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The Importance of Geographical
Background of Supreme Court
Appointments in the Period of 1830-1920

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THE IMPORTANCE OF GEOGRAPHICAL BACKGROUND OF
SUPREME COURT APPOINTMENTS IN THE PERIOD OF 1830-1920

By

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I. Problem Statement

Among the 112 Supreme Court justices\(^1\) and twenty-nine failed appointments stands one lone Floridian with ties to the state as questionable as his ideology.\(^2\) After losing in an election to the Georgia state legislature, G. Harrold Carswell moved to Tallahassee, Florida in 1948, where he would later become one of the nation’s youngest federal judges. President Richard Nixon appointed the Georgia native to the Supreme Court of the United States in 1970 in an attempt to fill the position left by Abe Fortas with a Southerner. Preceded by the failed appointment of Clement F. Haynsworth, Carswell’s confirmation hearings revolved around his controversial racial ideology and high rate of overturned cases, resulting in a 51-48 rejection.\(^3\)

Although President Nixon did not ostensibly make geographical background of candidates a major role in his nomination process, he did articulate on multiple occasions that he wanted to select a Southern strict-constructionist.\(^4\) This marks the last President in history to give geographical background recognition publicly or consciously. However, in the early years of the judiciary, when circuit riding prevailed, the geographical background of nominees played a tremendous role in the selection process.

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Why, then, can Florida not boast any Supreme Court justice and merely one failed appointee who, though officially considered a Floridian, perhaps had ties to Georgia just as strong as those to Florida? Amongst the other seventeen unrepresented states, including Nevada, Rhode Island, Vermont, and West Virginia, Florida certainly appears the most peculiar. Moreover, to what extent did geography matter in the selection of candidates? This paper will analyze these complex questions first using Florida as a case study and then turning to the larger, national question, and attempt to provide answers by isolating variables from ideological and practical standpoints.

The Founding Fathers wanted to isolate the judiciary from political influence and thus created the Supreme Court under Article III of the Constitution, but left the details and creation of lower courts to the Congress. The Constitution’s notably brief establishment of the judiciary left great discretion to Congress to create a court system in a matter they saw fit. As such, the landmark Judiciary Act of 1789 passed during the opening session of the First United States Congress. This legislation created the structure of the judiciary, with the Supreme Court at the helm, followed by three circuit court districts, and at least one district court in each state. The three circuit court districts consisted of the Eastern, containing New York, Connecticut, Massachusetts, and New Hampshire; the Middle, consisting of Virginia, Maryland, Pennsylvania, Delaware, and New Jersey; and the Southern, comprised of South Carolina and Georgia, with the addition of North Carolina in 1790. The logic behind

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5 Ibid. 46.
this Act, whereby new states and territories received their own district and circuit courts with accompanying Supreme Court justices, set a precedent that would challenge and perplex Congress over the next century.7

Rather than create separate judgeships for each Circuit Court, Congress mandated that the Circuit Court panels would consist of two Supreme Court justices and the District Court justice for that district.8 The First Congress did not, however, invent this practice, but rather borrowed it from the established British court system, created to keep justice in the towns and countryside consistent.9 To this end, justices would spend nearly six months every year traveling to the various District Courts and ruling on those cases.10 Congress viewed this immense burden favorably for several reasons. First, it would extend to the general populace a personal relation to the fledgling federal government, making the justices a type of “republican schoolmaster” who could serve as leaders and representatives. As such, it would aid in “nation building” that would, “…impress the citizens of the United States favorably toward the general government, should the most distinguished judges visit every state.”11 In order for the justices to easily relate to the residents, it

became customary with the enactment of this Act and George Washington’s first nominees to appoint justices from each region to their respective area.\(^{12}\)

Second, mandating that the justices travel, using their own funds, saved Congress a good deal of money that would otherwise be spent on securing an entire body of separate justices or reimbursing travel expenses, even though Congressmen received travel stipends. Third, it enabled justices to understand local law and legal customs rather than interpreting laws, which at this point varied greatly amongst the states, without any prior context.\(^{13}\)

In order to appease justices frustrated with their circuit riding duties, Congress passed an act in 1793 that decreased the number of Supreme Court justices needed to hold a quorum at the Circuit level from two to one. Now it was only necessary for one justice to travel the circuit and, along with the resident district court judge, try cases. However, in 1801, Congress passed a new Judiciary Act that overhauled the judiciary by reducing the number of Supreme Court justices from six to five and eliminating circuit riding. In lieu of circuit riding, the Act established sixteen judgeships for the six circuits.\(^{14}\)

Merely a year later, the 1801 Act was repealed and replaced with yet another Judiciary Act. This time, the Republican majority mandated that justices return to circuit riding, but reorganized the districts so that they were smaller and easier to

traverse, leaving Kentucky, Tennessee, and Maine outside the circuit system.\textsuperscript{15} In 1807 Congress established the Seventh Circuit consisting of Ohio, Kentucky, and Tennessee, and a seventh seat on the Supreme Court. As a member of the 19\textsuperscript{th} Congress, Justice John McKinley would establish the foundation for his own judicial career by urging the legislative body to extend the federal judiciary to the Deep South.\textsuperscript{16} During this period, two judicial factions emerged in Congress: those who advocated for a new seat on the Court to match every circuit, and those who wished for either partial or total relief from circuit duties, often in the form of lower federal judges.\textsuperscript{17}

Since the last restructuring of the Court in 1807, the union had welcomed nine new states, primarily in the south.\textsuperscript{18} To accommodate them, Congress established the Eighth and Ninth Circuits in 1837 along with two more seats on the Supreme Court, bringing the total number of justices to nine.\textsuperscript{19} In the case of the 1807 and 1837 acts, Congress altered the Supreme Court not to accommodate a high caseload, but as a response to the growing boundaries of the country, demonstrating the importance of having representation for the differing geographical areas. In many ways, though, the debate between the two methods of restructuring the judiciary centered around politics. Those against adding more seats to the Court


\textsuperscript{16} Steven Brown, \textit{John McKinley and the Antebellum Supreme Court: Circuit Riding in the Old Southwest} (Tuscaloosa: The University of Alabama Press, 2012) 73.

\textsuperscript{17} Ibid., 104-105.

