffrey Segal and Harold Spaeth, posits Justices as policymakers, rather than impartial "umpires" of the law.[35] In this model, Justices decide cases based on their own personal policy preferences, not upon the letter of the law. The letter of the law is used by the Justices as a means to achieving their preferred outcome, not as an end itself.

Building upon the attitudinal model, Lee Epstein and Jack Knight model the Justices as strategic actors, stating that Justices "are not unrestrained actors who make decisions based only on their own ideological attitudes. Here, Justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices that they expect others to make, and the institutional context in which they act."[36] Though originally applied to the Supreme Court, the strategic model accurately describes the relationship between the circuit courts and Supreme Court during the period of circuit riding; Justices had to consider the "preferences" of their Supreme Court brethren and take into account the "choices" they were expected to make under the "institutional framework" of riding circuit.

What might we expect the effect of circuit riding to have been on how Supreme Court Justices decided cases when on circuit? Does the fact that a Supreme Court Justice heard a case on circuit, which was later appealed, affect how the Supreme Court reviewed cases from those circuit courts? There are three possible theoretical explanations for circuit riding's influence upon judicial decision-making. The first, which will be deemed the

35: See Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993), and The Supreme Court and the Attitudinal Model Revisited (2002).

36: See Lee Epstein & Jack Knight, The Choices Justices Make 10 (1998).

"Hughes Theory," suggests that the Justices' decision-making on the circuit level was meaningfully constrained. The fear of reversal by their Supreme Court brethren led Justices to strategically align their circuit opinions to the policy preferences of their fellow Justices, despite possibly not sharing those preferences. Second, the "Jay Theory" looks to the level of the Supreme Court. Perhaps due to its tenuous position in the new federal government, the Supreme Court should have avoided reversing Justices' circuit opinions, as reversal could have brought the Court's legitimacy into question. Third, in the "Marshall Theory," a Justice, having already heard the case on circuit, became an advocate for his lower court decision on appeal. The close interaction between the Justices allowed the Justice, whose circuit decision was being debated, to use his expertise and familiarity of the case to convince his colleagues to affirm his circuit reasoning.

IVa. The Hughes Theory

There is a vast literature on "reversal aversion," a lower court judge's fear of being reversed by a higher court. David Rohde, Harold Spaeth, and Jeffrey all suggest that if the inferior federal courts did not have to fear reversal, lower court judges would be freer to make decisions based on their policy preferences.[37] Shep Melnick postulates that the primary reason lower court judges do not vote their personal preferences more often is the possibility of review by a higher court.[38] A major component of the theory of Lee Epstein, William Landes, and Richard Posner is the reviewability of Courts of Appeals' decisions by the Supreme Court.[39] Students of judicial behavior commonly argue that judges do not like to have their decisions reversed. [40] Being overturned implies that a judge, or panel of judges at a higher level, has

37: See David W. Rohde & Harold J. Spaeth, Supreme Court Decision-making (1976) and Segal & Spaeth, The Supreme Court and the Attitudinal Model (cited in note 35) and The Supreme Court and the Attitudinal Model Revisited (citd in note 35).

38: See Shep R. Melnick, Regulation and the Courts: The Case of the Clean Air Act (1983).

39: See Lee Epstein, William M. Landes, & Richard A. Posner The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice (2013).

40: See Lawrence Baum, *Court Response to Supreme Court Decisions: Reconsidering a Negative Picture* The Justice System Journal, 3 Just. Sys. J. 208 (1978); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?,* 46 Stan. L. Rev. 817 (1994); and McNollgast, *Politics and Courts: A Positive Theory of Judicial Doctrine and the Rule of Law,* 68 S. Cal. L. Rev. 1631 (1995).

determined the lower-court judge applied the law incorrectly. Walter Murphy notes that "Judges, no more than other men, enjoy the prospect of public correction and reprimand."[41] Similarly, Posner asserts that judges are "highly sensitive to being reversed."[42]

A series of studies have indicated judges on lower courts adjust their behavior to accommodate changes in higher courts.[43] Jean Smith provides some empirical support for the hypothesis that district court judges do react to reversals by avoiding the type of decision that was reversed.[44] Donald Songer, Jeffrey Segal, and Charles Cameron find that appeals court decisions were positively related to both the ideology of the appeals court judges and to changes in the current ideology of the Supreme Court.[45] Kirk Randazzo also finds evidence that liberal judges reach more conservative decisions, while conservatives come to more liberal decisions, than would otherwise be expected without higher court review.[46]

In the case of the Court's circuit-riding period, the Justices not only had to face the fear of reversal, but this reversal could have come at the hands of their colleagues. Chief Justice Hughes made special note of this phenomenon: "Not only did Justices of the Supreme Court on circuit duty suffer the extreme hardships of travel in the early days, but they were exposed to the even greater peril of subsequent reversal at the hands of their brethren."[47] Chief Justice Hughes, though perhaps being hyperbolic, clearly thought circuit riding may have affected how Justices reached decisions on circuit. Jonathan Macey characterizes reversals as "embarrassing;"[48] it is not hard to imagine a reversal by equal peers as being the ultimate form of judicial embarrassment. An important aspect of reversal aversion was the possible damage to a Justice's reputation. Individual Justices are concerned about their reputation as great

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41: See Walter F. Murphy, Elements of Judicial Strategy 1030 (1964).

42: See Richard A. Posner, The Problems of Jurisprudence 224 (1990).

