THE CERTIFICATE OF DIVISION AND THE EARLY SUPREME COURT

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The history and development of Supreme Court review over state courts in the early republic is well known. The equally important history and development of Supreme Court review of federal trial courts under the "Certificate of Division" is not. This Article addresses this largely forgotten yet critically significant feature of the early Court's appellate power. During much of the nineteenth century, the main federal trial courts were generally staffed with two judges—a Supreme Court Justice riding circuit and a resident district judge. As a result, there were often tie votes on questions of law. Congress's remedy was the certificate of division, which called for mandatory interlocutory Supreme Court review when the judges were divided. This unusual and understudied appellate mechanism proved critical to the development of law and the role of the Court during the Chief Justiceships of Marshall and Taney, and it implicated procedural issues that are still relevant today.

As this Article will show, many of the early Court's most important cases came to it via certificate of division. And certification produced almost as many Supreme Court decisions as did the Court's direct review of the state courts, the more widely studied practice. In addition, because review was obligatory when there was division, disagreement between the judges

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was sometimes feigned, in order to steer certain legal questions to the Court that the judges wished it to hear, many of which might otherwise have escaped review. In this regard, we include a heretofore unavailable dataset that collects all cases—civil and criminal—that reached the Court via certification. And we undertake an empirical analysis of the dataset to ascertain, among other things, which Justices used (and sometimes abused) the practice. This Article will also show how certification by division allowed for practices that scholars tend to assume arose much later. For example, it provided an early opportunity for interlocutory appeals from lower federal courts, and it provided Supreme Court Justices with a form of discretionary control over the Court's docket (simply by disagreeing with the district judge), long before discretionary review became the norm. Finally, certification was important as one of a variety of possible approaches that judicial systems use to break ties—here, by allowing an appeal as of right to a higher court.

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INTRODUCTION

The history and development of Supreme Court review over state courts in the early republic is well known. The equally important history and

development of Supreme Court review of federal trial courts under the "Certificate of Division" is not. In this Article, we examine this understudied, yet critically important, part of the early Supreme Court's appellate jurisdiction. During much of the nineteenth century, the main federal trial courts (circuit courts) were staffed with two judges: a Supreme Court Justice "riding circuit" and a resident district judge. As a result, there were often tie votes on questions of law. After experimenting with other remedies to break such ties, Congress eventually settled on the certificate of division, which called for mandatory interlocutory Supreme Court review when the judges were divided on issues of law. The practice was as common as was the Court's review of state courts—the better-studied aspect of the Court's appellate jurisdiction. This unusual and understudied appellate mechanism proved critical to the development of law and the role of the Court during the Chief Justiceships of Marshall and Taney. And although the practice is underappreciated, the study of certification by division is important for a number of reasons.

First and foremost, it allowed some of the early Court's most celebrated cases to reach its docket, including cases that it would otherwise have been unable to review.[1] For example, the certificate of division was the only basis (other than very limited review on habeas corpus) for the Supreme Court to directly review lower federal court criminal cases until the end of the nineteenth century. In addition, the certification mechanism empowered individual Justices to exercise control over the Court's docket and to develop the law in the republic's formative era on an as-needed (or as-desired) basis. Moreover, because Supreme Court jurisdiction over certified questions was mandatory, Justices could strategically cast votes in the circuit courts in order to create a division that would then trigger mandatory review by the Court. Indeed, there is historical evidence that Justices did just that, sometimes even going so far as to announce that the circuit court division was pro forma—that is, a mere pretense of division in order to obtain Supreme Court review.[2] Certification by division thus provides an example of a form of discretionary docket control (by individual Justices) more than a century before the Supreme Court was commonly understood to have gained such authority.

In addition, the practice offers important lessons for debates over issues that continue to vex lawyers, judges, and scholars today. First, whether and how to break tie judicial votes remains an important question. The use by the

1. *See infra* text accompanying notes 81–83 (discussing Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), and other cases that reached the Court on certification by division).

2. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 173–78 (1988).

early federal judiciary of certification by division provides an early American example of one such practice. Second, certification by division provides an early example of another practice that persists in some American judicial systems: establishing an appeal as of right when lower court judges are divided in opinion. Because Supreme Court jurisdiction over certified questions was mandatory, litigants were given the right to an appeal when a division arose. And in this regard, certification was suggestive of greater opportunities for appeal—especially in criminal cases—than are commonly supposed. Indeed, as we will show, the overall number of certification cases heard on the merits under the Marshall and Taney Courts approximated the total number of cases the Supreme Court heard on direct review of state courts—a far more studied phenomenon.[3] Third, certification by division was an early example of what federal courts scholars generally assume is highly restricted: interlocutory appeals within the federal judicial system.

Part I of this Article presents the origins of certification by division in the early 1800s, and it documents the procedural device's early development. Part II presents an examination—based in part on an empirical analysis—of the Court's engagement with certification by division during the time of Chief Justices Marshall and Taney. We gather the universe of certified cases and conduct an analysis of this dataset in order to ascertain the factors that gave rise to certification and which Justices made comparatively more (or less) use of the device. Part III then turns to a survey of features that the certification by division mechanism shares with issues that continue to challenge lawyers, judges, and scholars. Part IV offers an epilogue of certification practice from Chief Justice Taney's death through the end of the nineteenth century.

I. THE BEGINNINGS AND DEVELOPMENT OF CERTIFICATION BY DIVISION

Certification upon division of opinion was a means by which issues that arose before the federal circuit courts, in the exercise of their trial jurisdiction, could be heard by the Supreme Court. The circuit courts were created by the Judiciary Act of 1789; one circuit court was established in each federal judicial district[4] (with the exception of the districts of Maine and Kentucky[5]). While the circuit courts enjoyed limited appellate

3. *See infra* text accompanying note 84.

4. *See* Judiciary Act of 1789, Pub. L. No. 1-20, § 4, 1 Stat. 73, 74–75 (dividing the United States into three geographic circuits and creating "in each district of said circuits . . . Circuit Courts").

5. *See id.* The 1789 Act conferred powers normally conferred upon circuit courts upon the district courts in the districts of Maine and Kentucky. *See id.* § 10, 1 Stat. at 77–78.

jurisdiction over the district courts[6] (which were also products of the 1789 Act[7]), they were primarily courts of first instance with a substantial grant of original jurisdiction.[8] As originally created, the circuit courts had no dedicated judges. Instead, the circuit courts heard cases in panels consisting of district judges and Supreme Court Justices riding circuit.[9] Other than a short-lived experiment in the early 1800s,[10] there were no independently staffed circuit courts until Congress authorized the appointment of one circuit judge in each circuit with the Circuit Judges Act of 1869.[11]

The need for certification upon division of opinion arose out of early congressional legislation that directed circuit courts to render most of their decisions by a panel of multiple judges. The Judiciary Act of 1789 had directed that a circuit court hear cases in panels "consist[ing] of any two justices of the Supreme Court, and the district judge" for the district in which the circuit court was sitting.[12] If both Justices and the district judge were present and voting, no ties would arise. But in the Judiciary Act of 1793, Congress reduced the number of Justices who ordinarily would participate, along with the district judge, in a circuit court case from two to one.[13] As a result, ties became a possibility.

The 1793 Act recognized the possibility of a division of opinion, and it

6. *See id.* § 11, 1 Stat. at 78–79 ("[T]he circuit courts shall . . . have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided.").

7. *See id.* § 3, 1 Stat. at 73–74.

8. *See id.* § 11, 1 Stat. at 78–79.

9. For historical discussions of circuit riding by Supreme Court Justices, see David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1714–26 (2007); Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1763–1831 (2003).

10. The Judiciary Act of 1801 did away with circuit riding by Supreme Court Justices and instead called for staffing the various circuit courts with circuit judges. *See* Judiciary Act of 1801, Pub. L. No. 6-4, § 7, 2 Stat. 89, 90–91. An exception was the Sixth Circuit, which was to be staffed by a new circuit judge and the existing district judges from Kentucky and Tennessee. *See id.* § 24, 2 Stat. at 97. Commonly known as the Midnight Judges Act, the 1801 Act was the outgoing Federalists' effort to secure the judicial branch after going down in defeat in the election of 1800—in which Thomas Jefferson's Democratic-Republicans thrashed the Federalists. *See, e.g.*, Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1125–26 (2009). But in 1802, the new Congress and President formally repealed the 1801 Act, *see* Judiciary Act of 1802, Pub. L. No. 7-9, § 1, 2 Stat. 132, 132, and largely restored the federal judiciary to its state before the 1801 Act—including the staffing of circuit courts by Supreme Court Justices and district judges, *see* Amendatory Act of 1802, Pub. L. No. 7-31, 2 Stat. 156.

11. *See* Circuit Judges Act of 1869, Pub. L. No. 41-22, § 2, 16 Stat. 44, 44–45.

12. Judiciary Act of 1789 § 4, 1 Stat. at 74–75 (creating "in each district of [the federal] circuits . . . Circuit Courts, [which] shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum").

13. *See* Judiciary Act of 1793, Pub. L. No. 2-22, § 1, 1 Stat. 333, 333–34. The 1793 Act did allow the Supreme Court, in its "judgment, . . . to assign two . . . justices to attend the circuit court or courts." *Id.* It also allowed circuit court to be held before a lone Supreme Court Justice when "the district judge shall be absent, or shall have been of counsel, or be concerned in interest in any cause, then pending." *Id.*

dealt with the problem by relying on the requirement that the Supreme Court Justices ride a different circuit every year (a requirement that had been put in place by the Judiciary Act of 1792[14]). Thus, by simply holding the case over to the next Term, a different Supreme Court Justice would sit and might resolve the tie by agreeing with the district judge the second time around. Alternatively, according to the statute, "if upon the second hearing when a different judge of the supreme court shall be present, a like division shall take place, the district judge adhering to his former opinion, judgment shall be rendered in conformity to the opinion of the presiding judge."[15] This made sense because at that point, two Supreme Court Justices would have reached a similar conclusion, with a lone district judge voting the other way.[16]

The problem of tie votes on the circuit court was largely, but only briefly, eliminated by the Judiciary Act of 1801—the so-called Midnight Judges Act.[17] The Act did away with circuit riding by Supreme Court Justices and instead staffed the various circuit courts with three newly created circuit judges.[18] But the reforms of the Act were short lived. Congress formally repealed the 1801 Act with the Judiciary Act of 1802.[19] Shortly thereafter, it deployed the Amendatory Act of 1802 to restore the structure of the federal judiciary to its state before the 1801 Act.[20] Among other things, the Amendatory Act restored the staffing of circuit courts to a single Supreme Court Justice and the resident district judge.[21]

14. Joshua Glick's historical survey of Supreme Court Justice circuit riding explains: "[T]he Judiciary Act [of 1789] was silent regarding assignments [of Justices] to the circuit courts and, in its first meeting the Court adopted an informal rule permanently allocating the circuits according to the home states of the justices." Glick, *supra* note 9, at 1771 (footnote omitted). This informal rule committed Justice Iredell to ride the southern circuit—the circuit that involved the greatest travel through the most difficult terrain. *See id.* at 1765, 1771. Justice Iredell urged his colleagues to support rotation among the circuits. *See id.* at 1771. When that failed, Justice Iredell "contacted his brother-in-law Senator Johnston." *Id.* The eventual result was the Judiciary Act of 1792, which provided that the Justices were to allocate the circuits for circuit-riding purposes "in such manner that no judge, unless by his own consent, shall have assigned to him any circuit which he hath already attended, until the same hath been afterwards attended by every other of the said judges," unless "the public service or the convenience of the judges shall at any time, in their opinion, require a different arrangement, the same may take place with the consent of any four of the judges of the supreme court." Judiciary Act of 1792, Pub. L. No. 2-21, § 3, 1 Stat. 252, 253.

15. Judiciary Act of 1793 § 2, 1 Stat. at 334.

16. *See* United States v. Daniel, 19 U.S. (6 Wheat.) 542, 547 (1821).

17. *See* Glick, *supra* note 9, at 1782–1801.

18. *See* Judiciary Act of 1801, Pub. L. No. 6-4, § 7, 2 Stat. 89, 90–91. An exception was the Sixth Circuit, which was to be staffed by a new circuit judge and the existing district judges from Kentucky and Tennessee. *See id.* § 24, 2 Stat. at 97. Still, even the Sixth Circuit was to decide cases using panels of three judges. *See id.* § 7, 2 Stat. at 90–91.

19. *See* Judiciary Act of 1802, Pub. L. No. 7-9, § 1, 2 Stat. 132, 132.

20. *See* Amendatory Act of 1802, Pub. L. No. 7-31, 2 Stat. 156.

21. *See id.* § 4, 2 Stat. at 157–58.

The Amendatory Act did not, however, restore the practice of rotating the circuit on which a Justice would ride. And in this respect, it provided some relief to the Justices' circuit-riding duties. Instead, it assigned sitting Justices to particular circuits[22] and further directed that the circuits be reallocated upon the appointment of a new Justice.[23] The fact that the Amendatory Act restored the staffing of each circuit court to panels of two judges—a Supreme Court Justice and a district judge—meant that the prospect for tie votes had reappeared. But the permanency of the assignment of Justices to circuits (at least until the appointment of a new Justice) virtually eliminated the prospect that a circuit court tie could be resolved at the next Term, as it ordinarily would have been under the 1793 Act. Instead, the next Term would (in all likelihood) simply reunite the same two judges on the panel.[24]

Congress recognized the tie-vote problem, and the Amendatory Act dealt with the issue of ties differently, depending upon whether the circuit court was sitting in review of a district court decision or sitting as a court of original jurisdiction. In the former case, the Act directed that "judgment shall be rendered in conformity to the opinion of the judge of the supreme court presiding in such circuit court."[25] In the context of a circuit court sitting as a court of first instance, by contrast, the Amendatory Act introduced the concept of certification to the Supreme Court upon division of opinion[26]:

> [W]henever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the supreme court, at their next

22. *See id.*
23. *Id.* § 5, 2 Stat. at 158.
24. *See* United States v. Daniel, 19 U.S. (6 Wheat.) 542, 547–48 (1821).
25. Amendatory Act of 1802 § 5, 2 Stat. at 158.
26. The Amendatory Act of 1802 not only gave rise to certification by division, but it also provided a path by which circuit court original jurisdiction decisions could *not* be subject to certification by division. Section 4 of the Act included the proviso that "when only one of the judges hereby directed to hold the circuit courts, shall attend, such circuit court may be held by the judge so attending." *Id.* § 4, 2 Stat. at 157–58. And, when only one judge sat, there would be, of course, absolutely no possibility of a division in opinion. For a while, circuit court cases heard by a lone judge were rare. Over time, however, the burden of circuit riding grew, *see* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 49 (Routledge 2017) (1928), and the Supreme Court's docket swelled, *see id.* at 50–52. Perhaps not surprisingly, the Justices began to shirk their circuit-riding responsibilities. In the aftermath of the Civil War, circuit courts presided over by a single district judge became more common—even after Congress provided for the appointment of dedicated circuit judges in 1869. *See* Circuit Judges Act of 1869, Pub. L. No. 41-22, § 2, 16 Stat. 44, 44–45; FRANKFURTER & LANDIS, *supra*, at 69, 79, 109.