\textsuperscript{18} Ibid., 104.

often worried that doing so would allow the current president too much influence to select one or two lifetime appointments.\textsuperscript{20}

In 1855 Congress established a California Circuit. Rather than expecting a justice to travel between the West Coast and D.C. with no direct railroads, the statute created, for the first time since 1801, a distinct circuit judgeship. In 1862, Congress reshuffled the circuits so that Florida, Alabama, Georgia, Mississippi, and South Carolina constituted the Fifth Circuit and Florida, for the first time, was included in a circuit. This reorganization is seen by many as the first phase of Reconstruction and an attempt to limit the influence of the South.\textsuperscript{21} The new circuits compacted southern states into fewer circuits than previously held to necessitate fewer representatives on the Supreme Court, therefore diminishing the chance of southern appointments. At the conclusion of the Civil War in 1866, Congress removed South Carolina from the Fifth Circuit and added Louisiana and Texas. This composition did not change again until 1948.\textsuperscript{22}

Once more in 1869 Congress passed a new Judiciary Act to create and fund a separate judiciary. This Act mandated that nine separate justices would attend to circuit riding duties, but that the Supreme Court justices would still ride circuit once every two years, cutting in half the latter justices’ former responsibilities. The next substantial legislation came in 1891 with the Evarts Act, named after the Senator who proposed the solution to ease the burden on justices and the overwhelmed

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\textsuperscript{20} Brown, \textit{John McKinley and the Antebellum Supreme Court}, 105.
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court docket. The Act created a court of appeals in each of the nine circuits. These new courts, however, did not replace the circuit courts. Rather, the circuit courts continued to operate as trial courts alongside the district courts. Congress then appointed circuit justices who, along with the district judge, would preside over the three-panel court of appeals.\(^2\)

Given this legislative history, this thesis will focus on the period of 1830-1920. The former restriction enables an understanding of the changing judicial sentiments in the context of the rapidly growing boundaries of this nation. The latter limit allows an isolated discussion of geography. With the increase of travel and communication technology, geography's importance diminishes and other factors, more difficult to isolate, take precedence in the consideration of appointments.

II. Historiography Review

Although early presidents gave geography much consideration, historians have not talked about the factor with much frequency. Many Supreme Court historians and anthologies touch briefly on the issue of geography, but few deal with the issue directly. The ones that do dedicate significant passages to geography often merely give a cursory view or an outline of the various judicial appointees’ home state, his appointments, and his political leanings. This gap in our field leaves us without a full understanding of how and why some of the nation’s most historically

influential leaders obtained their positions, leaving an incomplete picture of the complex relationship between politics and the judiciary.

One such work, *The Path to the Court* by Richard K. Burke, organizes judicial appointments by president and then proceeds with brief remarks regarding each appointee’s geographical background, the confirmation or rejection of their appointment, and an overview of their ideology. While immensely advantageous, this surface-outline fails to discover the *why*. Burke’s work undoubtedly provides a functional guide but gives a much more mechanical and statistical analysis of the facts than can ever provide a satisfactory answer to why geography remained important.24

Joshua Glick’s “Comment: On the Road: The Supreme Court and the History of Circuit Riding,” gets closer to providing an answer but does not provide a sufficient one. Geography’s importance in history, he argues, revolves primarily around the bitterly hated duty of circuit riding. Antebellum Presidents followed an unspoken rule that any open seats on the Court must be filled with another justice from that region in order to accommodate the practice. Even during Reconstruction, with the influence of the South severely limited, Presidents were reluctant to abandon this custom all together. Several factors dictate the importance of selecting a regional native to fill this niche.

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24 Richard Burke, *The Path to the Court a Study of Federal Judicial Appointment,* (Ann Arbor: 1979), 41-78.
First, the justice needed to have existing knowledge of the region’s specific laws. At a time before law schools were a prerequisite, attorneys learned the practice by entrenching themselves in the various cases and contracts at the local level. Additionally, the grueling requirements of circuit riding left the justices little time to study the law, making it difficult for those established outside of a region to understand and rule on specific disputes.

Second, Congress and, most notably, President Washington viewed the responsibility of circuit riding as a republican one, an ideology often referred to as a “republican schoolmaster” justification for riding circuit. This was the predominant, if not only, form of contact between large numbers of the electorate and the federal government. Circuit riding, then, was a way for the government to establish a relationship and presence in local communities. In this regard, it would be more difficult for a Yankee to relate to a small Southern farmer than it would be for someone with a similar background. Similarly, the justices could learn more about the general populace, their wants and needs, and expand their own worldview through this travel. Many congressmen feared that abolishing circuit riding would enable the justices, tucked away in Washington D.C., to lose touch with the varying ideologies throughout the country and similarly that the constituents at the local level would not have such a direct way for their own ideas to get back to Washington.

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25 President Polk nominated the first justice to hold a law degree, Levi Woodbury, in 1845. Still, a law degree was not yet a prerequisite.
26 Though there is no definitive date of when this view became less popular, evidence suggests that it was still very much prevalent during Chief Roger B. Taney’s term, beginning in 1836.
Third, riding circuit near the justice’s hometown enabled him to return home much more quickly and easily in the small timeframe of court hiatus. If, say, a Georgian rode circuit in the northeast, it would take an immense amount of time to travel home by carriage. Several men, such as Robert Harrison in 1789, turned down Supreme Court appointments largely due to the inconveniences of circuit riding.27 Although the increasing popularity of the railroad in the 1850s cut down on this time, it too still entailed lengthy journeys.28

Although Glick’s work offers more insight to the why answer, namely, because of circuit riding duties, he fails to engage why not. Circuit riding only provides a partial answer to the importance of geography. It cannot answer why a state such as Florida never obtained a coveted seat.29

Perhaps examinations of specific justices, such as Steven P. Brown’s John McKinley and the Antebellum Supreme Court: Circuit Riding in the Old Southwest, provide another explanation, namely that more qualified and politically connected candidates existed within the region. President Martin Van Buren nominated McKinley to the Court in 1838. McKinley, the first justice from Alabama, made a name for himself among the Alabama legislative class.30 McKinley’s death in July of 1852 left a vacancy that President Millard Fillmore attempted to fill three times, but the Senate postponed consideration on each of the appointments. President Franklin Pierce then nominated the Court-recommended John A. Campbell of

28 “Railroads of the Confederacy,” Civil War Trust.
29 Glick, "Comment: On the Road: The Supreme Court and the History of Circuit Riding,"
30 Brown, John McKinley and the Antebellum Supreme Court.
Alabama. As Burke remarks, "He was the first southerner appointment since 1841 and the last until 1888." Geography's importance peaked during this antebellum period. Unfortunately for Florida, the states left out of circuits in this era lacked the chance for representation when it mattered most.