43: See Donald R. Songer, Jeffrey A. Segal, & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions,* 38 Am. J. Pol. Sci. 673 (1994), and Charles M. Cameron, Jeffrey A. Segal, & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 Am. Pol. Sci. Rev. 101 (2000).

44: See Smith, John Marshall (cited in note 14).

45: See Songer, Segal, & Cameron, 38 Am. J. Pol. Sci. at 673 (cited in note 43).

46: See Kirk A. Randazzo, *Strategic Anticipation of the Hierarchy of Justice in U.S. District Courts,* 36 Amer. Pol. Research 669 (2008).

47: *Remarks of Chief Justice Hughes at the Judicial Conference of the Federal Judges of the Fourth Circuit* at 2 (cited in note 13).

48: See Jonathan R. Macey, Internal and External Costs and Benefits of *Stare Decisis* 111 (1989).

legal minds and scholars.[49] Thus, the Justices should have strategically aligned their circuit opinions with the policy preferences of their brethren on the Supreme Court in order to avoid the "great peril" of being reversed by their peers on the Court and damaging their legal reputations.

Did the district court judges, the other half of the circuit court panels during this period, not have to worry about being reversed and not have to adjust their decisions accordingly? Should the affirmation rates for both district court judges and Supreme Court Justices, thus, not have been the same? Supreme Court Justices held an advantage over their circuit court colleagues: each Justice had repeated interaction with the other Justices upon the Supreme Court. This interaction allowed the Justices to better predict and anticipate the preferences of their brethren. A similar phenomena has been found in the use of *en banc* hearings by the Circuit Courts of Appeals. Michael Giles and others suggest that "Majority-minority panels may conceal their preferences and conform their decisions to the preferences of the circuit majority, thus avoiding *en banc* rehearing."[50] That is, members of a three-judge panel, due to their familiarity with the rest of judges on their circuit, strategically write their opinions in order to avoid review by the whole circuit. The district court judges during this time did not have these repeated interactions with the body, i.e. the Supreme Court, that would ultimately review their circuit opinions and were less adept at determining the Justices' policy preferences than the circuit-riding Justices.

IVb. The Jay Theory

Chief Justice John Jay expressed his concern about circuit riding in a letter to Congress. He worried that the "distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in one capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial Justice, and to that confidence in the Supreme Court, which it is so essential to the public Interest should be reposed in it."[51] His main argument was, by having the Justices review their

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49: See Posner, The Problems of Jurisprudence (cited in note 42); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making,* 23 J. Econ. Behavior & Organization 31 (1994); and Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior,* 68 U. Cincinnati L. Rev. 615 (2000).

50: See Michael W. Giles, Virginia A. Hettinger, Christopher Zorn, & Todd C. Peppers, *The Etiology of the Occurrence of En Banc Review in the U.S. Court of Appeals,* 51 Am. J. Poli. Sci. 449, 452 (2007).

51: *Remarks of Chief Justice Hughes at the Judicial Conference of the Federal Judges of the*

own circuit opinions, circuit riding would be ill-received by the American public and bring the legitimacy of the Court into question. During the circuit-riding period, the Court had little to no institutional power, as Congress controlled the number of Justices on the Court as well as its jurisdiction, while the President appointed the Justices and was tasked with enforcing judicial decisions. One way to interpret Chief Justice Jay's comment is that circuit riding undermined what little legitimacy the Court held in the early years of the new federal system.

The legitimacy of the Court has always been a concern amongst the Justices. It has been shown that the Supreme Court does not operate in a political vacuum; rather, the Court must take into consideration the policy preferences of the other branches[52] and often acts to avoid institutional conflict to protect its legitimacy.[53] According to David O'Brien, circuit riding was "not merely burdensome; it also diminished the Court's prestige, for a decision by a Justice on circuit could afterward be reversed by the whole Court."[54] With O'Brien, Chief Justice Jay's main concern centered on the possibility of the Supreme Court having to correct a Justice's circuit opinion by reversal. The reversal of a

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Fourth Circuit at 163-64 (cited in note 13).

52: For example, see Murphy, Elements of Judicial Strategy (cited in note 41); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy,* 6 J. L. Econ. & Organization 1 (1990); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988,* 23(4) RAND J. Econ. 463 (1992); Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison,* 38 Am. J. of Pol. Sci. 285 (1994); and Epstein & Knight, The Choices Justices Make (cited in note 36).

53: See Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan,* 81 Am. Pol. Sci. Rev. 1139 (1987); William Lasser, The Limits of Judicial Power: The Supreme Court in American Politics (1988); William P. Marshall, *Be Careful What You Wish For: The Problems with Using Empirical Rankings to Select Supreme Court Justices,* 78 S. Cal. L. Rev. 119 (2004); Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence,* 20 J. L. Econ. & Organization 379 (2004); Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness; Delegation, Defiance, and Judicial Opinions,* 52 Am. J. of Pol. Sci. 504 (2008); Clifford James Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems,* 71 J. Pol. 55 (2009); Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitutional (2009); and Thomas S. Clark, The Limits of Judicial Independence (2011).

54: David M. O'Brien, Storm Center: The Supreme Court in American Politics 138 (1990).

fellow Justice would have endangered the perception of judicial infallibility. If a Justice could be reversed and corrected on circuit, the whole judicial system unraveled; the decisions of the Supreme Court, considered to be the final say regarding the law of the land, were then opened to debate and the possibility of being ignored by the other branches and the American public.