> session to be held thereafter; and shall, by the said court, be finally decided.[27]

Once the Supreme Court had resolved the certified points—usually referred to as "certified questions"—the Court was to remit to the circuit court its decision, which was to "have effect according to the nature of the said judgment and order."[28] The Amendatory Act further directed that "nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, farther [sic] proceedings can be had without prejudice to the merits."[29] The Act thus contemplated certification upon division to function—and indeed the system did function—as a form of interlocutory appeal.[30]

Not only did certification by division allow for the resolution of tie votes on circuit courts and allow for interlocutory appeals,[31] it also allowed cases to reach the Supreme Court that otherwise could not have been heard by the Court. Probably most important of such cases were criminal cases in the circuit courts.[32] Congress did not grant the Supreme Court general appellate jurisdiction[33] over federal criminal cases until the late nineteenth

27. Amendatory Act of 1802 § 6, 2 Stat. at 159–61.

28. *Id.* Note that since the districts of Maine and Kentucky had no circuit courts, *see supra* note 5 and accompanying text, certification by division was unavailable from these districts, *see* DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801–1829, at 210 (1985) ("There was no provision . . . for any type of referral or appeal from the district courts that were not included in a circuit."). This continued to be a problem as additional states entered the Union that featured districts that did not lie within any circuit. *See id.* ("From 1802 to 1829 Congress added eighteen district courts but only one new circuit, the Seventh Circuit consisting of Kentucky, Tennessee, and Ohio. . . . Not until 1837 was a partial solution attempted.").

29. Amendatory Act of 1802 § 6, 2 Stat. at 159–61. The Act also barred imprisonment or punishment from being imposed "where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment." *Id.*

30. Not every issue qualified for certification by division jurisdiction. Rulings on new trial motions were not proper candidates for certification, *see, e.g.*, United States v. Daniel, 19 U.S. (6 Wheat.) 542, 549 (1821); nor were rulings committed to the discretion of the trial court (as would also have then been true of the motion in *Daniel*), *see* Packer v. Nixon, 35 U.S. (10 Pet.) 408, 411 (1836); nor were rulings relating to a question of fact rather than law, *see* Wilson v. Barnum, 49 U.S. (8 How.) 258, 262 (1850).

31. However, the Court held that certification by division jurisdiction did not extend to cases heard by the Circuit Court of the District of Columbia. *See* Ross v. Triplett, 16 U.S. (3 Wheat.) 600, 601 (1818) (holding that Supreme Court jurisdiction "extends only to the final judgments and decrees" of the Circuit Court of the District of Columbia).

32. *See* David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 563 (1990) ("Certification of questions under the [1802] Act occurred frequently in criminal cases.").

33. Although Article III itself may confer the Supreme Court's appellate jurisdiction (with such exceptions as Congress shall make), *see* U.S. CONST. art. III, § 2, cl. 2, it is common to speak of Congress as granting the Court appellate jurisdiction, with the affirmative grant being understood as the negation of what is not granted, *see Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513 (1869).

century.[34] Thus, for nearly one hundred years, certification by division was the near-exclusive means by which the Court could directly review lower federal court[35] decisions in criminal cases.[36] And during the Chief Justiceships of Marshall and Taney, we determined that forty-four criminal cases were reviewed on the merits by the Court through certification by division that would otherwise have been unreviewable after a final judgment. Although there was a limited opportunity for habeas corpus review by the Supreme Court in connection with criminal proceedings in the circuit courts,[37] it was seldom exercised.[38] Additionally, in *Ex parte Watkins*, the Marshall Court held that habeas would be unavailable at the post-conviction stage to collaterally attack the circuit court's judgment below, at least when there was no challenge to the lower court's jurisdiction.[39]

Insofar as civil cases were concerned, certification similarly allowed the Court to take review of circuit court cases that it would not otherwise have been able to review after a final judgment. That was because certification did

34. *See* United States v. More, 7 U.S. (3 Cranch) 159, 173–74 (1805) (holding that the Supreme Court's writ of error review of circuit courts extended only to civil cases); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960).

35. Insofar as section 5 of the Amendatory Act of 1802 did not allow certification by division with respect to cases appealed or removed from the district court to the circuit court, *see* Amendatory Act of 1802, Pub. L. No. 7-31, § 5, 2 Stat. 156, 158, criminal matters decided initially by the district courts were insulated from Supreme Court review. This remained the case until the enactment of the Revised Statutes of 1874. *See infra* note 159. The fact that district court criminal dispositions could not reach the Supreme Court was of little moment during the early years of the republic since criminal jurisdiction over more serious crimes was vested in the circuit courts. *See* HENDERSON, *supra* note 28, at 5; Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 531 (1992) ("At the time, circuit courts . . . essentially served as trial courts with jurisdiction over most criminal cases."); Rossman, *supra* note 32, at 560 ("The First Judiciary Act gave circuit courts the responsibility for trying all but petty crimes."). Over time, however, the original criminal jurisdiction of the district courts grew. *See* ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 112–13 (1987). In addition, districts that were not part of any circuit, *see supra* note 28 and accompanying text, generally enjoyed the criminal jurisdiction usually afforded to the circuit courts, *see* HENDERSON, *supra* note 28, at 5. Thus, the Supreme Court could not review criminal judgments arrived at in those districts, whereas it could conceivably review on certification by division in respect to the same crimes when those crimes were tried in districts with circuit courts.

36. *See* HENDERSON, *supra* note 28, at 20; Ratner, *supra* note 34, at 195–201.

37. The Supreme Court was able to exercise appellate power in connection with federal circuit court criminal proceedings by combining writs of habeas corpus and certiorari. *See* Ratner, *supra* note 34, at 196. Although the power was appellate within the meaning of Article III, the mechanism is ordinarily referred to as the "original writ" of habeas corpus. *See* Judiciary Act of 1789, Pub. L. No. 1-20, § 14, 1 Stat. 73, 81–82.

38. James S. Liebman has identified six "original" habeas cases decided by the Marshall Court (1801–35) and three by the Taney Court (1836–64). *See* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2059 & nn.350–54 (1992). Relief was granted in three of the cases under Chief Justice Marshall and none under Chief Justice Taney. *See id*.

39. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 207 (1830); *see also* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 587–90 (1993) (discussing *Watkins*).

not have an amount-in-controversy requirement that would otherwise have to have been satisfied as a precondition to obtaining Supreme Court review of circuit court civil judgments.[40] Because most of the civil cases originally filed in the circuit courts would have been grounded in diversity of citizenship jurisdiction, vigorous exercise of certification enabled the Court to develop principles of "general law" that it might not otherwise have been able to when the case fell below the amount in controversy required for a writ of error in a civil case after a final judgment. Indeed, *Swift v. Tyson*[41]—the case most closely associated with the early Court's development of general common law—was itself a case decided on certificate of division, and which would not have satisfied the amount in controversy for review by the Supreme Court (although it satisfied the lower amount in controversy for original diversity jurisdiction in the circuit court).[42]

An important limitation of the certification process was that the Supreme Court would decide only the particular legal issue (or issues) on which the judges below had divided rather than to decide the "whole case." That was the upshot of the first decision in which a question reached the Court by virtue of a division below, in *Ogle v. Lee*[43]—two years after the enactment of the 1802 legislation. Although the Court unanimously answered that its role was restricted to resolving the specific question on which the judges had divided, the Court never had occasion to answer the question on which the judges below were divided in *Ogle* because the parties thereupon settled the case.[44]

The first case in which the Court actually answered a certified question was *Ogden v. Blackledge*,[45] in which Justice Cushing "delivered the opinion of the court, which was entered on the minutes."[46] The Court's brief opinion answered a single legal question—that a North Carolina statute of limitations was no bar to the plaintiff's cause of action—without resolving the remainder of the case.[47] And in a footnote, the Court importantly recognized

40. *See* Ratner, *supra* note 34, at 193–94. The amount in controversy for writ of error review had to be in excess of two thousand dollars. Judiciary Act of 1789 § 22, 1 Stat. at 84–85.

41. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

42. The bill of exchange at issue was for $1,540.30, *id.* at 14, that is, below the requisite $2,000 for a writ of error but above the $500 amount in controversy required for diversity cases, *see supra* note 40 and accompanying text.

43. Ogle v. Lee, 6 U.S. (2 Cranch) 33 (1804).

44. *Id.* at 33. The Court noted that, if the parties wanted full review of the entire case, a writ of error could be sought in the case in question. *Id.*

45. Ogden v. Blackledge, 6 U.S. (2 Cranch) 272 (1804).

46. *Id.* at 279.

47. *Id.*

that its decisions on division would have precedential effect.[48] Of course, if the Court had concluded that the limitations period *barred* the action, it would have effectively resolved the "whole case" insofar as the Court's answer would have been dispositive on remand. But as discussed further below, deciding a single dispositive issue of law on certificate of division was not thought to raise a "whole case" problem, as opposed to when the circuit court purported to divide on basically all of the multiple potential legal issues in a case.

Another limitation on the certificate of division—and one that the Supreme Court often construed strictly—was that the relevant issue had to be a "point of pure law."[49] For example, Chief Justice Marshall once refused to allow the certification device to be used in a case in which the criminal defendant had asked for an instruction directing a verdict in his favor at the close of the government's case, arguing that there was insufficient evidence to make out a violation of the federal law under which he had been charged.[50] The judges on the circuit court had divided on the question. Although today one would think of such a question as raising a clear question of law,[51] it was apparently sufficiently factually based (and would effectively resolve the whole case) that appellate jurisdiction was denied by the Court. Similarly, rulings that went to a disputed question of fact or to the discretion of the lower court would also not be candidates for the certificate of division.[52]

During the early years of certification, the Justice who had sat as the Circuit Justice below would, on occasion, not participate in the decision of the questions before the Supreme Court.[53] However, the practice was erratic.[54] Moreover, our research revealed only one case where recusal at the

48. *Id.* at 274 n.(a) ("This being the first case under the late act of congress, the certificate and statement are copied as a precedent which may be of use in future practice.").

49. BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 83 (George Ticknor Curtis & Benjamin R. Curtis eds., 1880) (describing earlier practice, in lectures from 1872–73); *see also supra* notes 43–44 and accompanying text.

50. United States v. Bailey, 34 U.S. (9 Pet.) 267, 273–74 (1835).

51. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307 (1979); *In re* Winship, 397 U.S. 358 (1970).

52. CURTIS, *supra* note 49, at 83.

53. *See, e.g.*, United States v. Heth, 7 U.S. (3 Cranch) 399, 414 (1806) (noting that Chief Justice Marshall, the Circuit Justice below, did not participate in the Supreme Court's decision).

54. While judges today would presumably recuse themselves from hearing appeals of cases when they had heard the case below, this was not clearly the case in the Court's early years. Recusal norms were muddled. *Compare, e.g.*, Steven G. Calabresi & David C. Presser, Essay, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1397–98 (2006) (noting that recusing oneself from Supreme Court review of a case when one had sat as Circuit Justice in the case "was the unofficial practice"), *with* Stras, *supra* note 9, at 1745 n.201 (noting that recusal practices were nonuniform but that "many did eventually recuse themselves from consideration of cases that they heard before the circuit

Supreme Court level was directly attributed to participation in the court below as a Circuit Justice.[55] In the end, the norm over the years appears to have been that certification cases were heard by the entire Court. Indeed, we also found that in thirty-three (14%) of the cases decided by the Marshall and Taney Courts on certification, the author of the Court's opinion appears to have been the very Justice who had sat on the circuit court that was divided.[56]

By the 1820s, certification cases were reaching the Court based on a pro forma division between the judges on the circuit court panel[57]—that is, based upon a contrived difference of opinion between the Supreme Court Justice and district judge,[58] often with the acquiescence, if not at the request, of the parties.[59] This was the practice that G. Edward White has discussed at length, and which obviously provided the opportunity for Justices (when they sat on the circuit court) to shape the Supreme Court's docket.[60] White's most illuminating example of the practice involved the effort of counsel for Dartmouth College to arrange a quick pro forma division of opinion from Justice Story ("a regular user" of the practice[61]) in a circuit court case raising the same Contract Clause issues that the college was presenting to the Supreme Court on direct review from the state courts in *Trustees of Dartmouth College v. Woodward*.[62] The advantage to a circuit court ruling

courts"), *and* Partington v. Gedan, 880 F.2d 116, 132 (9th Cir. 1989) (Noonan, J., concurring) ("[T]he early Supreme Court did not believe that a judge was biased as a matter of law because he had previously ruled on the question being presented to him.").

55. *See Heth*, 7 U.S. (3 Cranch) at 414. Interestingly, in *United States v. Lancaster*—a case in which the Court rejected jurisdiction based on certification by division—the Supreme Court held that a district judge who presided over a case at trial in the district court could not properly then sit on the circuit court reviewing the district court's decision on writ of error. United States v. Lancaster, 18 U.S. (5 Wheat.) 434, 434 (1820).

56. *See infra* note 94 and accompanying text.

57. *See, e.g.*, Bank of the U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 910 (1824) (Johnson, J., dissenting) ("This cause is one in which, from the great importance of the questions it gave rise to, was certified to this Court, on a *pro forma* difference of opinion, that it might undergo the fullest investigation, and give time for the maturest reflection.").

58. *See* ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 679 (4th ed. 1864) ("[I]n practice, this convenient method or [sic] obtaining an authoritative decision upon questions of difficulty and importance, is sometimes resorted to, without the actual expression or even formation of hostile opinions between the judges of the circuit court.").

59. Appendix A, which presents all cases heard by the Supreme Court on certification by division during the Marshall and Taney Chief Justiceships, identifies those cases where an opinion makes clear that the case was heard pro forma. *See infra* Appendix A.

60. *See* WHITE, *supra* note 2, at 173–74.

61. *Id.* at 174.

62. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). There were apparently multiple circuit court cases in which division was essentially manufactured. *See* WHITE, *supra* note 2, at 177 (referring to the federal cases as essentially fictitious).

would have been that questions of general constitutional law protecting vested rights from state interference might also be decided by the Court on certification—something that would not have been possible in the Supreme Court in the case coming to it on direct review from the state courts.[63] This effort to engineer a pro forma division was for naught, however, as the Supreme Court decided the case on direct review before the certified case could be heard by the Court.[64]

After Chief Justice Marshall's tenure, the practice of pro forma division began to draw the occasional objection from the Taney Court before ultimately disappearing in the 1850s. For example, in *United States v. City of Chicago*,[65] the Court stated:

> [B]y considering questions, if certified here, only when real divisions of opinion occur on them, . . . no danger exists of extending this branch of our jurisdiction beyond what Congress intended. On the contrary, it is divisions of opinion *pro forma*, and from courtesy to counsel, and on a variety of points, and at times, some not then having actually arisen, but being anticipated, which appear to transcend the original design of vesting such a power here.
>
> We have, therefore, for several years, declined to consider a certificate of such a variety of points so arising. . . . And although an indulgence has sometimes been given to certificates, where, in important cases, a division was certified *pro forma* . . . , yet we do not feel justified in repeating it.[66]

Similarly, in a companion case to the well-known political question decision of *Luther v. Borden*,[67] the Court dismissed for want of jurisdiction a purported certification where the "division was merely formal" and had effectively "transferred" the "whole case" and "a multitude of points (twenty-nine in number)" from the circuit court to the Supreme Court.[68] But because the same issues had been resolved in the main case, which came up to the Court on a writ of error after a final judgment in the circuit court, the Court observed that its decision was effectively preclusive on the certified questions: "[T]he parties will understand the judgment of this court upon all

63. *See* WHITE, *supra* note 2, at 175–77 (noting that the Supreme Court could only consider denials of federal rights on direct review, such as the Contract Clause violation, and not nonfederal questions of general constitutional law, such as the vested-rights argument).