III. Ideological Concerns that Precluded a Floridian Justice

Delegates to the Constitutional Convention debated extensively about the scope and strength of the judiciary, hence the Constitution's brief and somewhat vague establishment of the third branch of government. Many could not forget the transgressions of the British judiciary and the various state courts' exploitation of debtors under the Articles of Confederation. The delegates thus feared that without proper restraints a judiciary had immense opportunity for tyranny. Article III, Section 2 of the Constitution gives the Supreme Court original jurisdiction in cases in which the United States is a party, cases between states, and cases involving representatives of foreign nations. All other cases, however, are relegated to lower courts or state courts. When Congress passed the Judiciary Act of 1789 the provision mandating justices to ride circuit was included, in part, to give the local citizenry the republican schoolmaster touch whereby their personal interactions with the justices would eradicate fears of tyranny reminiscent of earlier days and hold justices somewhat accountable to the people their decisions impacted.

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31 Burke, *The Path to the Court*, 55.
32 Wheeler and Harrison, “Creating the Federal Judicial System.”
Circuit riding thus enabled a justice to hear a case at the circuit level and then again, if appealed, in front of the full Supreme Court. While the 1789 Act contained provisions to prevent district court judges from rehearing a case at the circuit court level, the Act did not extend the same limitations to Supreme Court justices. It is this clear and blatant conflict of interest to which Chief Justice John Jay appealed in a letter to George Washington. The 1790 correspondence pleaded with the President to convince Congress to abolish circuit riding, on the basis that it was unconstitutional:

Had the Constitution permitted the Supreme Court to sit in judgment, and finally to decide on the acts and errors, done and committed by its own members, as judges of inferior and subordinate Courts, much room would have been left for men, on certain occasions, to suspect, that an unwillingness to be thought and found in the wrong had produced an improper adherence to it; or that mutual interest had generated mutual civilities and tendernesses [sic] injurious to right. If room had been left for such suspicions, there would have been reason to apprehend, that the public confidence would diminish almost in proportion to the number of cases in which the Supreme Court might affirm the acts of any of its members.  

Rather than attacking circuit riding because of the inconveniences and stresses it placed on the Justices, the Chief Justice’s appeal criticized the basis of the republican schoolmaster justification for circuit riding, or the thought that circuit riding brought, “justice, as it were, to every man’s door.” He argued that allowing justices to hear cases at the appellate level and then again, if appealed, at the Supreme Court was unconstitutional due to a clear bias in opinion. This bias would decrease public

36 Brown, John McKinley and the Antebellum Supreme Court, 125.
trust in the system and therefore achieve the exact opposite of what circuit riding was meant to do as a republican institution. Thus began the Supreme Court’s long history of loathing circuit riding for both ideological and practical reasons. Unfortunately, Jay’s appeal yielded no change. Left without Congressional intervention, the justices agreed amongst themselves to recuse themselves from any case that they adjudicated at the circuit court level, unless the vote split.\textsuperscript{37}

Merely two years later, the entire Court signed a letter to Washington, which was then relayed to Congress, in which they described their true feelings about the duty without the polite excuse of potential unconstitutionality. The letter read:

\textit{We really, sir, find the burdens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms...That the task of holding twenty-seven Circuit Courts a year...is a task which, considering the extent of the United States and the small number of Judges, is too burdensome. That to require of the Judges to pass the greater part of their days on the road, and at inns, and at a distance from their families...should not be made unless in cases of necessity.}\textsuperscript{38}

Even with the advent of the railroad in the 1830s, travel throughout the South remained difficult. This along with the general lack of infrastructure throughout the region for inns and roads required much more from southern justices than those from the north, not only physically but financially too. Congress, however, lacked sympathy for the justices.

Moreover, if the true value of circuit riding lay in the “republican schoolmaster” aspect of the practice, then what about Floridians in the mid-to-late

\textsuperscript{38} Charles Warren, \textit{The Supreme Court in United States History, Volume 1}. (Boston: 1922), 88.
nineteenth century? Surely citizens of the newly admitted state would benefit from a president awarding the state with an appointment. Such an award, by giving the local people a voice in and connection to the federal government, would enable them to draw a closer relationship to Washington and therefore further the ideals of the 14th Amendment, passed in 1868, by continuing to bring the south under a bigger national government. Of course there need not be a judge from Florida for Floridians to view these interactions with the federal judiciary in a positive way or to feel as though the government is answering their needs. After all, judges, irrelevant of their personal background, should administer justice blindly and represent the needs of all citizens equally. However, if the justification for circuit riding lay in the citizens’ sentiments toward the leadership in Washington, it would help to have a member of their own territory on the high court.

In this sense, it is also odd that neither Vermont nor Rhode Island, both of which were admitted to the union before Florida, boasted a Supreme Court justice. However, both Vermont and Rhode Island trailed far behind the population of most of the other New England states. Only New Hampshire’s population fell just below Vermont’s from 1830-1840, but then had approximately 3,000 more residents in 1850. In 1845, President James Polk nominated Levi Woodbury, of New Hampshire to replace Justice Story, of Massachusetts.

Although New Hampshire’s low population at this point in history might have been prohibitive under other circumstances, Polk was under a lot of pressure to appoint a good-standing Democrat to the New England seat. Woodbury, a nationally known figure, served in all three branches of state legislature, in the legislative and
executive branches of the federal government, and was the first Supreme Court justice to hold a law degree. In short, Woodbury was certainly the most qualified candidate for the position, no matter what state he hailed from.\textsuperscript{39}

At the time of the 1840 census, Rhode Island’s population numbered a mere 108,830. Even worse, Florida’s population that same year was a measly 54,477. In comparison to states like Alabama with a population of 590,756 or Maine with 501,793 the low population numbers in both of the former states certainly help to explain their lack of representation on the court. Even in 1790 when Rhode Island achieved statehood their population numbered 68,825, with a substantial 14,000 more citizens than Florida in 1840. However, in the 1850 census, a short five years after Florida’s admittance to the union, the state’s population totaled 87,445. Even taking the rather significant increase into consideration, Florida’s population still fell below the national average.\textsuperscript{40}

Additionally, Vermont and Rhode Island’s lack of appointment may be explained by the existence of the New England seat. As far as the republican schoolmaster thought went, the citizens of these two states had ample representation and contact with the longest standing geographical seat in the Court’s history. Maine and Massachusetts, the latter of which had a continuous justice from Horace Gray in 1882 all the way to Felix Frankfurter’s last day in 1962, predominantly accounted for this seat.\textsuperscript{41}