As stated, reversal of circuit decisions may have hurt the legitimacy of the Court, and the literature emphasizes that the Court takes precautions to avoid hurting its legitimacy. One could argue that the Court could have refused to hear cases that question its legitimacy; however, the Court did not control its docket until 1925, 34 years after circuit riding had been abolished. The Court also could not have relied upon its prestige as the ultimate arbiter of the law at this time, as it had not yet achieved this exalted status. On the other hand, the Court could have possibly acquiesced to the other branches' every whim. This, though, would have undermined the Court's goal of enhancing its legitimacy. Thus, as the only rational option, the Court should have been more likely to affirm its brethren on circuit to avoid the hurting its own legitimacy.

IVc. The Marshall Theory

The Marshall Theory proceeds as follows: the Justice, having already heard the case on circuit, was intimately familiar with the circumstances of the case, the local laws of his circuit, and the applicable precedent, all of which would have been cited in his circuit opinion. He was an expert on the particulars of the case, a conduit of information for the other Justices. In this regard, the collegial atmosphere of the Marshall Court, created by lodging in the same boardinghouse in Washington during the Court term and eating their meals together, cannot be understated. The close living situation of the Justices allowed them to better advocate and defend their circuit opinions appealed before the Supreme Court; the circuit Justice could have explained the nuances and reasoning of his decision to the other Justices, an advantage not available to the district court judges also riding circuit.

Kevin McGuire finds that a more experienced lawyer, by which he means one that appears frequently before the Court, as opposed to infrequent participants or new members of the Supreme Court Bar, significantly raises the probability of his party winning the case.[55] Repeated appearances before the Court and interactions with the Justices, it seems, breeds familiarity and trust between the advocate and the Court, making the advocate more

55: Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success,* 57 J. Pol. 187 (1996).

effective at arguing a case. During the Court's circuit riding period, the Justices themselves served a similar role, though in a different setting. The advocacy occurred in their private chambers or their shared boardinghouse, perhaps over a glass of Madeira, rather than the Supreme Court's chamber on the first floor of the Capitol.

IVd. Implications of Theory

What do these theories predict for the likelihood of a decision being affirmed? Under the Hughes Theory, the Justice on circuit should have aligned his opinion closely to the policy position of his brethren in order to avoid reversal. Recall that by the Jay theory, Supreme Court should avoid reversing their brethren's circuit opinions in order to protect the legitimacy of the Court. The Marshall Theory posits the Justices as effective advocates of their circuit opinions, leading the Supreme Court to affirm those decisions. Each theory, through different mechanisms, led to the same conclusion: cases in which a Justice sat on the circuit level should have been more likely to be affirmed than those cases in which a Justice did not sit.

Though the three theoretical explanations lead to the same conclusion, they also, conversely, would each lead to a difference in the content of the law after the decision. Under the Hughes Theory, the content of the law should have reflected the preferences of the majority of the Justices on the Supreme Court, as Justices on circuit shaped their opinions to avoid reversal by their brethren on appeal. But then, per the Jay Theory, the content of the law should have been closer to the circuit Justice's opinion, as, in order to protect its legitimacy, the Court should have affirmed the circuit Justice's opinion. Finally, the content of law under the Marshall Theory would have been located between the two ends of the spectrum, but closer to the circuit Justice's opinion. The circuit Justice's advocacy of his opinion would create a pivoting effect. Though the other Justices' preferences would have been reflected in the Court's opinion, the majority's reasoning would have always been grounded in the circuit Justice's opinion.

V. Data on Affirmation Rates

The hypothesis being tested is: "The Supreme Court is more likely to affirm a decision appealed from a fellow Justice on circuit than a decision that did not involve a Justice on the circuit level." The court cases featured in this analysis were heard by the Supreme Court in the period of 1812-1823. This period represents the longest "natural court"—defined as a period with no changes in membership of the Court—in the history of the Supreme Court. Choosing this time period provides two distinct advantages: no changes in the Court's make-up allows us to control for a number of variables (Justices' propensity to ride circuit, a change in the median Justice, etc.), and this time period presents a large number of cases to study during a time when circuit riding was more prevalent than later periods. We selected a four-year subset (1813-1817) during the natural court to study. This mitigates a number of factors, including a changing political climate over the natural court, substantively different issues reaching the Court, and territories becoming new states (and therefore adding more circuit burdens).

The dataset includes all cases heard by the Supreme Court during this period, as published in the U.S. Reports, including those that were remanded back to the circuit court or needed further proof. In order to test the hypothesis, we constructed two different groups: one group that contains Supreme Court cases heard by a Justice on circuit and the other group containing cases not heard by a Justice on circuit. To construct the first (circuit-riding) group, cases were culled based on any indication that a Justice heard a specific case on circuit, such as a Justice recusing himself based on circuit participation, a Justice referencing his circuit opinion during a dissent, or a writ of division (which requires both the Justice and district judge to disagree on circuit). If there was no apparent indication of a Justice on circuit, the remaining cases were then cross-listed with the numerous circuit reports published during the era, which garners 41 cases. Though this method is not exhaustive, it presents the best method to categorize cases. At the time, court records were notoriously incomplete; most circuit court records were not even published. If the case did not explicitly note a Supreme Court Justice on circuit and was not featured in the circuit reports, it is nearly impossible to discern whether a Justice heard the particular case on circuit, despite knowing the circuit from which the case arose. Thus, we cannot be confident that the unaccounted cases did not have a Justice on circuit.