64. *Id.* at 178. As White points out, most of Justice Story's concurrence in *Dartmouth College* was devoted to the vested-rights argument, *see id.* at 178, 619–20, positing a general principle that government may not "take the property of A, and give it to B," *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 702 (Story, J., concurring).

65. United States v. City of Chicago, 48 U.S. (7 How.) 185 (1849).

66. *Id.* at 192.

67. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

68. *Id.* at 47.

the material points certified, from the opinion it has already given in the case referred to."[69]

Interestingly, the Taney Court suggested more than once that constitutional problems might be presented by some multiple-issue certifications on division in which the circuit court was effectively sending up the "whole case" for resolution by the Supreme Court, in contrast to the early admonition not to do so in *Ogle v. Lee*.[70] In *White v. Turk*, for example, the Court stated that, if it heard the certificate of division in such a setting, "it would, in effect, be the exercise of original, rather than appellate jurisdiction" to the extent that the Court would be in the position of being the initial real decisionmaker in a case that was otherwise only within its appellate jurisdiction.[71] Of course, a particular resolution of a single dispositive issue—such as a question whether a statute of limitations barred an action—might also resolve the whole case, but such cases appear to have been quite ordinary. The Court attempted to articulate the distinction in *United States v. City of Chicago*:

> [T]he principle . . . is, not that the whole case may not properly be disposed of by our decision on what is certified, but that the decision must in substance be, not on several questions arising in various stages of the cause, and some of them anticipated and presented, so as to cover the whole case.[72]

As Chief Justice Taney explained, in what he hoped would put an end to the practice of sanctioning certificates when there may have been no real division below, either because it was pro forma; or because it involved multiple issues, not all of which could have been actually decided; or both:

> This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law . . . . Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise, as previous questions were ruled the one way or the other.
>
> The irregularity and evil tendency of this practice has upon several occasions attracted the attention of the court, although it has been occasionally acquiesced in . . . .[73]

69. *Id.* at 47–48.
70. *See supra* text accompanying notes 43–44.
71. White v. Turk, 37 U.S. (12 Pet.) 238, 239 (1838).
72. United States v. City of Chicago, 48 U.S. (7 How.) 185, 192 (1849).
73. Webster v. Cooper, 51 U.S. (10 How.) 54, 55 (1850) (relying on Nesmith v. Sheldon, 47 U.S. (6 How.) 41 (1848)).

Perhaps the classic example of the Court's overly indulgent allowance of a pro forma division on multiple questions of law was *Jones v. Van Zandt*, in which an "unusual number" of issues were certified to the Court involving the Fugitive Slave Act of 1793.[74] As stated by the Court, the division below was pro forma, and division was agreed to because the questions "possessed so wide and deep an interest" and could not have been reviewable later because of the insufficient amount in controversy.[75] Most of the many questions had to do with the formal requirements of the Act, such as what constituted harboring a fugitive, and what kind of notice the alleged slaveholder had to give individuals before being able to sue them for damages under the Act if the slaveholder could not recover the fugitive. But one of the primary questions was whether the Fugitive Slave Act was constitutional—an issue that had already been squarely resolved in the affirmative, just five years before, in *Prigg v. Pennsylvania*.[76] The *Van Zandt* Court accordingly ruled against that particular challenge (and each of the others), stating that the Act "is not repugnant to the constitution, [which] must be considered as among the settled adjudications of this court."[77]

II. AN EMPIRICAL ANALYSIS OF CERTIFICATION ON THE EARLY COURT

In Appendix A, we provide a full list of the civil and criminal cases that reached the Court on certification of division during the Chief Justiceships of Marshall and Taney. In developing our list, we used Westlaw to identify all cases that reached the Supreme Court on grounds of certification by division during their tenures as Chief Justice.[78] The Westlaw searches produced 238 cases.[79] As can be seen, some of the nineteenth century's most

74. Jones v. Van Zandt, 46 U.S. (5 How.) 215, 215, 224 (1847).

75. *Id.* at 224.

76. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 542 (1842).

77. *Van Zandt*, 46 U.S. (5 How.) at 230.

78. We identified cases using the following queries in the Westlaw Supreme Court case database, all along with appropriate date restrictions: 'certif! & divi! oppos! & differ!'; 'certif! /p question issue'; 'judges /p divi! oppos! & differ! certif!'; certif! /s again; oppos! /3 opinion % certif!. Because the searches returned numerous cases not having to do with certification by division—for example, cases in which a certificate was needed with respect to a division of property in land—we read through all the cases to cull those that reached the Court because of certification by division.

79. As a check, we compared our results with the information contained in the Supreme Court Legacy Database. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, & Sara C. Benesh, *Supreme Court Database Legacy 04*, SUP. CT. DATABASE, http://Supremecourtdatabase.org [http://perma.cc/UA4Y-RRNA]. The Legacy Database included 233 certification cases. One case, White v. Nicholls, 44 U.S. (3 How.) 266 (1845), seems to have been wrongly coded as a certification case (as opposed to a case reaching the Court solely on writ of error). As for the remaining six cases in our dataset but missing from the Legacy Database, the Legacy Database correctly coded those cases as

prominent cases reached the Supreme Court by virtue of certification by division, even though that is not always acknowledged. For example, in addition to *Swift v. Tyson*,[80] the landmark cases of *United States v. Hudson* (holding that circuit courts cannot exercise jurisdiction over statutorily undefined, common law crimes),[81] *Bank of the United States v. Planters' Bank of Georgia* (holding that the Bank of the United States could sue a nondiverse corporation in the circuit courts consistent with Article III's federal question jurisdiction),[82] and *The Antelope* (the Supreme Court's first encounter with the international slave trade)[83] all reached the Supreme Court on certification by division.

Based on the list of cases in Appendix A, and to gain better traction over the early Court's use of certification during the relevant time period (1802–1864), we undertook a systematic analysis of the cases that came to the Court via certification. Figure 1, below, presents a histogram showing the frequency of these 238 certified cases that the Supreme Court heard during that period. (Note that the 1850 Term was twice as large as usual, so the Supreme Court presumably heard more of every kind of case that Term.) By way of comparison, over the same time period, the Court heard 258 cases under its authority granted by section 25 of the Judiciary Act of 1789 to review state court decisions.[84] Indeed, the Court's certification cases constituted more than eight percent of its total nonoriginal docket during the time period we studied.[85] In other words, while the bulk of scholarly commentary on the Supreme Court's activity during this period has focused on the Court's review of state court cases, the Court's certification jurisdiction constituted a roughly similar proportion of the Court's docket.

having reached the Court on writ of error, but those cases also included issues that reached the Court on certification; or distinct cases merged together, one of which reached the Court on writ of error and the other on certification. We thus adhered to the view that these six cases properly belonged in our dataset.

80. *See supra* text accompanying notes 41–42.

81. United States v. Hudson, 11 U.S. (7 Cranch) 32, 32 (1812).

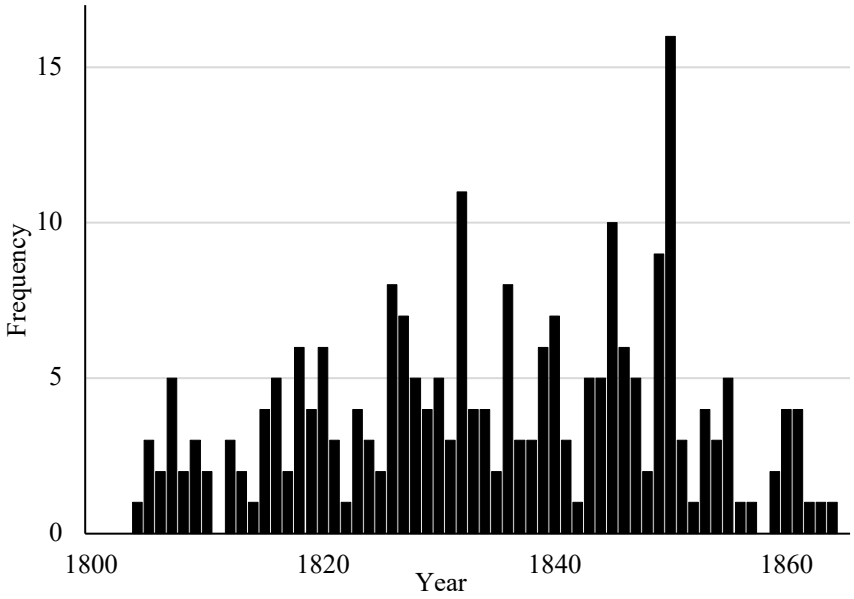
82. Bank of the U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904, 907–08 (1824).

83. The Antelope, 24 U.S. (11 Wheat.) 413 (1826).

84. To identify these cases, we searched the Supreme Court Legacy Database, *see* Spaeth et al., *supra* note 79, for cases reaching the Court on writ of error from the state courts beginning with the 1804 Term and during the Chief Justiceships of Marshall and Taney.

85. *See id.*

FIGURE 1. Histogram of Frequency of Certified Cases



For further investigation into the Court's certification docket, we focused on the 236 cases where the circuit court panel (as was typically the case) included a Supreme Court Justice.[86] Table 1 presents data for 235 of these cases (where we could determine the lower court from which the case came to the Supreme Court) on how frequently over the years the federal circuit courts in each state contributed to the Court's certified question docket. In some ways, these data appear to be what one might have expected: states with larger populations (such as New York) generated more certified questions. On the other hand, one also might have expected that states that entered the Union earlier than other states would have generated more

86. We eliminated two cases from our initial tabulation of 238. One came to the Court from the Circuit Court of the District of Columbia. Ross v. Triplett, 16 U.S. (3 Wheat.) 600, 600 (1818). Unlike the other circuit courts, this court was staffed by dedicated circuit judges. *See* An Act Concerning the District of Columbia, Pub. L. No. 6-15, § 3, 2 Stat. 103, 105–06 (1801). In *Ross v. Triplett*, the Supreme Court held that certification by division was unavailable from this circuit court. 16 U.S. (3 Wheat.) at 601. The other case arose out of the circuit court for the districts of California. Wiggins v. Gray, 65 U.S. (24 How.) 303, 304 (1861). At that time, no Justice was assigned to ride circuit in California. Rather, unlike the other circuit courts at the time, Congress authorized a dedicated circuit judge for this circuit court. *See* An Act to Establish a Circuit Court of the United States in and for the State of California, Pub. L. No. 33-142, § 1, 10 Stat. 631, 631 (1855). Thus, the division below was presumably between a circuit judge and district judge.

certified questions over time. Yet just a single certified question arose out of South Carolina, and none arose out of New Hampshire.

TABLE 1. Frequency with Which Certified Cases Emanated from a Federal Circuit Court Within Each State

State	*Number of Certified Cases*
Alabama	2
Arkansas	2
Connecticut	1
Delaware	2
Georgia	11
Illinois	9
Indiana	6
Kentucky	23
Louisiana	3
Maine	4
Maryland	13
Massachusetts	17
Michigan	6
Mississippi	11
New Hampshire	0
New Jersey	4
New York	36
North Carolina	7
Ohio	11
Pennsylvania	23
Rhode Island	8
South Carolina	1
Tennessee	10
Vermont	8
Virginia	17

Total	235

We also considered whether the rate at which a state-generated certification case might be predicted by (1) the state's population or (2) the distance between the state and Washington, D.C. As we spell out in Appendix B, we endeavored to test these hypotheses using regression analysis.[87] We found that, while the distance between the state and the U.S. capital was not statistically significant, the state's population was.[88]

We next considered the extent to which particular Justices were more, or less, likely to generate certification cases when they rode circuit below. We considered the 236 cases that reached the Supreme Court based on a circuit court division involving a Supreme Court Justice. To conduct this analysis, we first had to determine which Justices were responsible for which certification cases. (A few Supreme Court opinions name the Justice who rode circuit, but most do not.) To do this, we coded the state out of which each certified case emanated. On that basis—and relying on data showing the average length of time it took a case to reach the Supreme Court from the lower courts[89]—we deduced (1) the circuit out of which each certified case emanated and, (2) employing tables showing the allotment of Justices to circuits, the Circuit Justice for each case. We validated the Circuit Justice identified using this methodology by comparing the identified Circuit Justice with the actual Circuit Justice in cases that specifically gave the name of that Justice; and in all but one case, there was a match.[90]

As we discuss in greater detail in Appendix B, we ran a regression to confirm our expectation that the number of Terms a Justice served on the Court was predictive of the number of certification cases the Justice generated.[91] The results of the regression confirmed our expectation with a statistically significant result.[92]

That the number of Terms a Justice served is *overall* predictive of the number of certified cases that that Justice generated does not mean that that

87. *See infra* text accompanying notes 181–83.

88. The *p*-value was significant at the one percent level. *See infra* Appendix B Table B1.

89. We looked at Supreme Court cases where lower court records were available and, from those cases, tried to ascertain the mode number of years for cases to travel from the lower federal courts to the Supreme Court. We used a two-year lag during the 1800s, 1810s, 1820s, and 1830s, a four-year lag during the 1840s, and a three-year lag thereafter.

90. Appendix A identifies, for each certification by division case, the name of the Justice we impute as the Circuit Justice in the court below. That name is in all-capital letters when the Supreme Court's opinion confirms that name and is in italics when the Court's opinion indicates affirmatively that a different Justice was in fact the Circuit Justice below. *See infra* Appendix A.

91. *See infra* Appendix B.

92. The *p*-value was significant at the one percent level. *See infra* Appendix B Table B2.

relationship holds for each Justice. We therefore turned our attention to a comparison of (1) the expected number of certification cases a Justice should have generated (based on the number of Terms actually served and the average number of certified cases generated per "Justice-Term") and (2) the actual number of certification cases a Justice generated.[93] To estimate the number of certification cases we would have expected a Justice to have generated, we first took the total number of certification cases heard by the Court during the period under study—236—and divided that number by the total number of "Justice-Terms" during that period—456[94]—to arrive at the average number of certification cases we would expect a Justice to have generated each Term the Justice sat: just over one-half a certified case per Justice per Term.[95] Finally, we multiplied that per-Justice-per-Term estimate by the number of Terms each Justice served to arrive at an estimated number of cases for each Justice.

Table 2 provides raw data on the number of certification cases for which each of the twenty-seven Justices in the dataset was responsible. For each Justice, the Table provides the total number of Terms during which the Justice served;[96] the number of certification cases we would expect the Justice to have generated based on the number of Terms served; and the actual number of certification cases we found the Justice to have generated. A quick perusal of Table 2 reveals many Justices whose expected numbers approximate their actual numbers but also several Justices for whom this is not the case. For example, we would have expected Chief Justice Taney to

93. Insofar as we found that state population was predictive of the number of certified cases each state generated, *see infra* notes 181–84 and accompanying text and Appendix B Table B1, a more nuanced approach would consider the population of the circuit at the time a Justice served as Circuit Justice for that circuit.