\textsuperscript{39} Burke, \textit{The Path to the Court}, 52.
\textsuperscript{41} Burke, \textit{The Path to the Court}, 67.
In the 1880 census Kansas’s population increased by approximately 330,000 more residents over the total in 1870, bringing their overall population to 996,096. In 1890, the population increased wildly again, this time to 1,428,108. That same year President Benjamin Harrison appointed David Josiah Brewer, a Kansas native, to the high court. However, other factors likely influenced this appointment at least as much, if not more so, than the growing political importance of the state. President Harrison articulated that he wanted a Republican from the West or Midwest to replace Justice Matthews, of Ohio. He considered both Henry Brown, of Michigan, and David Brewer, but appointed the latter because of Brewer’s immense qualifications that created a lasting legacy. According to Richard Burke, a Supreme Court historian, “No man since Cushing had had so much prior judicial experience; no man since Brewer has had so much.” Similar to the case of Justice Woodbury, the geographical region did play a role in Justice Brewer’s appointment, but so too did his extensive professional background. This case elucidates the importance of geography in terms of population. Namely, that states with representation and low population numbers were often not rewarded a justice because of their political importance, but more so because the state produced a significant candidate.

Presidents, beginning with Washington, used Supreme Court appointments to award important regions and key states for joining the union. However, it is possible that a state’s low population numbers at the time of its admittance may

43 Burke, The Path to the Court.
44 Ibid., 70.
preclude this reward, since such a state is less likely to be strategically important. Moreover, Florida’s population did not begin to keep up with surrounding states until the 1930s, when the state started its transition to the populated epicenter that we know it as today.

Until the Civil War, when a justice resigned or passed away it was customary for the president to appoint a justice from that same region so that the justice and the judiciary alike might obtain the “benefits” of circuit riding. From this sprung the tradition of the New England seat, in which an appointee from that region occupied the First Circuit seat from 1789 to 1962 with only one exception.\(^45\) Alabama had a similar, albeit far shorter, monopoly on the Court, with a justice presiding over the Ninth Circuit from 1837 to 1887.

Justice McKinley’s appointment in 1837 came eighteen years after Alabama’s admittance to the union and only twenty years after the Alabama Fever rush in which people migrated en masse to the region for cotton cultivation.\(^46\) The mad rush for land that resulted in the territory’s elevation to statehood drew much national attention and made the region politically important.

John McKinley’s death in 1852 marked the first open seat for the southwestern region since Florida’s admittance to the union. To fill the seat, President Fillmore first appointed Edward Bradford, a Whig from Virginia, but the dominantly Democratic Senate adjourned without taking action. In early 1853 Fillmore appointed George E. Badger, yet another Whig, of North Carolina.


\(^{46}\) Brown, *John McKinley and the Antebellum Supreme Court: Alabama Fever and Georgia Faction*. 
Geography mattered not only to the president in his selection of candidates, but so too to Congress in their consideration of nominees. More importantly, though, the Whig party was rather tenuous at this time, making it more difficult for one to achieve confirmation. The Senate postponed consideration of Badger who was both a member of the competing party and a nominee for a circuit position in a region in which he was not from.47

Fillmore attempted a third time with William Micou, a Virginia native, but the Senate postponed consideration yet again. Finally, during President Franklin Pierce’s first term in office, John A. Campbell, of Alabama, was appointed to fill the seat left by McKinley. Campbell, a Calhounite, was young and robust enabling him to ride long distances, and, most importantly, was a leading lawyer in Alabama recommended for appointment by the sitting justices of the Court itself.48

Campbell’s favored status marks one of the few times in Court history that the sitting justices recommended a candidate for an open seat. This paired with his other favorable characteristics made Campbell an overwhelmingly fitting appointment that was confirmed the same day. The three consecutive Alabama justices – John McKinley, John Archibald Campbell, and William Burnham Woods – may have been one of several factors precluding a Florida appointment, for that state’s established preeminence may have overshadowed Florida’s when both states

47 Burke’s exposition remarks that being a native of North Carolina hurt Badger because he was not from McKinley’s district. He then insinuates that the same was not true for Bradford or Micou, both from Virginia. However, historical records from the Federal Judicial Center indicate that from 1802-1842 the Fifth Circuit consisted of North Carolina and Virginia. In 1842, the Fifth Circuit was restructured to include only Alabama and Louisiana, with the addition of Florida, Georgia, Mississippi, and South Carolina and removal of Louisiana in 1862.
48 Burke, *The Path to the Court*, 54-55.
were added to the Fifth Circuit in 1862. Furthermore, Campbell’s appointment came
during the last period when presidents *always* nominated candidates from the open
region. After the Civil War, presidents still gave geography weighty considerations,
but were not tied so strictly to regional boundaries as they were in the antebellum
era.

Before the first shots of the Civil War, when tensions rose between North and
South, the latter attempted to gain a majority of the Supreme Court seats to defend
their slave-owning rights. These states succeeded, and in 1860, a mere three years
after the Dred Scott decision, five of the nine justices considered themselves
Southerners and resided in slave-holding states. Many historians view the Dred
Scott decision as one of the precursors to the Civil War, which many northerners
considered the ruling part of a “slave-power conspiracy” meant to make the practice
untouchable by the federal government. John Archibald Campbell sided with the
majority, but wrote a separate concurring opinion. Though he defended states’
rights and felt that the federal government overreached its power in many ways, he
felt that slavery itself was a burden on the south that merely stunted their economic
and commercial growth.\(^{49}\)

\(^{50}\) In the *Slaughter-House* cases, decided in 1873, Campbell (who resigned the Court
in 1861) represented the Plaintiff Butchers’ Benevolent Association of New Orleans.
The cases were the first Supreme Court interpretation of the 14\(^{th}\) Amendment.
Campbell wished to use the language of the Amendment, meant to protect recently
freed slaves, to extend to a broader interpretation, in this case allowing his clients to
“sustain their lives through labor.” The Court ruled in favor of extending the 14\(^{th}\)
Amendment protection to privileges and immunities inherent in federal citizenship.
Much to the South’s chagrin, between 1860 and 1867, Peter Daniel, of Virginia; Roger Taney, of Maryland\textsuperscript{51}; John Catron, of Tennessee; James Moore Wayne, of Georgia died, and John Archibald Campbell resigned.\textsuperscript{52} However, both Justices Catron and Wayne stayed on the Court until their deaths in 1865 and 1867, respectively. During the engagement, Catron was able to ride circuit in some areas of Kentucky and Missouri, but was forced to leave his home in Nashville due to the fighting. Wayne was completely unable to attend to his circuit duties in the Carolinas and Georgia, the latter of which declared him an “alien enemy.” Newspapers at the time praised both justices for their loyalty and patriotism, but many southerners rebuked them as traitors.\textsuperscript{53}

Chief Justice Taney remained on the Court but was severely limited by his declining health. In 1861 while riding circuit in Maryland, Taney ruled in the Ex parte Merryman case that only Congress could suspend the writ of habeas corpus and thus Lincoln’s suspension in parts of Maryland was unconstitutional. Lincoln, however, ignored the ruling. Taney’s final years on the Court were far from pleasant. Both northerners and southerners disliked him, he was in financial ruin, and his health prohibited him from engaging in circuit riding and other activities. In October

\textsuperscript{51} Maryland was one of the few slave-holding states that remained in the Union. Taney himself believed in slaveholding, though he manumitted his slaves. Taney’s opinion in the Dred Scott case, where he argued that, “blacks had no rights which the white man was bound to respect,” and thus could not be citizens permanently burned his memory in history. Coincidentally, Taney died on the same day that Maryland abolished slavery.