In order to get the second group, which served as the control group, we collected cases that were appealed from the state courts and the Circuit Court of the District of Columbia. The D.C. Circuit did not have an appointed Supreme Court Justice. Rather, the court consisted of judges appointed by

the president and confirmed by the Senate (the only circuit with this feature at the time).[56] The cases that arose from state courts did not have a Supreme Court Justice sitting in on the decision, as judges on the state-level were appointed by the states' governments or elected by the voters of each state. These cases (60 in total) naturally exclude the independent variable (Justices riding circuit).[57]

The dataset is showcased in Figure I. Using the method described above, a total of 210 cases were heard during the 1813-1817 period. In 41 of these cases, a Justice sat on the circuit case. In 60 cases, no Supreme Court Justice sat on the lower level. Finally, the author could not determine whether or not a Justice sat on the circuit level in 109 cases. Eight of the circuit cases reached the Court on certificate of division, but the circuit position of the Justice could not be determined.

Figure I Supreme Court Case Dataset (1813-1817)	
Circuit-Riding Cases	41
D.C. Circuit and State Cases	60
Unaccounted Cases	109
Total Cases	210

In order to compare the affirmation rates between the circuit-riding group and the control group, a Welch's *t*-test was used. [58] This test was chosen because this paper is aiming to show that statistical evidence of the difference in affirmation rates between the two groups is not simply due to random chance, meaning riding circuit had a statistically significant effect on Supreme Court affirmation rates. In order to calculate the affirmation rates of the

56: William Cranch, who served on the D.C. Circuit from 1801 until his death in 1855 (and chief judge from 1806 onward), was the second Reporter of Decisions of the Supreme Court (from 1801 to 1815). A nephew of Abigail Adams, he was one of the "Midnight Judges" appointed under the Judiciary Act of 1801 by President John Adams. He was also the great-grandfather of T.S. Eliot. (An interesting future study would be to test whether his D.C. Circuit opinions were affirmed at a higher rate than others, due to his position as Reporter.)

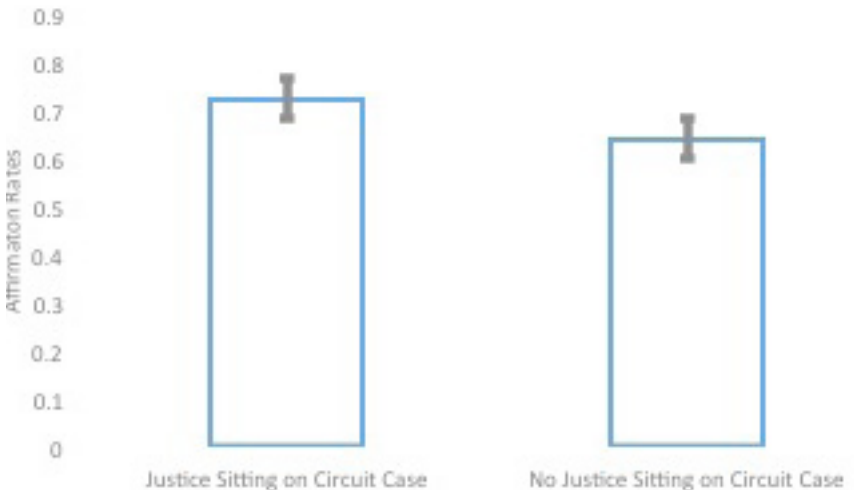
57: It should be noted that there is a heavy reliance on the D.C. Circuit cases in the control group. This occurs organically, as more cases reached the Court from that path than through the state and territorial courts.

58: A "two-sample unpooled *t*-test for unequal variances," also known as a "difference in means test."

cases, a circuit decision that was reversed by the Supreme Court was coded as "zero," while an affirmed circuit decision was coded as "one," essentially a dummy variable for Supreme Court affirmation. If the Supreme Court only reversed parts of a decision, not the entire decision, the case was coded as the proportion of affirmed clauses to overall clauses (i.e. if two clauses, out of five, of a decision were affirmed, as stated in the opinion itself, the case would be coded as ".4"); there are two of these cases in the test group and one in the control group. We then calculated the means of each group and the pooled standard error[59] and calculated a test statistic, t[60], where X_1 and X_2 are the sample means, s_1^2 and s_2^2 are the sample variances, and N_1 and N_2 are the sample sizes.

The results are featured in Figure II. Supreme Court cases featuring a Justice on circuit had an affirmation rate of 72.44% (standard error: 0.0689) while cases not featuring a Justice on circuit had an affirmation rate of 64.17% (standard error: 0.0619). The t-value associated with the Welch's t-test was -0.8937, which corresponded to a confidence interval (represented by the thick, grey lines in Figure II) of [-0.2666, 0.1012] and a p-value of 0.3738. This p-value means that we cannot reject the null hypothesis that circuit riding has no effect on Supreme Court affirmation rates.

Figure II
Comparison of Affirmation Rates



59: The formula is $SE_{pooled} = S_p[sqrt((1/N_1)+(1/N_2))]$
60: The formula is $t = (x_1 - x_2)/sqrt[(s^2_1/N_1)+(s^2_2/N_2)]$.

VI. Discussion of Results

What do the results of this test indicate for the three theoretic explanations? The explanations could simply be wrong. As it is almost impossible to discern the actual motivations behind how and why Justices make their decisions, these explanations may not factor into judicial decision-making. The aversion to reversal by other Justices (the Hughes Theory) may not have been as strong as stated. Also, the judges on the D. C. Circuit and state courts may have been equally capable as Justices of predicting the policy preferences of the Supreme Court. Though the Justices seemed to be worried about the legitimacy of the Supreme Court (the Jay Theory), this could have manifested itself in other considerations besides not wanting to reverse a fellow Justice on circuit; the Justices could have voted to reverse a circuit Justice's sound legal opinion if it was at odds with the policy preferences of the other branches, therefore lowing affirmation rates. Finally, the advocacy role (the Marshall Theory) of the circuit Justice in front of his brethren may not have been as effective as stated, as the Justices had the full case report in front of them, allowing a holistic look at the case at hand.