94. We considered that the Court had a complement of seven Justices until 1837 and a complement of nine Justices beginning in 1838. In so doing, we sacrificed (reasonably, we think) precision for some ease of computation. First, the Court had only six Justices until 1807, but this constitutes only three years out of our period of study. Second, Congress authorized the expansion of the Court to eight Justices in 1837. While one of those new seats was filled in 1837, the second was not filled until 1838. We decided to count 1837 as a year with seven sitting Justices. Finally, there were brief periods during which the authorized Court complement was not full due to a Justice's illness, death, or resignation. There were 33 Terms between 1804 and 1837, which translates to (33 Terms) x (7 Justices) = 231 Justice-Terms. And, between 1838 and 1863, there were 25 Terms, which translates to (25 Terms) x (9 Justices) = 225 Justice-Terms. This generates a total of 231 + 225 = 456 Justice-Terms.

95. (236 cases) ÷ (456 Justice-Terms) = 0.518 case/Justice-Term.

96. From 1804 through 1843, the Terms of Court began in January or February, and thus they nicely coincide with the calendar year. We assigned the actual year during which a Justice took his seat as the first year he sat if the Justice received his commission on or before July 31 of that year; otherwise, we assigned the *next* calendar year as the first year he sat. Similarly, we assigned the actual year during which a Justice resigned or died as the last year he sat if the Justice resigned or died on or after August 1 of that year; otherwise, we assigned the *previous* calendar year as the last year he sat.

have generated nearly fourteen certification cases as a Circuit Justice,[97] yet he in fact generated only six. And while we would have expected Justice McLean to have generated around fifteen certification cases,[98] in fact we find that McLean generated thirty-eight certification cases—far in excess of the expectation. In Appendix B, we present empirical analysis showing that the extent to which some Justices generated fewer certified cases than one would expect was statistically significant.[99]

TABLE 2. Number of Certification Cases Found to Be Generated by Each Circuit Justice (1804–1863 Terms of Court) [Circuit Justices Imputed to Cases According to the Method Described[a]]

Justice	*Total Number of Terms*	*Expected Number of Certified Cases*	*Actual Number of Certified Cases*
Marshall	31	16.04	20
Paterson	2	1.04	0
Cushing	6	3.11	1
Washington	25	12.94	10
Chase	7	3.62	1
Johnson	30	15.53	10
Livingston	15	7.76	11
Todd	18	9.32	15
Duvall	22	11.39	10
Story	33	17.08	23
Thompson	19	9.83	21
Trimble	2	1.04	1
McLean	30	15.53	38
Baldwin	13	6.73	7

97. Since Chief Justice Taney served on the Court for 27 Terms, we would have expected Chief Justice Taney to have generated (0.518 case/Justice-Term) x (27 Terms) = 13.974 cases during his tenure on the Court.

98. Since Justice McLean served on the Court for 30 Terms, we would have expected Justice McLean to have generated (0.518 case/Justice-Term) x (30 Terms) = 15.526 cases during his tenure on the Court.

99. *See infra* text accompanying notes 184–86 and Appendix B Table B3. In calculating the expected number of circuit court cases on which a Justice might have been expected to have divided, we focused only on time served. We did not also attempt to control for the fact that some Justices might have been sitting in sparsely populated versus highly populated states.

Wayne	28	14.49	3
Taney	27	13.97	6
Barbour	4	2.07	1
Catron	26	13.46	10
McKinley	14	7.25	5
Daniel	17	8.80	12
Nelson	19	9.83	13
Woodbury	5	2.59	3
Grier	17	8.80	10
Curtis	4	2.07	2
Campbell	7	3.62	1
Clifford	5	2.59	1
Swayne	1	0.52	1

Note: [a] *See supra* text accompanying notes 89–90.

A final empirical point we investigated is the extent to which a Justice who was (according to our method of imputation[100]) part of the division below then went on to author the Supreme Court's opinion disposing of the certified questions. Our analysis indicates that this occurred in 33 (or 14%) of the 236 cases in our dataset.

III. LESSONS FROM THE LEGACY OF CERTIFICATION BY DIVISION

In this Part, we discuss several ways in which certification upon division anticipated, and offers lessons for, several legal issues that continue to attract scholarly attention today. In particular, certification by division provides examples of (1) a mechanism by which to break judicial ties, (2) a mechanism offering a right of appeal when there is a divided bench on the court below, (3) a mechanism allowing interlocutory appeal (and suggesting greater opportunities for appeal to the Supreme Court than is commonly thought, especially in criminal cases), and (4) a mechanism that fostered in the Supreme Court Justices some discretionary control over the Court's docket.

100. *See supra* text accompanying notes 89–90.

A. CERTIFICATION BY DIVISION AS A METHOD OF BREAKING A JUDICIAL TIE

Certification by division was a method by which ties on a trial court could be broken. Today a single judge almost always presides over a trial court. The general rule on appellate courts is that a tie vote among appellate judges results in an affirmance of the ruling of the court below, but the affirmance lacks any precedential value.[101] While the affirmance provides clear direction to the parties to the suit, the absence of precedential value undermines one of the core functions of appellate courts.[102] To the extent that a tie vote generating no binding precedent is seen as problematic, it is important to keep tie votes to a minimum. This is also true, if somewhat less true, when the lower court in which the tie occurs is a trial court, staffed by a Supreme Court Justice, and when review, if any, is directly to the Supreme Court.[103]

A typical response to the problem of tie votes is to populate court panels with an odd number of judges. This was the approach taken for the old federal circuit courts under the short-lived Federalist reshaping of the federal judiciary in 1801.[104] And, in the federal system today, trial courts are generally presided over by a lone trial judge,[105] federal courts of appeals generally hear cases in three-judge panels,[106] and the Supreme Court

101. *See, e.g.*, William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 34 (1983) (explaining that equal divisions on the Court are to have no precedential effect). On the uncertain historical origins of the rule, see *id.* at 33–35. For a defense of the Supreme Court's practice respecting ties, see Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 650–73 (2002); *see also* Michael Coenen, Comment, *Original Jurisdiction Deadlocks*, 118 YALE L.J. 1003, 1003, 1008–12 (2009) (noting the absence of a rule for how to resolve ties in Supreme Court original jurisdiction cases and suggesting that (1) a tie on whether to hear a case means that the case should not be heard, and (2) a tie on whether to adopt a special master's report means that the report should be adopted).

102. *See, e.g.*, Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 86–88 (2003).

103. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 836 (1994) (footnote omitted) ("[I]n a sense the circuit courts served as panels of the Supreme Court, both in form and function: in form because the Justices sat on circuit courts, and in function because the Justices viewed their circuit duties as part of a collaborative effort of interpretation, achieved by communication among themselves between sittings and deference to each others' rulings.").

104. *See supra* text accompanying notes 17–19.

105. *See* 28 U.S.C. § 132. Congress has by statute called for three-judge district courts (that is, courts still populated with an odd number of judges) to hear certain exceptional cases. *See id.* § 2284.

106. *See id.* § 46(b) ("In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges . . . ."). The same statute authorizes the United States Court of Appeals for the Federal Circuit to "determine by rule the number of judges, not less than three, who constitute a panel." *Id.* In turn, Federal Circuit rules direct that "cases and controversies will be heard and determined by a panel consisting of an odd number of at least three judges." FED. CIR. R. 47.2(a). Federal courts of appeals occasionally hear cases en banc, and some courts

typically hears cases with its full complement of nine Justices.[107] An odd number of voting judges cannot produce a tie vote.[108]

If a tie vote nevertheless will result, judicial systems sometimes use other devices to avert a nonprecedential decision.[109] One possibility is to hold a case that today would produce a tie vote over until the next term of court, in the hope that the delay will resolve the tie. The Supreme Court has used this approach on occasion,[110] and under the Judiciary Act of 1793, the circuit courts relied on such an approach for a while.[111]

Another possibility is that a system might invest one judge (or group of judges) with greater voting power in order to break the tie. This was an approach of the 1802 Congress that gave rise to certification upon division used in another context: while it relied on certification by division in tie cases heard originally by a circuit court, it directed that the "presiding" judge's vote in the circuit court would prevail in tie cases hearing appeals from the district courts.[112] A third possibility is the one Congress employed in the certification upon division scheme: provide for automatic appellate jurisdiction in a superior court (assuming there is one) if a tie results in a lower court. Such a procedure remains in effect in other jurisdictions

of appeals are statutorily authorized to consist of an even number of judges. *See* 28 U.S.C. § 44(a) (establishing six judges for the First Circuit, fourteen for the Third Circuit, sixteen for the Sixth Circuit, and twelve each for the Tenth, Eleventh, and Federal Circuits).

107. *See* 28 U.S.C. § 1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."). The Court has always heard its cases en banc. *Cf.* Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 80 (2005) (describing Chief Justice Rehnquist's decision, while battling thyroid cancer, to participate in cases only as necessary to avoid tie votes).

108. Typically, courts are designed to default to panels of an odd number of judges but also to have a quorum requirement that allows fewer judges to constitute a viable panel. *See, e.g.*, 28 U.S.C. § 1 (setting the quorum of the Supreme Court at six); *id.* § 46(d) (setting the quorum of a federal court of appeals panel at a "majority of the number of judges authorized to constitute a court or panel," or two judges).

109. The special status and function of a court effectively takes an option that might be appropriate in other settings to resolve a tie—random decision—off the table. *See* Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1690, 1713 (2010). *But see* Dan S. Felsenthal, *Averting the Quorum Paradox*, 36 BEHAV. SCI. 57, 57–58 (1991) (arguing that, where majority rule governs, and an even number of judges sits by virtue of vacancies, illnesses, and recusals, breaking ties randomly will maximize the probability that the result reached will be the same as would have been reached by the full complement of judges).

110. *See, e.g.*, Black & Epstein, *supra* note 107, at 84 (noting two occasions when the Court decided to hold over cases in order to avoid tie votes). The Court also uses this approach for a case on appeal from a state court or a federal court of appeals when the absence of a quorum precludes Supreme Court resolution. *See* 28 U.S.C. § 2109 (directing in such cases that "a majority of the qualified justices shall" determine whether "the case can[] be heard and determined at the next ensuing term").

111. *See supra* notes 14–16 and accompanying text.

112. *See supra* note 25 and accompanying text.

today.[113]

What explains the decision by the early Congress to stick with a system that made ties a reasonably possible consequence (since circuit courts were constituted to sit with an even number of judges)? The best answer seems to be that there was no obvious source of additional judges to staff the circuit courts. Authorizing additional judgeships would have been costly and would have contributed to the possibly objectionable number of life-tenured federal officials who would populate the states. And the experiment of having two Supreme Court Justices at each circuit court sitting, along with the district judge, made the Justices' circuit-riding responsibilities much more onerous than they already were.

Once there were going to be many ties, there were good reasons to have the Court resolve those ties. First, Congress might have seen a need to shore up the fledgling federal judiciary's legitimacy.[114] And, even though circuit court resolutions that could be certified were actions of a mere trial court, still Congress might have perceived that allowing tie votes to fester could be deleterious to the federal court system.[115] Second, the early republic had numerous legal issues that called for guidance. Certification by division allowed the Supreme Court to offer that guidance. That opportunity was most important in cases over which Congress did not otherwise see fit to give the Supreme Court appellate jurisdiction—perhaps especially criminal cases.[116]

113. *See, e.g.*, GA. CONST. art. VI, § V, para. V ("In the event of an equal division of the Judges [of the Court of Appeals] when sitting as a body, the case shall be immediately transmitted to the Supreme Court."). Another possibility is to rely on judges from another court in the judicial system to resolve the tie. The Supreme Court of New Jersey, for example, arguably has the power to employ this approach. *See* Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735, 737–41 (2003) (explaining that a provision in New Jersey law allows—in certain conditions—for an absent justice on the Supreme Court of New Jersey to be temporarily replaced by a different judge).

114. *See* Clifford James Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 J. POL. 55, 61–64 (2009) (offering a game-theoretic model explaining how a court system in its "infancy" can ensure compliance with the governing regime's rules but only consistent with the purpose for which the judiciary was created, and how the court system's powers expand once it has earned the trust of the public); *see also* Michael D. Gilbert & Mauricio A. Guim, *Active Virtues*, 98 WASH. U. L. REV. 857, 863–67 (2021) (elucidating and discussing the importance of judicial legitimacy).

115. *See* Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599, 1623 (2014) ("It is probably . . . the case that older, more established courts need less legitimization than comparatively newer courts."); *cf.* Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 823 (2008) (noting that the "first-generation jurists [on the Federal Circuit] were right to establish the bona fides of the court and avoid attention" and arguing that "the court is now fully established," so "there is no longer a need for the court to take defensive positions or to maintain a low profile").

116. *See supra* text accompanying notes 32–39.

B. CERTIFICATION BY DIVISION AS AN EXAMPLE OF APPEAL OF RIGHT WHEN THERE IS A DIVISION OF OPINION BELOW

Relatedly, certification by division is an example of another practice that remains in use today (albeit not in the federal system): allowing appeals as of right to a higher court when a lower court's judges are divided in opinion—although usually not by tie vote. For example, New York state procedures allow for an appeal as of right from the Appellate Division to the Court of Appeals (New York's highest court) whenever two justices (of the five justices constituting an Appellate Division panel) dissent.[117]

The federal system, in contrast, has essentially abandoned this approach. Even as the nineteenth century practice of certification from the circuit courts waned and then disappeared,[118] Congress introduced new, though more limited, opportunities for certification by division. A 1903 statute designed to expedite resolution of cases brought by the United States under certain antimonopoly and interstate commerce statutes authorized certification upon division of the judges of the circuit court—sitting in a panel of three judges—upon the request of the Attorney General.[119] But Congress repealed this limited version of certification just seven years later.[120]

A form of certification to the Supreme Court continues to survive today, but it neither rests upon a division of opinion below, nor does it provide for mandatory Supreme Court review. The modern form of certification dates back to the Judiciary Act of 1891 (Evarts Act),[121] which created the federal courts of appeals—the "circuit courts of appeals";[122] the Evarts Act did not ensconce division on the court below as a prerequisite to certification,

117. *See* N.Y. C.P.L.R. § 5601(a) (McKinney 2021).

118. *See infra* Part IV. The old circuit courts themselves were dissolved in the early twentieth century. *See infra* text accompanying notes 179–81.

119. *See* Expediting Act, Pub. L. No. 57-82, § 1, 32 Stat. 823, 823 (1903) ("In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court . . . ."). The statute also directed that the panel hearing the case include *three*, not two, judges. *See id.* (directing that a case brought by the government under the relevant statutes be brought in a circuit court and heard by "not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select"). Thus, the statute necessarily contemplated a division of opinion as a 2-1, not a tie, vote. The Supreme Court made clear that certification under the provision otherwise had to comply with the rules developed under the old regime of certification by division of opinion. *See* Balt. & Ohio R.R. Co. v. ICC, 215 U.S. 216, 224 (1909); S. Pac. Co. v. ICC, 215 U.S. 226, 227 (1909).

120. *See* Act of June 25, 1910, Pub. L. No. 61-310, 36 Stat. 854.

121. Judiciary Act of 1891, Pub. L. No. 51-517, 26 Stat. 826.

122. *See id.* § 6, 26 Stat. at 828 (authorizing the circuit courts of appeals to certify questions of law in certain categories of cases to the Supreme Court).

however.[123] Under the current statutory provision, the judges on a federal court of appeals may "certify" a question of law, the resolution of which is critical to a case, and yet in the views of the circuit judges, is unclear.[124] Yet, much like the rest of the Court's docket,[125] the Court's jurisdiction over such certified questions is discretionary.[126] Indeed, the Court has so infrequently granted certification requests from the courts of appeals that the procedure is generally seen today to be a dead letter.[127] In short, the extant version of certification by courts of appeals to the Supreme Court neither turns on a division of opinion below nor provides for a mandatory appeal.