\textsuperscript{52} Elder Witt, “Members of the Court,” \textit{Congressional Quarterly} Second Ed. (1990), 791.

of 1864, a couple months before the war’s end, Taney died.\textsuperscript{54} It is unclear whether Justice Daniel would have remained on the Court during the war or if he would have resigned like Campbell. What is clear, however, is that losing this majority on the Court diminished the South’s influence in the federal government and marked the beginning of the federal government’s ideological limit on the region.

Campbell, initially opposed to secession, attempted to arbitrate hostilities between both parties.\textsuperscript{55} However, he eventually felt that the government’s transgressions against the rights of southern states were too great and relinquished his post. Merely a year later, Confederate President Jefferson Davis appointed him Assistant Secretary of War, a position he would hold until the conclusion of the war. During the Civil War, all of the district court judges from Alabama simply switched their allegiance to the Confederacy. Similarly, two Florida judges accepted appointments under the Confederate States, which set up a district in Tallahassee. Judge McIntosh, a former Northern District judge, resigned in 1861 and Judge Jesse Finley, the former Western Circuit (St. Augustine) judge became the new district judge for northern Florida.\textsuperscript{56}

Many regions of Florida fell to the Union early on due to the state’s geographic vulnerability. In particular, Fernandina, Jacksonville, St. Augustine, and Pensacola, all coastal cities, had Union garrisons. Early on, Judge McQueen McIntosh of the Northern District resigned, thereby relinquishing federal control over the

district. Since the Northern District incorporated all of the state except for Port St. Lucie and south, Lincoln needed to act quickly to regain control. He appointed Philip Fraser, of Jacksonville, to the post, but Fraser did not hold court until after the war.\footnote{Walter Manley, E. Canter Brown, and Eric W. Rise. \textit{The Supreme Court of Florida and Its Predecessor Courts, 1821-1917}. (Gainesville: The University Press of Florida, 1997), 193.}

The District Court in Key West, however, remained under Federal control throughout the war. Initially, Judge William Marvin, a New Yorker who served on the bench for the Southern District since Florida’s territorial days, resigned from the court in 1863 and returned to New York to evade the war. In his place, Judge Thomas Boynton continued to administer justice. The Key West District Court enabled important prosecution of prize vessels captured during the conflict.\footnote{Ibid.}

Boynton’s allegiance to the Union during this time ordinarily might have placed his name on a potential justice list, but the young judge fell ill of a brain tumor and resigned in early 1870.\footnote{“History of the Federal Judiciary: Biographical Directory of Federal Judges: Boynton, Thomas.” \textit{Federal Judicial Center}.} For his part, Marvin too stayed loyal to the Union, but President Johnson had other plans for Marvin. In 1865, Johnson appointed him as the provisional governor of Florida to reconstruct the state.\footnote{Kevin Kearney and William Marvin, “Autobiography of William Marvin,” \textit{The Florida Historical Quarterly}, Vol 36, no. 3 (Jan. 1958), 179.}

As part of Reconstruction efforts Congress ratified the 14\textsuperscript{th} Amendment in 1868, granting citizenship to “all persons born or naturalized in the United States.” The amendment included provisions prohibiting states from denying, “life, liberty,
or property, without due process of law.”61 This latter portion was aimed at reducing the rights of states, particularly those in the south, and creating a more cohesive nation with fewer localized ideals. Moreover, the 14th Amendment detailed the disenfranchisement of prominent Confederates.

Although a fairly new state, Florida did have some politically significant players. For instance, David Levy Yulee was a Democratic Congressional delegate from 1845-1851 and then again from 1855-1861 at a time of Democratic majority. He was an important figure in the quest for statehood, the expansion of slavery into new states, and was a prominent Florida attorney. However, Levy was also the first person of Jewish descent to hold a Congressional seat and experienced immense anti-Semitism throughout his career.62 Even when President Woodrow Wilson appointed Louis Brandeis to the Court in 1916, the judge’s religion sparked heated debate and backlash. Apparently adding religious diversity to one federal branch was more than enough progress. Furthermore, Levy served as a member of the Confederate Congress during the Civil War, thus marring his political ideology with allegiance to the south. Levy’s religion, strong support of slavery, and Confederate support made him an unlikely candidate in the postbellum period.

Another politically significant Floridian emerged on the scene during Reconstruction. Samuel Pasco, though originally born in London, moved to Massachusetts at the age of twelve. After obtaining a degree from Harvard

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University in 1858, Pasco moved to North Florida. Merely two years later he volunteered for the Confederate Army as a private. However, his “tainted” background due to the Civil War did not stop Pasco from making waves. From 1866-1868 he served as the clerk for the circuit court of Jefferson County and was admitted to the Florida Bar in 1868. In 1880 Pasco served as a presidential elector on the Democratic ticket, but unfortunately for Pasco, Winfield Hancock, the Democratic nominee, lost the presidency to James Garfield. Pasco possessed a significant legislative background, with a term in the Florida House, several terms as a United States Senator, and as president of the State constitutional convention in 1885. 63

However, several factors likely impacted Pasco’s exclusion from the judiciary. First, his reputation, tarnished with his volunteer Civil War service, likely made it difficult to distance himself from that event. This paired with the restructuring of circuits to limit southern influence made it unfortunate for Pasco that during the time of his political significance the federal government refused to give southerners, and particularly ex-confederates, a voice. Furthermore, Pasco’s devotion to the Democratic Party cast him on the wrong side of the line, yet again, for incumbents to seriously consider him for a spot in the judiciary since the next Democratic president does not come until 1884 with President Cleveland, who was an outlier during a Republican era.