Or, circuit riding did matter for decision-making on the Supreme Court, but the results of our test did not translate well. While circuit riding could have had an effect on affirmation rates, it may not be the only explanatory variable. One confounding variable could be the ideological division of Supreme Court; the Court could have been deeply split along ideological lines, no matter which Justice was riding circuit. We also did not control for the composition of lower panels, whose relationships between district judges and circuit Justices could have varied greatly. Another possible confounding variable is similar issues could have been arising from different circuit courts at the same time. If the circuits differed in their proscribed outcome, the Court would have had to choose a side, meaning one Justice necessarily would have been reversed. Finally, we did not control for the total distance travelled by Justices on circuit. Spending more time on the road, traveling to each court in one's circuit, could have meant having less time to craft high quality opinions than those Justices riding smaller circuits; these lesser-quality opinions could have been reversed at a higher rate by the Supreme Court. In an ideal world, we would conduct a multivariate analysis to tease out these confounding factors, but we are limited to a simple test of comparing affirmation rates across two groups. Thus, within the confines of this Article, we were not able to test for these confounding variables.

Also, the data collected could not be very reflective of the circuit-riding phenomenon, as it is very incomplete. As mentioned earlier, court reporting was notoriously inconsistent during the nineteenth century; accordingly, in

over half of the cases in the dataset (109 cases), it could not be determined whether a Justice sat on the case on the circuit level. Furthermore, the circuit-riding group is overwhelmingly reliant upon cases from the First Circuit and decisions by Justice Joseph Story, whose records appear to be more reliable than those of other circuits (30 out of 41 cases). The cases heard in the First Circuit, with its multitude of shipping and cargo condemnation (libel) cases, could have also been substantively different from, say, cases dealing with western land sales arising from the Seventh Circuit.

As noted, the difference between Supreme Court affirmation rates in circuit cases featuring a Justice and affirmation rates for circuit cases not featuring a Justice was not statistically significant. Thus, with the possibility of having incomplete or unreflective data, several case studies will be showcased to attempt to flesh out the theoretical explanations. Due to the relatively obscure nature of these cases and the inventiveness of this study, the best approach is an in-depth reading of both the circuit and Supreme Court opinions of the following cases: *Stuart v. Laird*,[61] *Evans v. Jordan and Morehead*[62] *and Jones vs. Shore's Executors*,[63] and *Haney v. the Baltimore Steamship Company.*[64] Delving into these cases allows us to explore, examine, and illustrate the theoretical explanations in the Justices' own words.

VIa. *Stuart v. Laird*

Ironically, the constitutional test of circuit riding arose from the practice itself, as Marshall heard *Stuart v. Laird* on circuit. The case placed the Marshall Court in a quandary. Ruling against the constitutionality of the act would have removed the onerous duty of riding circuit, something that the Court would have preferred. However, this action would have incurred the wrath of the Jefferson Administration and the Democratic-Republican-controlled Congress only days after the momentous decision in *Marbury v. Madison*. In a letter, Marshall inveighed, "This is a subject not to be lightly resolved on. The consequences of refusing to carry the law into effect may be very serious… The law having been once executed will detract very much in the public estimation from the merit or opinion of the sincerity of a determination, not now to act under it."[65] Obviously, Marshall was very concerned with

61: 5. U.S. 299 (1803).

62: The appellate decision is reported at 8 F. Cas. 872 (1813) and the Supreme Court's decision is reported at 13 U.S. 199 (1815).

63: The appellate opinion can be found at 26 F. Cas. 638 (1814), and the Supreme Court's decision is reported at 14 U.S. 462 (1816).

64: 64 U.S. 287 (1859).

65: See Bruce A. Ackerman The Failure of the Founding Fathers: Jefferson,

the "public estimation," i.e. legitimacy, of the Court if it was to strike down circuit riding as unconstitutional, despite performing the practice in the past.

In another letter to Justice William Paterson, Marshall stated his policy preference as being against circuit riding and would have acted on that preference if he was not constrained. "If the question was new I should be willing to act in this character without a consultation of the Judges; but I consider it as decided & that whatever my own scruples may be I am bound by the decision."[66] However, Marshall implied he was constrained not only by the tradition of circuit riding but by the preferences of the other Justices, gleaned from "a consultation of the Judges." It is obvious that he was worried about the "survival of the institution."[67]

In the end, Justice Paterson announced the Court's decision in *Stuart*:

> [It is said] that the judges of the [S]upreme [C]ourt have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.[68]

Though arduous, the Court agreed to ride circuit as a conciliatory measure to the executive and legislative branches. Rather than rule on the constitutionality of the Act, the Court sidestepped the question by basing its ruling on the fact that circuit riding was already established, and reversal would have had negative effects on the Court's legitimacy. As Dean Alfange states, "The Court acted out of a fully justified fear of the political consequences of doing otherwise, not out of an overriding compulsion to reach the correct legal result at whatever sacrifice of their own political preferences."[69]

Stuart suggests an interplay of both the Hughes and Jay Theories. Knight

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Marshall, and the Rise of the Presidential Democracy 164 (2005).

66: See George Lee Haskins & Herbert Alan Johnson, Foundations of Power: John Marshall, 1801-15, 5 (1981).

67: *Id.* at 157.