C. CERTIFICATION BY DIVISION AS AN EXAMPLE OF INTERLOCUTORY APPEALS IN THE FEDERAL JUDICIAL SYSTEM

The current federal judicial system disfavors interlocutory appeals.[128] Few interlocutory federal trial court orders are appealable as of right,[129] and the probability of discretionary review is low as well.[130] In contrast, while

123. *See id.*

124. *See* 28 U.S.C. § 1254 ("Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired . . . ."); SUP. CT. R. 19.

125. *See, e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1456 (2009).

126. *See* SUP. CT. R. 19.3 ("After docketing [a case in which a question has been certified], the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed."); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1711–12 (2000).

127. *See* United States v. Seale, 558 U.S. 985, 986 (2009) (statement of Stevens, J., respecting the dismissal of the certified question) (lamenting that "[t]he certification process has all but disappeared in recent decades" such that "it is a newsworthy event these days when a lower court even tries for certification"); Hartnett, *supra* note 126, at 1712; Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1706 (2003); Aaron Nielson, Essay, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 484–85 (2010).

128. *See, e.g.*, Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 92 (2016).

129. The federal judicial code provides the federal courts of appeals with appellate jurisdiction over "final decisions" from the district courts. 28 U.S.C. § 1291. The Supreme Court, in turn, generally has appellate jurisdiction over cases heard by the courts of appeals. *See id.* § 1254(1); *cf. id.* § 1253 (providing for limited Supreme Court interlocutory appellate jurisdiction over injunctions issued by three-judge district courts). There are limited categories of orders over which federal appellate courts nevertheless have mandatory interlocutory jurisdiction. By statute, the courts of appeals have mandatory interlocutory jurisdiction over appeals involving the grant or denial of injunctive relief. *See id.* § 1292(a). Another basis for mandatory appellate jurisdiction over what are arguably interlocutory district court orders is the collateral order doctrine. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546–47 (1949).

130. *Cf.* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1242 (2007) (noting that technically "it is fair to say that under the prevailing judicial doctrines, no interlocutory trial court order is categorically beyond an appellate court's jurisdiction," although at the same time, federal

not all cases reaching the Court under the older practice of certification by division arrived in an interlocutory posture (in some cases the issue that divided the judges would have resolved the case),[131] certification by division provided a basis for interlocutory appeals directly to the Supreme Court in a broad swath of cases.

On reflection, the justifications for interlocutory appeals carried more resonance during the early stages of the republic than they do today. There were numerous legal issues early in the country's history that doubtless called for clarity; interlocutory appeals allowed courts to reach the "correct" result in cases,[132] while at the same time providing relatively quick legal guidance to the broader legal community. Further, while some scholars may suppose that widespread interlocutory review bespeaks a distrust of trial courts and thus to some degree detracts from trial courts' legitimacy,[133] certification by division dealt with trial courts staffed in part by Supreme Court Justices; the risk of delegitimizing courts staffed by Justices by introducing interlocutory appeals to the Supreme Court itself seems small—especially given the Justices' ability to control whether there would be a division at all.

Finally, it bears noting that the opportunity for interlocutory review that certification provided has implications for understanding the scope of litigants' ability to secure review of lower court holdings. While there may not have been anything like a right of review, there were clearly greater opportunities to obtain review during the early republic—even in otherwise unreviewable cases—than might be commonly supposed.[134]

"appellate courts exercise [their] discretion [to review interlocutory trial court orders] quite sparingly (and justifiably so)"). A district court hearing a civil action is statutorily authorized to certify an order involving "a controlling question of law as to which there is substantial ground for difference of opinion and [when] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The court of appeals then has "discretion . . . [to] permit an appeal to be taken from such order." *Id.* The All Writs Act, *id.* § 1651(a), also provides a statutory basis for discretionary court of appeals review of district court interlocutory orders, *see* Steinman, *supra*, at 1257–66.

131. *See, e.g.*, The Antelope, 25 U.S. (12 Wheat.) 546 (1827). This was *The Antelope*'s third trip to the Court. *The Antelope* initially came to the Court on appeal, post-judgment, The Antelope, 23 U.S. (10 Wheat.) 66 (1825), and then it returned purely on a certificate of division after remand, The Antelope, 24 U.S. (11 Wheat.) 413 (1826).

132. *See* Johnson v. Jones, 515 U.S. 304, 309 (1995) (identifying as benefits of interlocutory appellate review that "it may avoid injustice by quickly correcting a trial court's error" and that "[i]t can simplify, or more appropriately direct, the future course of litigation").

133. *See* Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 SW. L.J. 1045, 1048 (1990) (noting the argument that "[e]asily available [interlocutory] review . . . risks destroying the morale of the trial court judges and lowering public respect for trial courts").

134. As Marc M. Arkin has argued, while "the certificate of division was [not] the equivalent of either the modern appeal or even the writ of error," "the existence of this procedure shows that Congress

D. CERTIFICATION BY DIVISION AS AN EARLY EXAMPLE OF THE SUPREME COURT'S DISCRETIONARY CONTROL OVER ITS DOCKET

The standard learning—not altogether wrong—is that the Supreme Court's discretionary docket did not arise until the end of the nineteenth century,[135] when Congress sought to mitigate the effects of the Court's burgeoning docket, which was then largely mandatory.[136] But the reality is that certification by division provided significant opportunity for the Justices to shape the Court's docket for much of the nineteenth century. It is something the Justices took advantage of (and that Congress likely *wanted* the Justices to take advantage of). As we have noted above, the early practice of certification by division did not require the lower court judges to express opinions that actually conflicted with one another, and for a time, judges on the circuit court might feign disagreement, often openly, to allow a case to reach the Court.[137] Moreover, there is evidence that the Justices riding circuit sometimes communicated (by mail) with other Justices about cases they heard, meaning that the Justices' effort to control their docket through the certification by division device could extend beyond the desire of a single Justice to have the full Court opine on a particular issue. As noted above, Justices at times freely discussed with their colleagues the issues they wanted the Court to confront, and they collaborated to achieve that end.[138]

What, then, is one to make of the retrenchment during the Taney Court that took issue with the liberal use of pro forma divisions and the hearing of multiple issues amounting to the "whole case"? The move certainly did not eliminate the certificate of division or a Justice's ability to shape the Court's appellate jurisdiction. But it did eliminate some of the arguable abuses of certification, and it may have clipped the wings of some of the device's abusers, by focusing on jurisdictional and constitutional concerns that seem

and the federal courts continued to attach importance to review by a second tribunal in criminal cases." Arkin, *supra* note 35, at 531. And this was the case despite the common belief in the absence for the first hundred years of the republic of any provision for direct appeal to the Supreme Court in federal criminal cases. *See, e.g.*, Abney v. United States, 431 U.S. 651, 656 (1977).

135. *See* Hartnett, *supra* note 126, at 1649 ("For over one hundred years, the Supreme Court had no power to pick and choose which cases to decide.").

136. *See id.* at 1650; FRANKFURTER & LANDIS, *supra* note 26, at 98–101.

137. Arkin, *supra* note 35, at 531.

138. *See* WHITE, *supra* note 2, at 173–81; *see also* Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 238 n.113 (2012) (stating that certification by division "created opportunities for the justices to capitalize on, or even create, disagreements with the district judges with whom they sat on circuit in order to ensure that a given case would reach the Supreme Court"); *cf.* Letter from John Marshall to Joseph Story (July 13, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL 352, 352 (Charles F. Hobson ed., 1995) ("Another admiralty question of great consequence has occurred at the last term which I would carry before the supreme court if I could, but as I have not the privilege of dividing the court when alone & as the sum is only about 1800$ it must abide by my decision."), *referenced in* WHITE, *supra* note 2, at 174.

not to have much attracted the Court's attention before then. Perhaps also many of the uncertain questions in the early republic had been asked and answered, and the need for the Court to build up its stature seems to have become less immediate, as its role had become fairly secure. So, while individual Justices may have had a harder time arranging for issues to come before the full Court, the device remained an important feature in the discretionary control of the Court's docket.

IV. EPILOGUE

The introduction of a separate cadre of federal circuit judges during Reconstruction did not reduce the need for certification on division. With the Circuit Judges Act of 1869, Congress authorized the appointment of one separately appointed circuit judge in each circuit.[139] Going forward, a circuit court panel of two judges might consist of "the justice of the Supreme Court and circuit judge sitting together, . . . or in the absence of either of them . . . , [then of] the other . . . and the district judge."[140] And the 1802 Act's certification provision—which could be invoked whenever "the opinions of the judges [on the circuit court] shall be opposed"—applied when a division of opinion arose between any pair of these judges.[141]

But in 1872, there was a fundamental reform in certification by division: a division in opinion between judges on the circuit court would no longer lead to an interlocutory appeal. Instead, the view of the "presiding" judge—the Circuit Justice if the Justice was part of the panel, and otherwise, the circuit judge under the 1869 Act[142]—would prevail, with final judgment being entered "for the time being" in accord with that view.[143] Thereafter, litigants could obtain review of the "final judgment" in the Supreme Court "on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas."[144]

One can identify two factors that prompted Congress to enact the 1872 reform. One was the delay in the trial proceedings that might accompany the interlocutory appeals that the 1802 version of certification allowed.[145] The

139. *See* Circuit Judges Act of 1869, Pub. L. No. 41-22, § 2, 16 Stat. 44, 44–45 ("[F]or each of the nine existing judicial circuits there shall be appointed a circuit judge, who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court allotted to the circuit."). For historical discussion of the 1869 Act, see STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 56–59 (1968).

140. Circuit Judges Act of 1869 § 2, 16 Stat. at 44–45.

141. Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 21–22 (1871) (citation omitted); *see also* United States v. Rider, 163 U.S. 132, 136 (1896) ("The act of April 10, 1869, c. 22, 16 Stat. 44, provided for the appointment of a Circuit Judge in each circuit, but this did not repeal the act of 1802, as the same necessity existed as before for the power to certify questions.").

142. The Circuit Judges Act of 1869 had already established that, when "the justice of the Supreme Court and circuit judge s[a]t[] together, . . . the justice of the Supreme Court shall preside," and that, "in the absence of either of them . . . the other . . . shall preside." Circuit Judges Act of 1869 § 2, 16 Stat. at 44–45.

143. Act of June 1, 1872, Pub. L. No. 42-255, § 1, 17 Stat. 196, 196.

144. *Id.*

145. Notwithstanding the freedom the Amendatory Act of 1802 provided to the circuit courts to continue with trial proceedings pending resolution of the certified question, *see supra* text accompanying note 29, further proceedings sometimes realistically hinged upon resolution of the certified question.

other was the tremendous growth in the Supreme Court's docket.[146] The 1872 reform clearly addressed the interlocutory appeal concern. It also was designed to stem the Court's workload. Whereas, before the reform, a given case might reach the Court more than once (once on certification by division and again in review of a final judgment), now appeals could be consolidated. Moreover, the final judgment requirement could moot some questions that otherwise might have come before the Court on certification; this, too, would alleviate pressures on the Court's docket imposed by interlocutory appeals as of right.

Did the procedural reform of 1872 have an effect beyond the elimination of interlocutory appeals? The answer hinges on whether, after the reform, Supreme Court review by writ of error or appeal could extend, via certification upon division, to any additional cases. The plain language of the 1872 provision certainly suggested that the requirements of ordinary Supreme Court review were *not* applicable to review on certificate of division.[147] On the civil side, it seems clear that this was indeed the case. At the least, certification by division after the reform continued to allow the Supreme Court to hear cases that, because of the now more-than-doubled amount-in-controversy requirement,[148] were not reviewable via writ of error.[149] With respect to criminal cases, the answer to the question is less clear. The Supreme Court seems to have assumed that the amalgam of certification by division and writ of error permitted it to review criminal cases that reached the Court during the brief period of time within which the

Explained the Court in *Dow v. Johnson*:

> The original act of 1802 . . . was always held to extend our appellate jurisdiction to material questions of law arising in all cases, criminal as well as civil, without regard to the amount in controversy or the condition of the litigation. Its defect consisted in the delays it created by frequently suspending proceedings in the midst of a trial. To obviate this defect the first section of the act of June, 1872, was passed, requiring the case to proceed notwithstanding the division, the opinion of the presiding justice to prevail for the time being . . . . The benefit of the certificate can now be had after judgment upon a writ of error or appeal.

Dow v. Johnson, 100 U.S. 158, 163–64 (1880) (citations omitted).

146. *See* William Strong, *The Needs of the Supreme Court*, 132 N. AM. REV. 437, 437–38 (1881) (noting growth in the Court's docket resulting from the nation's growth in both geographic size and population); *id.* at 438–39 (noting that increases in the jurisdiction of circuit courts led to more Supreme Court cases); *id.* at 439 (noting the deleterious effects the large caseload had on the Court's ability to fulfill its obligations).

147. In contrast, the statute *did* specifically apply to "the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas." Act of June 1, 1872 § 1, 17 Stat. at 196.

148. In 1875, Congress elevated the appellate hurdle from two thousand to five thousand dollars. *See supra* note 40 and accompanying text; Act of Feb. 16, 1875, ch. 77, § 3, 18 Stat. 315, 316.

149. *See* Jewell v. Knight, 123 U.S. 426, 432 (1887); *Dow*, 100 U.S. at 163–64; James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 14 n.52 (1949) ("The practical effect of the certificatory provision was to allow Supreme Court review of certain facets of cases—through certified questions—that otherwise were not reviewable because of the small amount in controversy.").

1872 reform applied to criminal matters.[150] For example, in both *United States v. Reese*[151] and *United States v. Cruikshank*[152]—two important civil rights prosecutions—the Court resolved criminal issues that reached the Court under the guise of both certification upon division and writ of error.[153] Since it was still well established at the time that writs of error were unavailable in criminal cases, it seems that it was the 1872 "integration" of certification upon division and writ of error that permitted these cases to reach the Court. Indeed, the Court in *Reese* specifically acknowledged the application of the 1872 statute and explained how it affected—but presumably did not proscribe—the Court's review.[154]

Yet some two decades later, the Court looked back on its review of criminal cases under the 1872 reform, and it questioned whether in fact jurisdiction had been proper. In *United States v. Sanges*, the Court explained that, since "no objection was taken to the jurisdiction of this court" in those two earlier cases, "[t]he exercise of jurisdiction over those cases on writ of error is therefore entitled to no . . . weight by way of precedent."[155] In any event, the ultimate resolution of the issue was ultimately of little moment since Congress soon restored the availability of review by pure certification by division in criminal cases. While the Revised Statutes of 1874—a broad attempt to codify federal law[156]—codified certification by division in civil cases according to the 1872 reform,[157] they codified certification by division

150. As we discuss just below, the Revised Statutes of 1874 restored certification by division in criminal cases to the 1802 procedural form. *See infra* text accompanying note 158.

151. United States v. Reese, 92 U.S. 214 (1876).

152. United States v. Cruikshank, 92 U.S. 542 (1876).

153. While both of these cases were decided by the Court during its October 1875 Term, they were "argued at October term, 1874," and "the judgment[s] below w[ere] entered and the certificate of division made under the act of 1872." United States v. Sanges, 144 U.S. 310, 321 (1892).

154. The Court stated:

> Since the law which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion . . . , if we find that the judgment as rendered is correct, we need not do more than affirm. If, however, we reverse, all questions certified, which may be considered in the final determination of the case according to the opinion we express, should be answered.