In 1869 Congress passed a new Judiciary Act to create and fund a separate judiciary, consisting of nine justices, who would attend to circuit court duties.

However, the Act still required Supreme Court justices to attend circuit courts once biennially. President Grant needed to appoint new justices to these circuits, but unfortunately, the memory of the Civil War hung over the nation, creating bitterness on both sides of the Mason-Dixon line. Those holding high positions under the Confederacy were disenfranchised, and even supporters of the rebel cause were wildly unpopular in Congress, making it extremely difficult to fill these judgeships. Southern Senators along with Attorney General Ebenezer Hoar worried about the lack of viable candidates for the new positions given that the most qualified men were tainted with their service to the Confederacy.

When confronted with the task of finding suitable candidates, Campbell, in 1869, suggested President Grant abandon the tradition of appointing candidates from the region and instead to import them from other areas. Often, presidents looked to District Court judges within the region for potential appointees. To this, Campbell remarked:

> The District Judges at all points are in bad odour for common honesty...I hardly supposed that a man in any relation to the rebellion would be appointed to the Sup Court & that I know of no man in the Circuit who was qualified belonging to the republican party...who had the possibility of attaining the office. That under those conditions I preferred an honorable upright able man from another section to one that was thus selected.

Efforts to reconcile North-South relations using the Court began with President Rutherford B. Hayes, who appointed Justice William Woods in 1880. Woods, a

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64 Cushman, Courtwatchers, 41.
66 Ibid.
67 Cushman, Courtwatchers, 41.
northerner who moved to the South at the end of the Civil War, represented a compromise between the two regions but kept with the tradition of appointing regional justices.68

Further, the idea that men were marred by Confederate ties leaves Florida District Court judges little hope of elevation to the high court. The state, the third to secede from the Union, made up one of the six founding states of the Confederacy and served as the Confederacy's supplier throughout much of the war. Florida's reputation and eagerness to secede could certainly provide a partial explanation of why presidents avoided appointing members with strong ties to Florida's region.

The next viable Floridian candidate was Nathan P. Bryan, a native Floridian, was also perhaps the one of the most qualified candidates the state produced. Bryan graduated from Emory in 1893 and from Washington and Lee Law School in 1895. Bryan served as chairman of the board of control for Florida State institutions of higher education from 1905-1909. In 1911, a seat opened that traditionally belonged to the Fifth Circuit. However, President Taft nominated Joseph Lamar, of Georgia, for the vacancy.

Historians remain uncertain about the details of Lamar's selection, but rumor has it that Taft inquired into the Georgia and Fifth Circuit bars about Lamar, with whom he had met socially in Augusta, and received complimentary responses. Justice Lamar possessed an adequate judicial background, with thirty years as an attorney, four as a state legislator, and two as a Georgia Supreme Court justice. Still, Lamar was a southern Democrat and Taft had already nominated Justices Horace

68 Witt, "Members of the Court," 793.
Lurton and Edward White to appeal to the southern conservatives. Although Lamar met Taft’s high moral and performance standards, so too did many Republicans. Apparently Lamar’s connections to those close to Taft played a substantial role in his selection. Bryan served one term as United States Senator, but lost a second term in 1916, the same year that Justice Lamar died.

Although geography mandated that President Wilson nominate a southerner in Lamar’s place, President Wilson instead appointed Bryan as the Governor General of the Philippine Islands, but Bryan declined the nomination. In place of Lamar, Wilson nominated Louis Brandeis, of Kentucky, in 1916. In 1920 President Wilson nominated Bryan to the Court of Appeals for the Fifth Judicial Circuit, a position Bryan would hold until his death in 1935.

Especially in this latter period, Presidents looked to judges on the lower federal courts when preparing for a Supreme Court nomination. Bryan’s appointment to the federal judiciary and nomination in the Philippines clearly shows President Wilson, the first Southern Democrat elected since the war, favored the candidate, at least to some degree. Additionally:

Wilson had used geography for partisan purposes, not to give the Court balance. He had used his appointments to appeal to progressives and liberals. Although all of his nominees were competent lawyers, this consideration appeared secondary whether it was or not. Partisan politics, ideology, and personal considerations dominated.  

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69 Burke, *The Path to the Court*, 115.
Wilson and Bryan were both Southern Democrats. But, Wilson appointed approximately seventy-five federal judges throughout his administration.\(^{70}\) During his tenure, the only southern seat to open was that of the Sixth District, containing Kentucky, Michigan, Ohio, and Tennessee\(^ {71} \), to which he appointed James McReynolds, of Tennessee, in 1914. McReynolds, a staunch individualist, served first as Wilson’s Attorney General where he closely supervised appointments and put justice above politics. Considering his reputation, it is no surprise that Wilson offered him a seat on the Supreme Court. At this time the Democrats had a large majority in Congress,\(^ {72} \) but Wilson’s prioritized his legislative program.\(^ {73} \) So while Wilson needed to nominate justices who would be in line with him ideologically, he needed to make small concessions in some areas so his blatant appointments of white southerners did not hurt him politically. Thus, Wilson stacked the Court with ideologically important white southern justices who also happened to be competent lawyers, though this latter consideration was secondary. In this instance, the president appointed justices from a geographic region that might be ideologically aligned with his purposes.

Furthermore, at the time of Wilson’s election, the court was, “…better balanced geographically than at any time since the Civil War.”\(^ {74} \) Current justices represented Wyoming, whose first representation came with Willis Van Devanter in

\(^{70}\) Ibid.
\(^{72}\) Burke, *The Path to the Court*, 112.
\(^{73}\) Ibid., 106.
\(^{74}\) Ibid.
1911,75 Georgia, Tennessee, Louisiana, New York, Massachusetts, New Jersey, Ohio, and California. With all three Democrats coming from Southern states, Wilson could use their political ideology to his advantage and could appoint southerners to the already balanced Court without worry of balancing it out.76

Moreover, Wilson initially wanted to appoint Brandeis as Attorney General in 1913, but felt that putting both William Bryan, Secretary of State, and Brandeis in the same cabinet might be too liberal. Instead, Wilson appointed McReynolds Attorney General.77 When President Wilson finally received the opportunity to appoint a southerner with immense popularity and the correct ideology, he immediately turned to Brandeis, the man Wilson wanted to appoint all along. Yet again a possible Floridian candidate was simply outpaced by other, more qualified candidates elsewhere.