68: *Stuart,* 5 U.S. at 299.

69: See Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom,* 1993 Sup. Ct. Rev. 329, 364 (1993).

and Epstein, looking at *Stuart* through a game theoretic lens, postulate, "[P]oliticians—even those who lack an electoral connection—are strategic actors. Had this not been the case for Marshall, for example, he simply would have voted his unconstrained preferred positions…in *Stuart* (strike the Repeal Act)."[70] Despite his misgivings (and those of Justice Samuel Chase), Chief Justice Marshall ruled in favor of riding circuit in his circuit ruling. Though making different claims than both the Hughes and Jay Theories, it is reasonable that these theories can be derived from the assumptions gleaned from *Stuart*. It seems that Chief Justice Marshall acted strategically by ruling in favor of circuit riding in his circuit decision, perhaps after gauging his colleague's policy preferences by seeking the "consultation of the Judges (Justices)" (the Hughes Theory), while also being concerned by the "public estimation" of striking down the practice, which could have decreased the legitimacy of the judicial branch (Jay Theory). Striking down circuit riding would have been a double-edged sword for Marshall; not only would his circuit opinion have been reversed by his brethren on the Supreme Court level, the Court itself would have damaged its legitimacy as an institution.

VIb. *Evans v. Jordan and Morehead* and *Jones vs. Shore's Executors*

During the circuit-riding period, a unique writ existed: the writ of division. The writ of division signaled that the district judge and the Supreme Court Justice, hearing a particular case on circuit, disagreed on the outcome of the case. The certificate of division automatically appealed the case to the Supreme Court's docket. Thus, cases in which there is a writ of division can be qualitatively analyzed for evidence of the Marshall Theory, which suggests the Supreme Court was more likely to side with the Supreme Court Justice's circuit opinion, due to his advocacy role, than the district judge. The Brokenbrough volumes (1837) provide two instances of writs of division arising from Chief Justice Marshall's Fifth Circuit: *Evans v. Jordan and Morehead*[71] and *Jones vs. Shore's Executors*.[72]

In the May 1813 term of the Circuit Court of Virginia, Chief Justice Marshall and District Judge Tucker heard *Evans v. Jordan & Morehead.* Oliver Evans had been granted a 14-year patent for his invention used in the manufacture of flour and cornmeal. After the patent had expired, Jordan

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70: See Epstein & Knight, The Choices Justices Make at 112 (cited in note 36).

71: 8 F. Cas. 872 (1813).

72: 26 F. Cas. 638. There are a number of other instances of writs of division during the 1812-1823 time period, but circuit opinions, which are needed to discern the difference of opinion, could only be found for these cases.

and Morehead started to manufacture Evans' invention. In 1808, Congress passed a law that gave Evans the exclusive right to manufacture his invention for another 14-year term. It also provided that "no person who shall have used the said [invention], or have erected the same for use, before the issuing of said patent, shall be liable for damages therefor."[73] Evans brought suit against Jordan and Morehead for the violating his exclusive patent, but Jordan and Morehead contended that they were protected by the recent Act, as they started manufacture during the interim period between the expiration of the patent and the issuance of the Act.

The question before the circuit court was whether Evans could sue Jordan and Morehead for manufacturing his invention after the expiration of the first patent but before the issuance of the patent renewal. To Chief Justice Marshall, "[Since this is] one of those subjects which is, by the Constitution of the United States, delegated entirely to the government of the Union, the question which has been made, must depend on the acts of [C]ongress."[74] The intention of the legislature, as exhibited by the wording of the Act, was to provide for the relief of Evans and grant him another patent. "The Constitution and law, taken together, give to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent. This inchoate right is exclusive. It can be invaded or impaired by no person. No person can, without the consent of the inventor, acquire a property in the invention."[75] Jordan and Morehead were allowed to manufacture the invention during the period that the patent was expired (1804-1808), but once Congress passed the relief act, they had to cease manufacture. Thus, Evans was entitled to, and could sue for, damages based on the manufacture of his invention after Congress issued the new patent.

Chief Justice Marshall and District Judge Tucker split in their decision, so the case was sent to the Supreme Court on certificate of division. Justice Bushrod Washington authored the opinion of the Supreme Court in *Evans v. Jordan and Morehead*. Justice Washington's opinion read, "The language of this last proviso [that protects against damages for manufacturing the invention before the passage of the Act] is so precise, and so entirely free from all ambiguity, that it is difficult for any course of reasoning to shed light upon its meaning."[76] Clearly, Jordan and Morehead could have been liable for damages relating to the manufacture of the invention after the expiration of the first patent and before the issuance of the second. "The legislature might

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73: *Evans,* 8 F. Cas. at 873.
74: *Id.* at 872.
75: *Id.* at 873.
76: *Evans,* 13 U.S. at 202.

have proceeded…by providing a shield for persons standing in the situation of these Defendants [and protecting them against damages]. It is [believed] that the reasonableness of such a provision could have been questioned by no one."[77] However, since Congress did not provide such a provision, the Court affirmed Chief Justice Marshall's circuit court opinion and awarded damages to Evans for the infringement of his patent by Jordan and Morehead after 1808.