Reese, 92 U.S. at 222 (citation omitted).

155. *Sanges*, 144 U.S. at 321.

156. *See* Revised Statutes of 1874, 18 Stat. 1 (1873) (identifying the goal of the Act as "revis[ing] and consolidat[ing] the statutes of the United States, in force on the first day of December, anno Domini one thousand eight hundred and seventy-three"). These statutes were published in 1874. Act of June 20, 1874, ch. 333, 18 Stat. 113. *But see* Robert C. Berring, *Title 51 of the U.S. Code and Why It Matters*, 14 GREEN BAG 2d 251, 253 n.4 (2011) ("Because this codification only covered enactments through 1874, some refer to it as the Revised Statutes of 1874. It took effect in 1875, however, so most authorities use the term Revised Statutes of 1875.").

157. *See* Revised Statutes of 1874, tit. 13, §§ 650, 652, 693, 18 Stat. at 117–18, 129. The Revised Statutes seem to have expanded the class of cases with respect to which the Court could hear certified questions. Section 5 of the Amendatory Act of 1802 had provided that, when a case reached the circuit

in *criminal* cases largely[158] according to the original 1802 Act.[159] And the Revised Statutes of 1878 adhered to the same model.[160]

The certification regime would thereafter remain unchanged until the 1890s. It took a little time for the impact on certification by division of the 1891 Evarts Act[161] to become apparent. While the Act created new, separately staffed, circuit courts of appeals, it still left intact the old circuit courts (albeit stripped of their appellate jurisdiction over the district courts).[162] The 1891 Act spelled out several grounds on which the Supreme Court could review circuit court (and district court) decisions via writ of error; but certification by division was not included in this list.[163] The Act

court on appeal from the district court, there would be no certification; instead, judgment would be entered in accordance with the presiding Supreme Court Justice's position. *See supra* note 25 and accompanying text. In contrast, the Revised Statutes of 1874 made no distinction between cases within the circuit courts' original and appellate jurisdiction, thus allowing for certification by division of opinion between circuit court judges in cases appealed from the district courts. *See, e.g.*, The Max Morris, 137 U.S. 1, 2 (1890) (stating that the admiralty case began in district court, was appealed to the circuit court, and ultimately reached the Supreme Court upon certification by division). A similar rule seems to have applied in criminal cases. *See infra* notes 158–60 and accompanying text. That said, the district judge who ruled in a district court case could not contribute to a division of opinion at the circuit court level in the same case. *See* Revised Statutes of 1874, tit. 13, § 614, 18 Stat. at 107; *see also, e.g.*, United States v. Emholt, 105 U.S. 414, 414–16 (1881) (dismissing appeal based on certification of division when the division of opinion was between the Supreme Court Justice and district judge who ruled in the case at the district court).

158. Just as the 1874 version of certification allowed civil cases that had originated in the district courts to reach the Court from the circuit courts, *see supra* notes 156–58 and accompanying text, so too did it allow such criminal cases to reach the Court, *see, e.g.*, Parkinson v. United States, 121 U.S. 281, 281 (1887); Mackin v. United States, 117 U.S. 348, 348–49 (1886). This does not seem to have been the case for criminal cases under the 1802 Act. *Cf.* Ratner, *supra* note 34, at 190 n.175 ("There appears to have been no case which considered the effect of [§ 5] upon the provision for certification in § 6."). In this sense, the Revised Statutes of 1874 effectively broadened the Supreme Court's criminal jurisdiction.

159. *See* Revised Statutes of 1874, tit. 13, §§ 651, 697, 18 Stat. at 117, 129.

160. *See* Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 135 (2010) (footnote omitted) ("Numerous complaints about mistakes and omissions in the 1873 Revised Statutes led to the publication of an amended and updated version in 1878."). The provisions on certification by division in the 1874 and 1878 versions of the Revised Statutes were identical.

161. Judiciary Act of 1891, Pub. L. No. 51-517, 26 Stat. 826.

162. *Id.* § 4, 26 Stat. at 827.

163. Specifically, the Act provided:

> [A]ppeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.
>
> From the final sentences and decrees in prize causes.
>
> In cases of conviction of a capital or otherwise infamous crime.
>
> In any case that involves the construction or application of the Constitution of the United States.
>
> In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.
>
> In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Id. § 5, 26 Stat. at 827–28.

further indicated that the grounds for Supreme Court review identified in the Act itself should be the *sole* grounds for such review going forward.[164] Finally, the Act "repealed" all preexisting methods for appeal to the Supreme Court that were "inconsistent with" the avenues for Supreme Court appellate review set forth in the Act.[165]

Nevertheless, at least at first, certification by division from the old circuit courts to the Supreme Court continued in both criminal cases[166] and civil cases[167]—the latter after final judgment and via writ of error or appeal—the Evarts Act notwithstanding. However, in *United States v. Rider*,[168] the Court (in 1896) held that the Act had impliedly repealed certification by division in criminal cases.[169]

The Court's subsequent opinion in *United States v. Hewecker* confirmed the broad scope of *Rider*'s holding regarding criminal cases.[170] In *Hewecker*, the United States sought Supreme Court review based on a division of opinion in one of the old circuit courts. The federal government argued that *its* ability to seek Supreme Court review in criminal cases by certification of division survived the Evarts Act—the holding in *Rider* notwithstanding—because the Act did not afford the government (as opposed to criminal defendants) a right of appeal in circuit court criminal cases. Insofar as the Evarts Act substituted (after *Rider*) direct Supreme Court review for certification by division, Congress could not have meant, the government argued, to eliminate the government's only path to Supreme Court review.[171] But the Supreme Court rejected the argument[172] and hewed to the *Rider* line.[173]

164. *See id.* § 4, 26 Stat. at 827 ("[T]he review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.").

165. *Id.* § 14, 26 Stat. at 829–30 ("[A]ll acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.").

166. *See, e.g.*, United States v. Thomas, 151 U.S. 577 (1894); United States v. Eaton, 144 U.S. 677 (1892).

167. *See, e.g.*, N. Pac. R.R. Co. v. Hambly, 154 U.S. 349 (1894); Gibson v. Peters, 150 U.S. 342 (1893).

168. United States v. Rider, 163 U.S. 132 (1896).

169. *See id.* at 135–40.

170. United States v. Hewecker, 164 U.S. 46 (1896).

171. *See id.* at 48.

172. *See id.* at 48–49 ("The appellate jurisdiction was increased in many respects by th[e] [Evarts] [A]ct and was curtailed in others, and while enlarged in criminal cases in favor of defendants, it was at the same time circumscribed as to the United States . . . .").

173. *See id.* at 48 ("[I]f the sections [governing certification by division in criminal cases] were repealed so far as defendants were concerned, we think it follows that this was so as to the United States, and that a certificate which could not be granted upon the request of the defendants could not be granted on the request of the prosecution.").

The Court never explicitly extended *Rider*'s holding—which by its own terms was limited to criminal cases[174]—to civil cases. Still, dicta in other cases strongly suggested that *Rider*'s rationale applied equally in the civil context. For example, *The Paquete Habana* came before the Supreme Court on appeal directly from a federal district court's final decree in a prize case.[175] The Court noted that *Rider* "affords an important, if not controlling precedent."[176] It thus is not surprising that *Hewecker* was the last case to reach the Supreme Court from the old circuit courts[177] under the preexisting certification by division rule.[178] The old circuit courts were abolished as of

174. *See Rider*, 163 U.S. at 139; *see also* Rider v. United States, 178 U.S. 251, 258 (1900) (stating in subsequent hearing on writ of error in the *Rider* case that, in the original *Rider* opinion, "[t]his court held that since the passage of the [Evarts Act] . . . , certificates of division of opinion *in criminal cases* . . . were not authorized") (emphasis added)). Ironically, the premise upon which certification by division in criminal cases was eliminated—that the Supreme Court would now enjoy direct review of criminal convictions in the vast run of cases—was short lived. In response to the Court's broad interpretation of the "infamous crimes" language in the 1891 Act, *see In re* Claasen, 140 U.S. 200, 205 (1891) ("[A] crime which is punishable by imprisonment in the state prison or penitentiary . . . is an infamous crime, whether the accused is or is not sentenced or put to hard labor, and that, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one."), Congress withdrew the Supreme Court's appellate jurisdiction over cases involving infamous crimes, *see* Act of Jan. 20, 1897, Pub. L. No. 54-69, 29 Stat. 492; *see also* FRANKFURTER & LANDIS, *supra* note 26, at 109–13 (explaining how Congress felt obligated to remedy the growth in the Court's docket resulting from the Court's expansive interpretation of "infamous crimes"); HENDERSON, *supra* note 28, at 210. The 1897 Act did redirect appeals in circuit court cases involving infamous crimes to the new courts of appeals, *see* Act of Jan. 20, 1897, 29 Stat. at 492, so that two levels of federal judicial attention remained available, *see* Carroll v. United States, 354 U.S. 394, 400 n.9 (1957) ("The burden upon this Court of hearing the large number of criminal cases led, in 1897, to transfer of the jurisdiction over convictions in noncapital cases to the Circuit Courts of Appeals."). On this basis, Dwight F. Henderson laments that, "[a]fter 1897 the Supreme Court was divorced from all but capital cases" until "[t]he Criminal Appeals Act of 1907 finally restored that right." HENDERSON, *supra* note 28, at 210. This contention ignores the fact that—the Act of 1897 notwithstanding—the Evarts Act of 1891 continued to vest the Supreme Court with the power to review by appeal or writ of error any circuit court case "that involves the construction or application of the Constitution of the United States." Judiciary Act of 1891, Pub. L. No. 51-517, § 5, 26 Stat. 826, 827–28. The Supreme Court construed that provision to extend to criminal cases as well as civil cases, and on that basis the Supreme Court continued to enjoy jurisdiction to review a fair swath of circuit court criminal judgments. *See* Motes v. United States, 178 U.S. 458, 466–67 (1900) (so holding, and consequently finding jurisdiction to hear a criminal case on writ of error to a circuit court based on a dispute over "whether the admission of certain testimony was not an infringement of rights secured to the accused by the Sixth Amendment of the Constitution").

175. The Paquete Habana, 175 U.S. 677 (1900).

176. *Id.* at 684.

177. The Evarts Act authorized circuit courts (along with district courts) to certify jurisdictional questions to the Supreme Court. *See* Judiciary Act of 1891 § 5, 26 Stat. at 827–28. But such certification did not require division of opinion. The Evarts Act also created a mechanism for certification of questions of law by the newly formed circuit courts of appeals. *See id.* § 6, 26 Stat. at 828. This mechanism remains on the books today, *see* 28 U.S.C. § 1254(2), although it does not require a division of opinion below and is, in any event, largely a dead letter, *see supra* note 127 and accompanying text.

178. Division of opinion between circuit judges on the courts of appeals seems to have been something the Supreme Court would consider in deciding whether to grant a petition for writ of certiorari.

January 1, 1912;[179] all cases on their dockets were then transferred to the district courts.[180]

CONCLUSION

In this Article, we have attempted to shed additional light on the underexplored practice of the Supreme Court to review issues of law from a federal circuit court where the court below reached a tie vote on the issues. The practice contributed to a substantial proportion of the early Court's docket—indeed, as much a portion of the docket as the oft-studied judicial review by the Court of cases on appeal from state high courts under section 25 of the Judiciary Act of 1789. And as we have calculated, the practice generated numerous important cases along the way. For example, review on certification by division was essentially the sole method by which the early Court enjoyed review of federal criminal cases, and when there was a division, review was mandatory. Moreover, division in both civil and criminal cases in the circuit courts was often feigned between the sitting Supreme Court Justice riding circuit and district judge, thus allowing for important issues during the early republic to make their way to the Supreme Court for resolution.

Certification by division also allowed for practices that scholars tend to assume arose much later. First, certification by division provided an opportunity for interlocutory appeal from lower courts far earlier than is often appreciated. Second, the practice of certification by division provided the Supreme Court Justices with a form of control over their docket decades before the Evarts Act introduced discretionary jurisdiction through certiorari and a century before the Judiciary Act of 1925 made certiorari the norm. Certification by division also provides an early example of allowing appeals as of right where the court below is divided in opinion. Finally, the practice is important as an example of one among a variety of approaches that judicial systems use to break ties—here, by allowing an appeal as of right to a higher court.

See, e.g., Forsyth v. Hammond, 166 U.S. 506, 512 (1897) (including among the grounds weighing in favor of granting certiorari a setting where, "[a]s the Courts of Appeal[s] would often be constituted of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the questions involved"). It was not, however, a basis for automatic Supreme Court review via certification of division.

179. Act of March 3, 1911, Pub. L. No. 61-475, § 301, 36 Stat. 1087, 1169.

180. *Id.* § 290, 36 Stat. at 1167.

APPENDIX A

APPENDIX TABLE A. Table of Cases Reaching the Supreme Court on Certification by Division (Marshall and Taney Chief Justiceship)[a]

Case name	*Citation*	*Year*	*Expressly pro forma?*	*Civil or Criminal*	*Name of Imputed Circuit Justice*[b]
Ogle v. Lee	6 U.S. (2 Cranch) 33	1804	No	Civil	…[c]
Ogden v. Blackledge	6 U.S. (2 Cranch) 272	1804	No	Civil	Marshall
Huidekoper's Lessee v. Douglass	7 U.S. (3 Cranch) 1	1805	No	Civil	Paterson
Hepburn v. Ellzey	6 U.S. (4 Cranch) 445	1805	No	Civil	Marshall
Adams v. Woods	6 U.S. (2 Cranch) 336	1805	No	Civil	Cushing
United States v. Heth	7 U.S. (3 Cranch) 399	1806	No	Civil	MARSHALL
Hopkirk v. Bell	7 U.S. (3 Cranch) 454	1806	No	Civil	MARSHALL
Rhinelander v. Ins. Co. of Pa.	8 U.S. (4 Cranch) 29	1807	No	Civil	Washington
Hicks v. Rogers	8 U.S. (4 Cranch) 165	1807	No	Civil	PATERSON
United States v. Kid	8 U.S. (4 Cranch) 1	1807	No	Civil	Washington
Hopkirk v. Bell	8 U.S. (4 Cranch) 164	1807	No	Civil	Marshall
United States v. Cantril	8 U.S. (4 Cranch) 167	1807	No	Criminal	Johnson
United States v. Gurney	8 U.S. (4 Cranch) 333	1807	No	Civil	Washington
Ex parte Lewis	8 U.S. (4 Cranch) 433	1807	No	Civil	Washington
Browne v. Strode	9 U.S. (5 Cranch) 303	1809	No	Civil	Marshall
Logan v. Patrick	9 U.S. (5 Cranch) 288	1809	No	Civil	Todd
United States v. Potts	9 U.S. (5 Cranch) 284	1809	No	Civil	Chase
Tyler v. Tuel	10 U.S. (6 Cranch) 324	1810	No	Civil	Livingston
Skillern's Ex'rs v. May's Ex'rs	10 U.S. (6 Cranch) 267	1810	No	Civil	Todd