IV. Practical Concerns: Travel in the Old Southwest

During President Lincoln’s first State of the Union address in 1861, he reminded Congress that:

...The country has generally outgrown our present judicial system. If uniformity was at all intended, the system requires that all the States shall be accommodated with circuit courts, attended by Supreme judges, while, in fact, Wisconsin, Minnesota, Iowa, Kansas, Florida, Texas, California, and Oregon have never had any such courts. Nor can this well be remedied without a change in the system, because the adding of judges to the Supreme Court, enough for the accommodation of all parts of the country with circuit courts, would create a court altogether too numerous for a judicial body of any sort. And the evil, if it be one, will increase as new States come into the Union. Circuit courts are useful or they are not useful. If useful, no State

75 Burke, The Path to the Court, 102.
76 Ibid., 106.
77 Ibid., 107.
should be denied them; if not useful, no State should have them. Let them be provided for all or abolished as to all.\textsuperscript{78}

Lincoln’s address spurred the discussion that would last until the passage of the Evarts Act in 1891 of how to restructure the judiciary and what exact role that branch should take.\textsuperscript{79} Circuit riding in general placed an undue burden on the justices and often took an immense toll on their health. Riding circuit in the south, however, was certainly the hardest and most taxing region. Justice John McKinley, appointed to the Court nearly a quarter-century earlier, understood this predicament better than any other justice. Using his account of riding circuit provides a partial explanation of why Florida was not added to a circuit when geography mattered most: namely that adding the state to either the Ninth or the Sixth Circuit would make for an impossible circuit schedule and that travel throughout the state, and traveling through the region as a whole proved very burdensome.

McKinley’s circuit docket encompassed, by modern road, approximately 5,000 travel miles. Unfortunately, for McKinley, he did not travel on modern roads. For example, traveling from Montgomery to Mobile required McKinley to utilize the only available route down the Alabama River, which took nearly three times as long as would a road directly connecting the two cities.\textsuperscript{80} Rather than wait for Congressional restructuring, McKinley decided to prioritize the circuit courts in

\textsuperscript{79} Wheeler and Harrison, “Creating the Federal Judicial System,” 12.
\textsuperscript{80} Steven Brown, "John McKinley and the Antebellum Supreme Court: Circuit Riding in the Old Southwest," Lecture, Discover Auburn Lecture Series, Auburn, January 29, 2014.
Louisiana and Alabama, knowing that no one could actually follow his Congressionally mandated schedule and that these states had more cases on their dockets and were easiest to reach.\footnote{Brown, \textit{John McKinley and the Antebellum Supreme Court}, 7.} The First through Sixth Circuits, all located along the eastern seaboard, could be traversed by ship. The Seventh, comprised of Kentucky, Missouri, and Tennessee, at least had the benefit of the Mississippi, Missouri, Ohio, and Tennessee rivers for travel.\footnote{Ibid., 132.}

Frustratingly, John McKinley’s original Ninth Circuit contained few water routes and even fewer railroads, forcing him to make use of a combination limited rail, steamboat, canal, stagecoach, and horseback travel from city to city. These forms of travel entailed various degrees of hazard, with insects, robbers, and bumpy roads threatening passengers at each turn.\footnote{Ibid.}

During McKinley’s tenure, yellow fever epidemics broke out frequently in Southern cities, particularly Mobile and New Orleans where goods from South America and Africa brought along mosquitoes that transmitted the disease.\footnote{Ibid., 136.} Southern travelers also battled thieves along with highway, which was so common that many justices, such as Chief Justice Roger B. Taney, kept a wooden lockbox for “sensitive legal papers.” The nearly microwave-sized box, which is currently on display at the Supreme Court as a part of the \textit{In War and In Peace: The Supreme Court and the Civil War} exhibition, would be kept on Taney’s lap throughout much of any stagecoach trip.\footnote{“In War and In Peace: The Supreme Court and the Civil War.”} At any time, the passengers could be asked to disembark the
carriage and walk, sometimes with their belongings in hand. All of these factors could, at any time, delay the stagecoach schedule. Even worse, stagecoaches were known to, on occasion, strand their passengers far from their intended destination in order to aid backlogged mail runs.86

Stagecoach travel was also far from private. On an ordinary trip McKinley would be expected to share the coach with seven or eight other passengers, but sometimes as many as ten if people were willing to ride on top of the carriage. To accommodate the excess weight, each passenger had a luggage weight limit of ten pounds.87 By modern standards these limitations seem ludicrous. While the expectation that McKinley could travel for months on end with only ten pounds of luggage is bad enough, even more so is the security concerns inherent in a lone justice travelling in close quarters with so many other passengers.

Moreover, anyone using these modes of travel encountered swampy terrain, worn ruts, sandy soil, and obstacles in the road. In 1835 a stagecoach containing Chief Justice John Marshall overturned, seriously injuring the eighty-year-old. The injuries were so severe that Marshall never recovered and died the following July. McKinley himself was injured outside of Nashville, in the same year, due to an overturned stagecoach.88 All of these factors took heavy tolls on the aging, weathered justices.

Steamships came with a host of other problems such as weather delays, excessive noise and shaking, and unplanned stops. McKinley travelled from D.C. to

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87 Ibid., 128.
88 Ibid., 135.
the Ohio River by stagecoach, and from there to the Mississippi River headed towards New Orleans and Mobile. For the preliminary part of this journey, McKinley should hope for dry lands so that the stagecoach could pass unencumbered and without disembarking the passengers. For the latter half, however, McKinley and other passengers relied on an amply flooded river to avoid sandbar collisions and impasses.\(^\text{89}\)

However, rainfall during the journey often led to delays, as debris and changes in the river made the journey substantially more dangerous.\(^\text{90}\) These unexpected setbacks paired with the general discomfort of travel made steamships a frustrating mode of travel, particularly for a justice attempting to adhere to a schedule. Even more frustrating, steamship captains would often take unplanned detours for “commercial interests,” which sometimes took precedence over passenger travel.\(^\text{91}\)

Many of the other justices had free time to spend at home with family or conducting personal business. For Justice McKinley, however, much of his time was spent on the road travelling from district to district in a mad attempt to meet the impossible Congressionally mandated schedule. In 1842 Congress split the Ninth Circuit, assigning Mississippi and Arkansas to Justice Peter Daniel and Alabama and Louisiana to McKinley. Justice Daniel’s biographer remarked, “He...spent more time traveling than judging, and returned home not only exhausted from the constant strain of his movement but nervously tense from his everlasting rush from one

\(^{89}\) Ibid., 132.

\(^{90}\) Ibid.

\(^{91}\) Ibid., 133.
means of transportation to another,”\textsuperscript{92} even though Justice Daniel’s circuit contained half of what McKinley’s once had.