An additional notable case, heard during the May 1814 term of the Circuit Court for the District of Virginia by Chief Justice Marshall and District Judge Tucker, is *United States v. Jones,*[78] which arose from the Embargo Act of 1807.[79] On November 23, 1808, Thomas Pearse took out an embargo bond on his ship, the *Sally*, to the tune of $46,300. A penalty to be assessed if the ship did not re-land its cargo in the United States, as trading with Britain and France during the Napoleonic Wars was forbidden. The case then became highly complicated, as the collector of the port of Petersburg, John Shore, died shortly after bringing the embargo bond to the district court after the *Sally* failed to re-land in the United States. His brother succeeded him in the post as collector from October 31 to December 14, 1811, during which the district court rendered its decision against George Pegram, one of the obligors of the bond. Joseph Jones then became the collector of the port. Pegram soon died, and the case was carried to the circuit court by his executors, where the district court's decision was affirmed. At the same time, Andrew Forborne, surveyor for the district of Petersburg, died in office after the suit was brought but before judgment was rendered, and John Peterson filled that position. In 1814, Pegram's executors paid the full penalty to the circuit court. A number of petitions followed, issued separately by the district attorney on behalf of the United States, by the living surveyor and collector, and the executors of the deceased surveyor and collector. In a previous case, the circuit court ruled that the United States was entitled to a moiety (half) of the penalty. The question before the court was whether the other moiety should go to the current (living) collector and commissioner or the deceased under the provisions of the Embargo Act.

After dismissing some questions not pertinent to the case, Chief Justice Marshall began, "It is first observable, that the bounty [in accordance with the law] is payable in equal proportions to the collector, naval officer, and surveyor."[80] This bounty provided motivation, in the form of money, to

77: *Id.* at 203.
78: 26 F. Cas. 638 (1814).
79: See Embargo Act of 1807 2 § 451.
80: *Jones,* 26. F. Cas. at 642.

ensure the collection laws were being followed diligently by all relevant officials. This compensation, thus, was a reward at the time of incidence for the official who caught the perpetrator, not his successor in office. "Though the office [of collector] never dies, the individuals who fill it do, and as their emoluments are considered in the light of compensation for services, the rewards of services rendered by one, ought not to be bestowed on another."[81] Though John Shore died just a few days before the judgment was rendered, he was still entitled to his compensation. Chief Justice Marshall and District Judge Tucker split in their decision when it came to the surveyor position, as Marshall felt that Forborne was entitled to his compensation, while Tucker disagreed.

On certificate of division, the Supreme Court heard *Jones v. Shore's Executors.*[82] After going over the facts pertaining to the case, Justice Joseph Story intoned, "The Court is clearly of opinion that the right of the collector to forfeitures…attaches on seizure and to personal penalties on suits brought, and in each case it is ascertained and consummated by the judgment, and it is wholly immaterial whether the collector die before or after the judgment."[83] Thus, the Court affirmed the circuit court's opinion in which the judges were not split (the collector position). Story turned to the contentious issue: "And it is further of opinion that the case of the surveyor is not in this respect distinguishable in any manner from that of the collector. It is therefore of opinion that the representatives of the deceased collector and surveyor, and not the present incumbents in office, are entitled to the distributive shares of the moiety of the money now in the registry of the circuit court."[84] The Court did not consider the positions of surveyor and collector to be fundamentally different, so the payment should not have been treated differently, either. Once again, the Court sided with one of its own, Chief Justice Marshall, over the district judge, Tucker.

In both of these cases, the Court ruled in favor of Marshall's opinion. Though some could point to the fact that this was due to Tucker being a mere district judge, this is unlikely; Tucker was one of the most revered American legal scholars of his day, having published a highly influential edition of Blackstone's *Commentaries.* Thus, the Court siding with Marshall over Tucker is not likely to be rooted in a perceived difference in legal acumen. It seems plausible that Marshall's presence on the Court gave him an advantage that Tucker, who was not a member of the Supreme Court, did not have: a venue

81: *Id.* at 643.
82: 14 U.S. 462 (1816).
83: *Id.* at 474.
84: *Id.* at 475.

to advocate for his circuit opinion by persuading the other Supreme Court Justices to his side.

VIc. *Haney v. Baltimore Steam Packet Company*

So far, we have looked at cases in which the Justice accurately anticipated the policy positions of his brethren, as the theoretical explanations predict. However, the Justices operated in an imperfect world with imperfect information. It was possible the Justices could not have known the policy preferences of their brethren, could have misapplied or misunderstood precedent, or could simply have guessed the policy preferences of their fellow Justices incorrectly.

Haney can be interpreted as an example of the last consideration. In the November 1858 term of the Circuit Court for the District of Maryland, Chief Justice Taney heard *Haney v. the Louisiana.*[85] The steamboat *Louisiana* collided with and sank the schooner *William K. Perrin* on February 26, 1858 in Chesapeake Bay. The schooner, despite sailing in an important thoroughfare, had a navigator who was inexperienced in sailing and was not familiar with the area and a pilot who was not paying attention at the helm and did not heed the warnings of his navigator. Each vessel had spotted the other from miles away, yet the chain of events that transpired resulted in the *Louisiana* ramming the *William K. Perrin* at a ninety-degree angle.

Chief Justice Taney anchored his decision on the inexperience of the schooner's crew. "[T]he weight of the testimony is decidedly on the side of those on board the *Louisiana*; for there was a steersman and a look-out, each competent and experienced, and accustomed to navigate the bay for years, each in his proper place, and each confining his attention exclusively to his appropriate duty," as opposed to the ineptitude of the crew of the *William K. Perrin*.[86] The precedent set by the Supreme Court in *The Case of the Gennesee Chief*,[87] which ruled that damages would solely be accrued by a steamboat if it was responsible for a collision, did not apply in this case, as Chief Justice Taney had established that it was the schooner's, not the steamboat's, fault. Likewise, the rule established in *St. John v. Paine,*[88] which stated, "when two vessels are meeting in opposite directions, each one shall port the helm, so as to pass each other on the larboard side," was not applicable because "[t]he rule applies only to cases where both are sailing vessels, or both are steamboats,

85: 11 F. Cas. 425 (1858).
86: *Id.* at 427.
87: 53 U.S. 443 (1851).
88: 51 U.S. 557 (1850).

not to cases where one is a steamboat and the other navigated only by sails."[89] Thus, Chief Justice Taney ruled the crew of the schooner was at fault and ordered its owners to pay for all damages.