United States v. Tyler	11 U.S. (7 Cranch) 285	1812	No	Criminal	Livingston
United States v. Hudson	11 U.S. (7 Cranch) 32	1812	No	Criminal	Livingston
M'Kim v. Voorhies	11 U.S. (7 Cranch) 279	1812	No	Civil	Todd
Livingston v. Md. Ins. Co.	11 U.S. (7 Cranch) 506	1813	No	Civil	Chase
M'Intire v. Wood	11 U.S. (7 Cranch) 504	1813	No	Civil	Todd
Green v. Liter	12 U.S. (8 Cranch) 229	1814	No	Civil	Todd
United States v. Giles	13 U.S. (9 Cranch) 212	1815	No	Civil	Livingston
Evans v. Jordan	13 U.S. (9 Cranch) 199	1815	No	Civil	Marshall
United States v. Barber	13 U.S. (9 Cranch) 243	1815	No	Criminal	Livingston
Town of Pawlet v. Clark	13 U.S. (9 Cranch) 292	1815	No	Civil	Livingston
Jones v. Shore's Ex'r	14 U.S. (1 Wheat.) 462	1816	No	Civil	Marshall
The Nereid	14 U.S. (1 Wheat.) 171	1816	No	Civil	Livingston
Ammidon v. Smith	14 U.S. (1 Wheat.) 447	1816	No	Civil	Story
United States v. Coolidge	14 U.S. (1 Wheat.) 415	1816	No	Criminal	Story
Patton's Lessee v. Easton	14 U.S. (1 Wheat.) 476	1816	No	Civil	Todd
United States v. Sheldon	15 U.S. (2 Wheat.) 119	1817	No	Criminal	Livingston
Colson v. Lewis	15 U.S. (2 Wheat.) 377	1817	No	Civil	Todd
United States v. Bevans	16 U.S. (3 Wheat.) 336	1818	No	Criminal	Story
Murray's Lessee v. Baker	16 U.S. (3 Wheat.) 541	1818	No	Civil	Johnson
Craig v. Leslie	16 U.S. (3 Wheat.) 563	1818	No	Civil	Marshall
Cameron v. M'Roberts	16 U.S. (3 Wheat.) 591	1818	No	Civil	Todd
Ross v. Triplett	16 U.S. (3 Wheat.) 600	1818	No	Civil	…[d]

United States v. Palmer	16 U.S. (3 Wheat.) 610	1818	No	Criminal	Story
Trs. of the Phila. Baptist Ass'n v. Hart's Ex'rs	17 U.S. (4 Wheat.) 1	1819	No	Civil	Marshall
Sturges v. Crowninshield	17 U.S. (4 Wheat.) 122	1819	No	Civil	Story
Somerville's Ex'rs v. Hamilton	17 U.S. (4 Wheat.) 230	1819	No	Civil	Marshall
Sergeant's Lessee v. Biddle	17 U.S. (4 Wheat.) 508	1819	No	Civil	Duvall
United States v. Wiltberger	18 U.S. (5 Wheat.) 76	1820	No	Criminal	Washington
United States v. Klintock	18 U.S. (5 Wheat.) 144	1820	No	Criminal	Marshall
United States v. Furlong	18 U.S. (5 Wheat.) 184	1820	No	Criminal	Johnson
United States v. Smith	18 U.S. (5 Wheat.) 153	1820	No	Criminal	Marshall
United States v. Holmes	18 U.S. (5 Wheat.) 412	1820	No	Criminal	Story
United States v. Lancaster	18 U.S. (5 Wheat.) 434	1820	No	Civil	Washington
United States v. Wilkins	19 U.S. (6 Wheat.) 135	1821	No	Civil	Todd
Willinks v. Hollingsworth	19 U.S. (6 Wheat.) 240	1821	No	Civil	Duvall
United States v. Daniel	19 U.S. (6 Wheat.) 542	1821	No	Criminal	Johnson
Taylor's Lessee v. Myers	20 U.S. (7 Wheat.) 23	1822	No	Civil	Todd
United States v. Wilson	21 U.S. (8 Wheat.) 253	1823	No	Civil	Livingston
Greeley v. United States	21 U.S. (8 Wheat.) 257	1823	No	Civil	Story
Green v. Biddle	21 U.S. (8 Wheat.) 1	1823	No	Civil	Todd
Soc'y for the Propagation of the Gospel in Foreign Parts v. Town of New-Haven	21 U.S. (8 Wheat.) 464	1823	No	Civil	Livingston
Miller v. Stewart	22 U.S. (9 Wheat.) 680	1824	No	Civil	Washington
United States v. Perez	22 U.S. (9 Wheat.) 579	1824	No	Criminal	Livingston

Bank of the U.S. v. Planters' Bank of Ga.	22 U.S. (9 Wheat.) 904	1824	Yes	Civil	Johnson
Wayman v. Southard	23 U.S. (10 Wheat.) 1	1825	No	Civil	Todd
Bank of the U.S. v. Halstead	23 U.S. (10 Wheat.) 51	1825	No	Civil	Todd
Perkins v. Hart	24 U.S. (11 Wheat.) 237	1826	No	Civil	Todd
Doe *ex dem.* Patterson v. Winn	24 U.S. (11 Wheat.) 380	1826	No	Civil	Johnson
The Antelope	24 U.S. (11 Wheat.) 413	1826	No	Civil	Johnson
United States v. Kelly	24 U.S. (11 Wheat.) 417	1826	No	Criminal	Washington
United States v. Tappan	24 U.S. (11 Wheat.) 419	1826	No	Civil	Story
Doe *ex dem.* Governeur's Heirs v. Robertson	24 U.S. (11 Wheat.) 332	1826	No	Civil	Todd
United States v. Amedy	24 U.S. (11 Wheat.) 392	1826	No	Criminal	Story
United States v. Ortega	24 U.S. (11 Wheat.) 467	1826	No	Criminal	Washington
Mason v. Haile	25 U.S. (12 Wheat.) 370	1827	No	Civil	Story
Devereaux v. Marr	25 U.S. (12 Wheat.) 212	1827	No	Civil	Todd
Lidderdale's Ex'rs v. Ex'r of Robinson	25 U.S. (12 Wheat.) 594	1827	No	Civil	Marshall
United States v. Marchant	25 U.S. (12 Wheat.) 480	1827	No	Criminal	Story
Post Master Gen. v. Early	25 U.S. (12 Wheat.) 136	1827	No	Civil	Johnson
The Antelope	25 U.S. (12 Wheat.) 546	1827	No	Civil	Johnson
United States v. Gooding	25 U.S. (12 Wheat.) 460	1827	No	Criminal	Duvall
Schimmelpennich v. Bayard	26 U.S. (1 Pet.) 264	1828	No	Civil	Thompson
Konig v. Bayard	26 U.S. (1 Pet.) 250	1828	No	Civil	Thompson
Dox v. Postmaster-Gen.	26 U.S. (1 Pet.) 318	1828	No	Civil	Thompson
Breithaupt v. Bank of Ga.	26 U.S. (1 Pet.) 238	1828	No	Civil	Johnson

Buck v. Chesapeake Ins. Co.	26 U.S. (1 Pet.) 151	1828	No	Civil	Duvall
Gardner v. Collins	27 U.S. (2 Pet.) 58	1829	No	Civil	Story
Lessee of Powell v. Harman	27 U.S. (2 Pet.) 241	1829	No	Civil	Trimble
Buckner v. Finley	27 U.S. (2 Pet.) 586	1829	No	Civil	Duvall
Bank of the U.S. v. Owens	27 U.S. (2 Pet.) 527	1829	No	Civil	Trimble
Wolf v. Usher	28 U.S. (3 Pet.) 269	1830	No	Civil	Story
Wilcox v. Ex'rs of Plummer	29 U.S. (4 Pet.) 172	1830	No	Civil	Marshall
Saunders v. Gould	29 U.S. (4 Pet.) 392	1830	No	Civil	Story
Inglis v. Trs. of the Sailor's Snug Harbour	28 U.S. (3 Pet.) 99	1830	No	Civil	Thompson
Soc'y for the Propagation of the Gospel in Foreign Parts v. Town of Pawlet	29 U.S. (4 Pet.) 480	1830	No	Civil	Thompson
United States v. Robertson	30 U.S. (5 Pet.) 641	1831	No	Civil	Duvall
Backhouse v. Patton	30 U.S. (5 Pet.) 160	1831	No	Civil	Marshall
Page v. Lloyd	30 U.S. (5 Pet.) 304	1831	No	Civil	Marshall
United States v. Paul	31 U.S. (6 Pet.) 141	1832	No	Criminal	Thompson
Schimmelpennick v. Turner	31 U.S. (6 Pet.) 1	1832	No	Civil	Duvall
Lessee of Levy v. M'Cartee	31 U.S. (6 Pet.) 102	1832	No	Civil	Thompson
Kirkman v. Hamilton	31 U.S. (6 Pet.) 20	1832	No	Civil	McLean
Grant v. Raymond	31 U.S. (6 Pet.) 218	1832	No	Civil	Thompson
Bank of the U.S. v. Green	31 U.S. (6 Pet.) 26	1832	No	Civil	McLean
Smith v. Bell	31 U.S. (6 Pet.) 68	1832	No	Civil	McLean
United States v. State Bank of N.C.	31 U.S. (6 Pet.) 29	1832	No	Civil	Marshall
United States v. Quincy	31 U.S. (6 Pet.) 445	1832	No	Criminal	Duvall
Leland v. Wilkinson	31 U.S. (6 Pet.) 317	1832	No	Civil	Story
United States v. Reyburn	31 U.S. (6 Pet.) 352	1832	No	Criminal	Duvall
United States v. Wilson	32 U.S. (7 Pet.) 150	1833	No	Criminal	Baldwin

United States v. Turner	32 U.S. (7 Pet.) 132	1833	No	Criminal	Marshall
United States v. Mills	32 U.S. (7 Pet.) 138	1833	No	Criminal	Marshall
United States v. Brewster	32 U.S. (7 Pet.) 164	1833	No	Criminal	Baldwin
Briscoe v. Commonwealth's Bank of Ky.	33 U.S. (8 Pet.) 118	1834	No	Civil	Thompson
Carrington v. Merchs.' Ins. Co.	33 U.S. (8 Pet.) 495	1834	No	Civil	Story
United States v. Randenbush	33 U.S. (8 Pet.) 288	1834	No	Criminal	Baldwin
Boon's Heirs v. Chiles	33 U.S. (8 Pet.) 532	1834	No	Civil	McLean
United States v. Bailey	34 U.S. (9 Pet.) 267	1835	No	Criminal	McLean
United States v. Bailey	34 U.S. (9 Pet.) 238	1835	No	Criminal	McLean
Harris v. Elliott	35 U.S. (10 Pet.) 25	1836	No	Civil	Story
Smith v. Vaughan	35 U.S. (10 Pet.) 366	1836	No	Civil	Baldwin
Packer v. Nixon	35 U.S. (10 Pet.) 408	1836	No	Civil	Baldwin
United States v. Gardner	35 U.S. (10 Pet.) 618	1836	No	Criminal	Baldwin
Elliott v. Swartwout	35 U.S. (10 Pet.) 137	1836	No	Civil	Thompson
Leland v. Wilkinson	35 U.S. (10 Pet.) 294	1836	No	Civil	Story
Davis v. Braden	35 U.S. (10 Pet.) 286	1836	No	Civil	McLean
Denn v. Reid	35 U.S. (10 Pet.) 524	1836	No	Civil	McLean
Waters v. Merchs.' Louisville Ins. Co.	36 U.S. (11 Pet.) 213	1837	No	Civil	McLean
Mayor of N.Y. v. Miln	36 U.S. (11 Pet.) 102	1837	No	Civil	THOMPSON
Veazie v. Wadleigh	36 U.S. (11 Pet.) 55	1837	No	Civil	Story
Adams, Cunningham & Co. v. Jones	37 U.S. (12 Pet.) 207	1838	No	Civil	McLean
United States v. Coombs	37 U.S. (12 Pet.) 72	1838	No	Criminal	Thompson
White v. Turk	37 U.S. (12 Pet.) 238	1838	No	Civil	McLean

Bend v. Hoyt	38 U.S. (13 Pet.) 263	1839	No	Civil	Thompson
Williams v. Suffolk Ins. Co.	38 U.S. (13 Pet.) 415	1839	No	Civil	Story
United States v. Hardyman	38 U.S. (13 Pet.) 176	1839	No	Criminal	Barbour
Hardy v. Hoyt	38 U.S. (13 Pet.) 292	1839	No	Civil	Thompson
Downes & Co. v. Church	38 U.S. (13 Pet.) 205	1839	No	Civil	McKinley
M'Elmoyle v. Cohen	38 U.S. (13 Pet.) 312	1839	No	Civil	Wayne
Peters v. Warren Ins. Co.	39 U.S. (14 Pet.) 99	1840	No	Civil	Story
United States v. Morris	39 U.S. (14 Pet.) 464	1840	No	Criminal	Thompson
United States v. Gratiot	39 U.S. (14 Pet.) 526	1840	No	Civil	McLean
Suydam v. Broadnax	39 U.S. (14 Pet.) 67	1840	No	Civil	McKinley
Irvine v. Lowry	39 U.S. (14 Pet.) 293	1840	No	Civil	Baldwin
United States v. Wood	39 U.S. (14 Pet.) 430	1840	No	Criminal	Thompson
United States v. Stone	39 U.S. (14 Pet.) 524	1840	Yes	Civil	Thompson
United States v. Linn	40 U.S. (15 Pet.) 290	1841	No	Civil	McLean
Gaines v. Relf	40 U.S. (15 Pet.) 9	1841	No	Civil	McKinley
Swift v. Tyson	41 U.S. (16 Pet.) 1	1842	No	Civil	Thompson
United States v. Murphy	41 U.S. (16 Pet.) 203	1842	No	Criminal	Thompson
Collins v. Blyth	42 U.S. (1 How.) 282	1843	No	Civil	Catron
In re Castleman	42 U.S. (1 How.) 281	1843	No	Civil	Catron
Nelson v. Carland	42 U.S. (1 How.) 265	1843	No	Civil	Catron
United States v. Irving	42 U.S. (1 How.) 250	1843	No	Civil	Thompson
Bronson v. Kinzie	42 U.S. (1 How.) 311	1843	No	Civil	McLean
Chapman v. Forsyth	43 U.S. (2 How.) 202	1844	No	Civil	Catron

Griffin v. Thompson	43 U.S. (2 How.) 244	1844	No	Civil	McKinley
Buckhannan, Hagan & Co. v. Tinnin	43 U.S. (2 How.) 258	1844	No	Civil	McKinley
Gaines v. Chew	43 U.S. (2 How.) 619	1844	No	Civil	Barbour
McCracken v. Hayward	43 U.S. (2 How.) 608	1844	No	Civil	McLean
Dickson v. Wilkinson	44 U.S. (3 How.) 57	1844	No	Civil	Catron
United States v. Freeman	44 U.S. (3 How.) 556	1845	No	Civil	Story
Cary v. Curtis	44 U.S. (3 How.) 236	1845	No	Civil	Thompson
Lessee of Waller v. Best	44 U.S. (3 How.) 111	1845	No	Civil	Catron
United States v. Prescott	44 U.S. (3 How.) 578	1845	No	Civil	McLean
Lessee of Gantly v. Ewing	44 U.S. (3 How.) 707	1845	No	Civil	McLean
Thomas Wilson & Co. v. Smith	44 U.S. (3 How.) 763	1845	No	Civil	Wayne
United States v. Gear	44 U.S. (3 How.) 120	1845	No	Civil	McLean
Lessee of Croghan v. Nelson	44 U.S. (3 How.) 187	1845	No	Civil	Catron
Carroll v. Safford	44 U.S. (3 How.) 441	1845	No	Civil	McLean
Simpson v. Wilson	45 U.S. (4 How.) 709	1846	No	Civil	Daniel
Wilson v. Rousseau	45 U.S. (4 How.) 646	1846	No	Civil	Thompson
United States v. Rogers	45 U.S. (4 How.) 567	1846	No	Criminal	McKinley
Aspden v. Nixon	45 U.S. (4 How.) 467	1846	No	Civil	Baldwin
Musson v. Lake	45 U.S. (4 How.) 262	1846	No	Civil	MCKINLEY
Beals v. Hale	45 U.S. (4 How.) 37	1846	No	Civil	McLean
N. & J. Dick & Co. v. Runnels	46 U.S. (5 How.) 7	1847	No	Civil	Daniel
United States v. Briggs	46 U.S. (5 How.) 208	1847	No	Criminal	McLean
Jones v. Van Zandt	46 U.S. (5 How.) 215	1847	Yes	Civil	MCLEAN