The owners of the *Perrin* appealed to the Supreme Court in *Haney v. Baltimore Steam Packet Company.*[90] Justice Grier gave the Court's opinion, which, unlike Chief Justice Taney's circuit opinion, placed blame for the accident upon the crew of the *Louisiana*. The crew's testimony "alleges as an excuse that while the steamboat and schooner were meeting on parallel lines, the schooner suddenly changed her course and ran under the bow of the steamer. This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable, and generally false."[91] Furthermore, "[t]he hypothesis set forth in the answer to excuse this collision…is not only grossly improbable in itself, but contradicted by the testimony and is a mathematical impossibility."[92] The doctrine laid out in *Chamberlain v. Ward,*[93] which required a capable watchman and helmsman on board each vessel, controlled in this case. Finding that the *Louisiana* did not adhere to this requirement, the Court overruled Chief Justice Taney's opinion and awarded damages to the owners of the *Perrin.*

In a dissent that dwarfed the length of the majority opinion,[94] Chief Justice Taney defended his circuit court opinion by saying, "I think it my duty, therefore, to state the principles of law and the evidence in the case, upon which my opinion has been formed."[95] As he did in his circuit opinion, he cited *Gennesee Chief* and *St. John* as still remaining the controlling precedent for this case. He then recounted the testimonies of the crews of both of the vessels and stated unequivocally, "I regard this as the true history of the disaster, and of the movements of the vessels by which it was produced," i.e., the collision was the fault of the inexperienced crew upon the *Perrin*, not the capable crew of the *Louisiana.* "I cannot think that the steamboat should be charged with any part of the damage which the sailing vessel brought upon itself. Those who entrust their property on the water to incompetent hands have no just right to complain of disasters, and claim indemnity for losses arising altogether from the incapacity and unfitness of those to whom they have confided it, and still less have Cory and Miles (the crew of the *Perrin*),

89: *Haney,* 11 F. Cas. at 428.
90: 64 U.S. 287 (1860).
91: *Id.* at 291.
92: *Id.* at 293.
93: 62 U.S. 548 (1858).
94: Taney comments, "This opinion…occupies more space than I anticipated." 64 U.S. at 308 (Taney, J., dissenting).
95: *Id.* at 294.

whose incapacity and misconduct were the sole cause of disaster."[96]

A closer look at *Louisiana* reveals a technologically sage opinion by Chief Justice Taney. He adroitly handles the advantages and limitations offered by the recent advent of steamboat technology and seems to be in command of the relevant law and precedent. However, he, in this case, was less adept in anticipating the policy preferences of his brethren on the Supreme Court. The Supreme Court, according to Taney, could not grasp the technological shift that steam caused in the shipping industry, but it seems that Taney did not grasp the adverse reaction of the rest of the Supreme Court to his decision. Though this is the opposite of what the Jay Theory predicts, the Court could have been worried less about its legitimacy in the middle of the nineteenth century than in the beginning. Also, Chief Justice Taney's decision could have been so far from the Court's policy preferences that the costs of affirming this decision outweighed the costs to the Court's legitimacy.

VII. Conclusion

This Article makes an important contribution to the study of the Supreme Court during its early history—the Circuit-Riding Century—a period that is understudied in the literature. It attempts to quantitatively analyze the possible effect that circuit riding had upon Supreme Court affirmation rates in an area where no quantitative work has been done before. Initial findings suggest circuit riding did not have an effect on Supreme Court affirmation rates, but further research is necessary to reach a conclusive position on either side of the issue. The findings are subject to inherent limitations: inconsistent recording and dearth of records, the difficulty of locating transcripts of circuit decisions, the lack of secondary literature on circuit riding and circuit cases in general (especially on the quantitative side), and not finding a "smoking gun," meaning we cannot discern which of the three theoretical explanations—that is, the Hughes, Jay, and Marshall Theories—if any, had an effect on affirmation rates. Although the difference between the affirmation rates of cases heard by a Justice on circuit and of circuit cases without a Justice present was not found to be statistically significant, we have found an explicit result: the thesis provides a positive counterpoint to scholars who have speculated about the detrimental effect of circuit riding on Supreme Court decision-making in strictly normative terms.

This study provides a launching pad for studying this important part of the Court's early history, and there are many paths moving forward. Locating better data or sources would allow a clearer picture of the possible effect of

96: *Id.* at 309.

circuit riding, as it would allow regression analysis to be conducted rather than a simple statistical test. The expansion of the studied time period could allow for analysis across changing political climates and the changing composition of the Supreme Court.

Appendix I		
Miles Traveled on Circuit by Justice		
Circuit	Justice	Miles Traveled
1st	Joseph Story	1896
2nd	Smith Thompson	2590
3rd	Henry Baldwin	2000
4th	Roger Brooke Taney	458
5th	Philip Pendleton Barbour	1498
6th	James Moore Wayne	2370
7th	John McLean	2500
8th	John Catron	3464
9th	John McKinley	10000
See Schwartz, History of the Supreme Court at 153 (cited in note 25).		