Hall v. Smith	46 U.S. (5 How.) 96	1847	No	Civil	Taney
Hildeburn v. Turner	46 U.S. (5 How.) 69	1847	No	Civil	Daniel
United States v. Daniel	47 U.S. (6 How.) 11	1848	No	Civil	Wayne
Nesmith v. Sheldon	47 U.S. (6 How.) 41	1848	No	Civil	McLean
United States v. City of Chicago	48 U.S. (7 How.) 185	1849	Yes	Civil	McLean
Nesmith v. Sheldon	48 U.S. (7 How.) 812	1849	No	Civil	McLean
McArthur's Heirs v. Dun's Heirs	48 U.S. (7 How.) 262	1849	No	Civil	McLean
Luther v. Borden	48 U.S. (7 How.) 1	1849	Yes	Civil	STORY
Sadler v. Hoover	48 U.S. (7 How.) 646	1849	No	Civil	DANIEL
Hardeman v. Harris	48 U.S. (7 How.) 726	1849	No	Civil	Daniel
Massingill v. Downs	48 U.S. (7 How.) 760	1849	No	Civil	Daniel
Lewis v. Lewis	48 U.S. (7 How.) 776	1849	No	Civil	McLean
Hugg v. Augusta Ins. & Banking Co.	48 U.S. (7 How.) 595	1849	No	Civil	Taney
Perrine v. Chesapeake & Del. Canal Co.	50 U.S. (9 How.) 172	1850	No	Civil	Taney
Lambert v. Ghiselin	50 U.S. (9 How.) 552	1850	No	Civil	TANEY
Hill v. United States	50 U.S. (9 How.) 386	1850	No	Civil	DANIEL
Harrison v. Vose	50 U.S. (9 How.) 372	1850	No	Civil	WOODBURY
United States v. Briggs	50 U.S. (9 How.) 351	1850	No	Criminal	McLean
Fleming v. Page	50 U.S. (9 How.) 603	1850	No	Civil	Grier
Boswell's Lessee v. Otis	50 U.S. (9 How.) 336	1850	No	Civil	McLean
United States v. Marigold	50 U.S. (9 How.) 560	1850	No	Criminal	NELSON
Wilson v. Barnum	49 U.S. (8 How.) 258	1850	No	Civil	GRIER
Williamson v. Berry	49 U.S. (8 How.) 495	1850	No	Civil	Nelson

Williamson v. Irish Presbyterian Congregation of N.Y.	49 U.S. (8 How.) 565	1850	No	Civil	Nelson
Williamson v. Ball	49 U.S. (8 How.) 566	1850	No	Civil	Nelson
United States v. Staats	49 U.S. (8 How.) 41	1850	No	Criminal	Nelson
Webster v. Cooper	51 U.S. (10 How.) 54	1850	Yes	Civil	Woodbury
Shelby v. Bacon	51 U.S. (10 How.) 56	1850	No	Civil	Grier
Moore v. Brown	52 U.S. (11 How.) 414	1850	No	Civil	MCLEAN
Norris v. Crocker	54 U.S. (13 How.) 429	1851	No	Civil	MCLEAN
Binns v. Lawrence	53 U.S. (12 How.) 9	1851	No	Civil	*Nelson*[c]
United States v. Reid	53 U.S. (12 How.) 361	1851	No	Criminal	Taney
Lessee of Doolittle v. Bryan	55 U.S. (14 How.) 563	1852	No	Civil	MCLEAN
Smith v. Ely	56 U.S. (15 How.) 137	1853	No	Civil	McLean
Rockhill v. Hanna	56 U.S. (15 How.) 189	1853	No	Civil	McLean
United States v. Dawson	56 U.S. (15 How.) 467	1853	No	Criminal	DANIEL
Murray v. Gibson	56 U.S. (15 How.) 421	1853	No	Civil	DANIEL
Henshaw v. Miller	58 U.S. (17 How.) 212	1854	No	Civil	Taney
United States v. Nickerson	58 U.S. (17 How.) 204	1854	No	Criminal	Woodbury
Ring v. Maxwell	58 U.S. (17 How.) 147	1854	No	Civil	Nelson
Dennistoun v. Stewart	59 U.S. (18 How.) 565	1855	No	Civil	McKinley
Ogilvie v. Knox Ins. Co.	59 U.S. (18 How.) 577	1855	No	Civil	McLean
Stairs v. Peaslee	59 U.S. (18 How.) 521	1855	No	Civil	Woodbury
Den *ex dem.* Murray v. Hoboken Land & Improvement Co.	59 U.S. (18 How.) 272	1856	No	Civil	Grier
United States v. Shackleford	59 U.S. (18 How.) 588	1856	No	Criminal	CATRON

United States v. City Bank of Columbus	60 U.S. (19 How.) 385	1857	No	Civil	MCLEAN
Wade v. Leroy	61 U.S. (20 How.) 34	1858	No	Civil	Nelson
Aspinwall v. Bd. of Comm'rs	63 U.S. (22 How.) 364	1860	No	Civil	McLean
Irvine v. Redfield	64 U.S. (23 How.) 170	1860	No	Civil	Nelson
Amey v. Mayor of Allegheny City	65 U.S. (24 How.) 364	1861	No	Civil	Grier
Wiggins v. Gray	65 U.S. (24 How.) 303	1861	No	Civil	…[f]
Curtis v. County of Butler	65 U.S. (24 How.) 435	1861	No	Civil	GRIER
Knight v. Schell	65 U.S. (24 How.) 526	1860	No	Civil	Nelson
Ohio & Miss. R.R. Co. v. Wheeler	66 U.S. (1 Black) 286	1861	No	Civil	McLean
United States v. Jackalow	66 U.S. (1 Black) 484	1861	No	Criminal	Grier
Woods v. Lawrence County	66 U.S. (1 Black) 386	1861	No	Civil	Grier
Silliman v. Hudson River Bridge Co.	66 U.S. (1 Black) 582	1861	No	Civil	Nelson
Ward v. Chamberlain	67 U.S. (2 Black) 430	1862	No	Civil	McLean
Homer v. Collector	68 U.S. (1 Wall.) 486	1863	No	Civil	Clifford
Richardson v. Lawrence County	154 U.S. 536	1864	No	Civil	Grier

Notes: [a] In addition to the cases in this Appendix, we came upon one circuit court case—Wildes v. Parker, 29 F. Cas. 1224 (C.C.D. Mass. 1839) (No. 17,652)—that apparently reached the Supreme Court on a certificate of division, but the Court was evenly divided and could not resolve the certified question. *See id.* at 1226. The case then continued in the circuit court. *See id.* [b] The method by which we arrived at the imputed Circuit Justice is described above. *See supra* notes 89–90 and accompanying text. A few opinions identify the Circuit Justice below. In all but one of those cases, the imputed Circuit Justice is the actual Circuit Justice; in the table, the Justice's name in these cases is in all-capital letters. In one case, the imputed Justice is not the actual Justice; the Justice's name in this case is italicized. [c] Because the opinion does not identify the court below, we could not impute a Circuit Justice. [d] This case came to the Supreme Court from the Circuit Court of the District of Columbia; as such, there was no Circuit Justice below. [e] The actual Circuit Justice below was Chief Justice Taney. Any systematic imputation method would be unlikely to suggest Chief Justice Taney as the Circuit Justice since the case arose out of the Southern District of New York, for which Chief Justice Taney never had official responsibility. [f] This case

came to the Supreme Court from the circuit court for the districts of California; as such, there was no Circuit Justice below.

APPENDIX B: STATISTICAL ANALYSES

We hypothesized that the rate at which a state-generated certification cases might be predicted by (1) the state's population, and (2) the distance between the state and Washington, D.C. We endeavored to test these hypotheses using regression analysis. To conduct the analysis, we considered the time period 1805–1854. We divided this time period into five ten-year periods (1805–1814, 1815–1824, 1825–1834, and 1845–1854), each of which centered on a federal census year. (We deliberately omitted the years following 1854, since the Civil War provided an exogenous shock that affected the Court's docket.) Our unit of analysis is each state that, during the relevant ten-year period, *could have* generated certification cases (that is, every state that was admitted to the Union during the ten-year period in question for which there was a statutorily authorized federal circuit court). This generated a dataset with 105 observations.

The dependent variable was the fraction of certification cases on the Court's docket for the entire ten-year period that originated in each state. There were two independent variables of interest. The first was the fraction of population in the state out of the total population of states that could have produced certified cases during the ten-year period.[181] The second was the mileage[182] between Washington, D.C., and the largest city in the state.[183]

Table B1 presents the results of our analysis. While we find no statistically significant relationship between the fraction of certification cases originating in a state and the distance between the state and Washington, D.C., we do find a strong statistically significant relationship between the fraction of certification cases and the state's fraction of the

181. Census data from the time period under study raise the difficult issue of enslaved persons. Despite the institution of slavery then in effect throughout the American South, and even elsewhere, we opted to rely on population data that counted all people living in a state, on the reasoning that the true total population more accurately reflected economic and social activity within the state. (On analogous thinking, states might use, as a proxy for total population, figures that included foreign citizens or subjects, documented or not. *Cf.* Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (holding that the Constitution allows states to draw legislative districts based upon total population, not just voting-eligible population counts)).

182. We relied on Google Maps for the total mileage. While of course routes (and means of transportation) would have been different in an earlier era, still we felt that the Google Maps information would provide a reasonable approximation.

183. We identified the largest city (by population) in each state from U.S. Census data for the year in question. In a few cases, the U.S. Census list of largest cities for the year in question included no city from the state. In those instances, we used the state's capital city. For example, Vermont generally had no city on the largest cities list, so we treated the capital—Montpelier—as Vermont's largest city.

country's population.

APPENDIX TABLE B1. Results of Regression of Fraction of Certification Cases Originating in Each State for Each Ten-Year Period (1805–1814 through 1845–1854)

Variable	*Coefficient*	*Standard Error*	*p-Value*
State's fraction of country's population	0.910	0.104	0.000***
Distance between state's largest city and Washington, D.C.	0.000	0.000	0.357
constant	-0.004	0.012	0.734

Notes: *N*=105. Robust standard errors clustered by state. R^2=0.345. ***=significant at the 1% level; **=significant at the 5% level; *=significant at the 10% level.

We next consider the extent to which particular Justices were more, or less, likely to generate certification cases when they rode circuit below. First, we ran a regression to confirm our expectation that the number of Terms a Justice serves on the Court is predictive of the number of certification cases the Justice generates. The results of the regression, which do indeed confirm our expectation with a statistically significant result, appear below in Table B2.

APPENDIX TABLE B2. Results of Regression of Number of Certification Cases Generated by Each Circuit Justice (1804–1863 Terms of Court)

Variable	*Coefficient*	*Standard Error*	*p-Value*
Total number of Terms served	0.612	0.118	0.000***
constant	-0.934	2.226	0.678

Notes: *N*=27. Adjusted R^2=0.518. ***=significant at the 1% level; **=significant at the 5% level; *=significant at the 10% level.

We turn next to a comparison of (1) the expected number of certification cases a Justice should have generated (based on the number of Terms actually served and the average number of certified cases generated per Justice-Term), and (2) the actual number of certification cases a Justice generated. Table 2 in the text above—replicated below in the leftmost four columns of Table B3—provides raw data on the number of certification cases for which each of the twenty-seven Justices in the dataset was responsible. But are these discrepancies statistically significant? To evaluate this, we employed a binomial test. Specifically, we compared for each Justice

(1) the actual proportion of the number of certification cases we found the Justice to have generated to the number of Terms the Justice served, with (2) the expected fraction of 236/456 of a certified case per Justice per Term.[184] The results of those tests appear in the rightmost column in Table B3; a few of those findings are statistically significant.[185]

APPENDIX TABLE B3. Number of Certification Cases Found to be Generated by Each Circuit Justice (1804-1863 Terms of Court)

Justice	*Total Number of Terms*	*Expected Number of Certified Cases*	*Actual Number of Certified Cases*	*p-Value from Two-Tailed Binomial Test*
Marshall	31	16.04	20	0.208
Paterson	2	1.04	0	0.233
Cushing	6	3.11	1	0.113
Washington	25	12.94	10	0.317
Chase	7	3.62	1	0.062*
Johnson	30	15.53	10	0.046**
Livingston	15	7.76	11	0.122
Todd	18	9.32	15	0.008***
Duvall	22	11.39	10	0.671
Story	33	17.08	23	0.054*
Thompson	19	9.83	21	…[a]
Trimble	2	1.04	1	1.000
McLean	30	15.53	38	…[b]
Baldwin	13	6.73	7	1.000
Wayne	28	14.49	3	0.000***

184. *See supra* notes 94–95 and accompanying text.

185. A couple of entries in the rightmost column of Table B3 are empty. That is because the number of actual certification cases generated exceeds the number of Terms on the Court: the binomial test, to the contrary, requires that the dividend of the number of cases and the number of Terms be a proper fraction. Still, we conclude that these certification rates are inordinately large. *See infra* Appendix B Table B3 notes *a*, *b*.

Taney	27	13.97	6	0.003***
Barbour	4	2.07	1	0.358
Catron	26	13.46	10	0.239
McKinley	14	7.25	5	0.289
Daniel	17	8.80	12	0.148
Nelson	19	9.83	13	0.172
Woodbury	5	2.59	3	1.000
Grier	17	8.80	10	0.633
Curtis	4	2.07	2	1.000
Campbell	7	3.62	1	0.062*
Clifford	5	2.59	1	0.203
Swayne	1	0.52	1	1.000

Notes: ***=significant at the 1% level; **=significant at the 5% level; *=significant at the 10% level. [a] Justice Thompson was involved as a Circuit Justice in generating twenty-one certifications over the nineteen Terms that he sat on the Court. Because he certified more than one case per Term, we were unable to run the binomial test. However, had Justice Thompson generated nineteen certifications as a Circuit Justice—that is, two fewer than he actually did—the binomial test would have been statistically significant at the one percent level (p=0.000). Accordingly, we conclude that Justice Thompson generated an inordinately large number of certified cases during his Court tenure. [b] Justice McLean was involved as a Circuit Justice in generating thirty-eight certifications over the thirty Terms that he sat on the Court. Because he certified more than one case per Term, we were unable to run the binomial test. However, had Justice McLean generated thirty certifications as a Circuit Justice—that is, eight fewer than he actually did—the binomial test would have been statistically significant at the one percent level (p=0.000). Accordingly, we conclude that Justice McLean generated an inordinately large number of certified cases during his Court tenure.