Figure 1: Wheeler and Harrison, "Creating the Federal Judicial System," 14.

Another factor that one need consider before accepting a Supreme Court appointment was the cost of travel. Legislation enacted on the last day of President Andrew Jackson’s administration created a circuit in the old west and old southwest, thus creating two vacancies on the Court. As a final act, President Jackson nominated William Smith, of Alabama, to fill the new seat. However, understanding the immense financial and physical burden traversing the old Ninth Circuit would place

\textsuperscript{92} Ibid., 142.
on him, Smith declined the appointment. Unlike the travel stipend provided for members of Congress, the legislative body had yet to approve any travel compensation for the Supreme Court by the time of McKinley's appointment. Additionally, associate justices received a $4,500 salary (a chief justice would receive only $500 more), a pay scale set in 1819 that did not adjust with the caseload or burden imposed on these men. As such, McKinley estimated that travelling would require one-third of his judicial salary as he journeyed through Alabama, Mississippi, Arkansas, and Louisiana, then back to D.C. for Court adjournment.

For the northern districts that encompassed less distance to and from D.C. and amongst district courts, this requirement, though far from negligible, was far less prohibitive. Notably circuit riding for Chief Justice Taney, whose district included only nearby Delaware and Maryland, imposed a far less burdensome requirement, both physically and financially, that his $500 salary increase could certainly accommodate. The Seventh Circuit of the upper Midwest contained 935 miles of track and even the Sixth Circuit, containing the Carolinas and Georgia, possessed 1,180 miles of railroad lines. However, southwestern travel lacked similar luxuries. At the time of McKinley's appointment in 1837, there was only 163 miles of track through the more than 200,000-mile district. In 1850, five years after Florida's admission to the Union, the entire Ninth Circuit, boasted only 283 miles of track.

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93 Burke, *The Path to the Court*, 49-50.
94 Brown, *John McKinley and the Antebellum Supreme Court*, 129.
95 Ibid., 131.
Although presidents up until Reconstruction appointed candidates from within the region with an open seat, it appears that which state within that region was far less important, particularly when a tremendous candidate existed within the overall area. For example, Justice Woodbury seemed like the most obvious and logical choice to fill the New England seat. Similarly, Justice Campbell was a tremendous candidate from a politically important state in the region, and was more than enough to trump any possible candidates from Florida or the desire to give that new state a reward.

Even during the early days of the Civil War, the Confederate Judiciary, modeled on the United State’s version, experienced delay due to travel difficulties. For instance, District Attorney Yonge remarked to Assistant Attorney General Keyes that a round-trip from Pensacola to Apalachicola, a mere 330 miles by modern road, took 108 hours of travel time. Most of the District Courts in the South, as mentioned above, simply picked up where they left off, utilizing the same judges. However, since the Confederate Supreme Court never came to fruition due to the established supremacy of the states, the district court judges did not need to wait for a Supreme Court justice to arrive to administer appellate justice. Unfortunately, though, these travel times only worsened as the war progressed.

In the State of the Union mentioned at the beginning of this section, Lincoln stated that, in 1861, eight recently admitted states, mostly those in the west, never had a circuit court attended to by a Supreme Court justice. He argued that rather than adding a new seat on the court with every new circuit, as had been done in the

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96 Robinson, *Justice in Grey*, 141.
97 Ibid.
past, that Congress fix the number of the judiciary and reorganize the circuits to a “convenient size,” that either Supreme Court justices or separate justices could attend to, or else abolish the circuit courts all together.98 In some other circumstances, Congress allowed district court judges to hold circuit court in the absence of the Supreme Court justice.99 If, say, a storm blew through the Southwest that stalled McKinley’s journey an extra five days and he needed to now move on to another city, the district court judge could hold a quorum to prevent backlog.

![Map of the United States in 1855](image)

*Figure 2: Wheeler and Harrison, "Creating the Federal Judicial System," 15.*

President Lincoln’s reference to the eight unvisited states includes Florida. Florida’s admittance came shortly before Texas’s in December of 1845, Iowa’s in

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1846, Wisconsin’s in 1848, and California’s in 1850. Congress again struggled between adding justices to accommodate the new states and limiting circuit riding. McKinley’s example demonstrates the need for splitting up the Ninth Circuit amongst justices due to the sheer size and difficulty of travel in the region. His circuit riding hardships took such a toll on the aging justice that he returned to Louisville, KY due to illness in April of 1852 with nearly a month left on the Court’s docket. McKinley died that July.

Adding Florida to the Ninth Circuit in 1845 would have proved too burdensome on the already taxed justice; adding a second justice for the region and tenth overall on the Court would create a too large judiciary and the possibility of a tie. However, reducing circuit riding would cost a great deal of money, reduce “nation building”\(^\text{100}\) where contact with the justices solidified positive sentiments of the federal government, allow the justices to be far removed from their roots and possibly grow narrow-minded, and remove the justices from the application of the state laws they had to interpret. In short, the young nation still needed to gain the support of the localized and independent citizenry while keeping the justices in contact with their constituents in an age where contact across distances took immense effort.

Moreover, traveling in the south did not improve at the same pace it did in the north. In thirteen years a measly 100 miles of track was added in McKinley’s district. Similarly, railroad production throughout Florida was severely limited. In 1862, Congress added Florida to the Fifth Judicial Circuit, a year after Lincoln’s

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\(^{100}\) A term used by Supreme Court historian Charles Warren. See page 4 for more information.
proposal. Although the Southern District of Florida, under Judge Marvin and then Judge Boynton, remained under federal control throughout the war, the same cannot be said of the Northern District. The Florida Keys with the Fort Jefferson federal stronghold in the Dry Tortugas, were isolated from other Union territories. Moreover, no railroad connected the southern region of the state to Georgia or Alabama, and the middle region completely lacked infrastructure. The only way for a federal justice to ride circuit in the Southern District would entail travelling through warzones by ship, a clearly unnecessarily dangerous task. For this reason, Congress allowed the district court jurisdiction over all federal cases that arose in the Southern District.

**V. Practical Concerns: Geography’s Importance on the Large Scale**

During President Johnson’s tenure, Congress reduced the number of sitting justices to seven. Some historians contend that this was done by Congress to limit Johnson’s influence, while others argue that the act intended to make the Court more manageable and provide the justices higher salaries.  

With the death of Justice Wayne in 1867, the Court’s overall number declined to seven. However, two years later, under President Grant’s administration, Congress again increased the number to nine justices in the Judiciary Act of 1869. At the time, the Court was divided down party lines with no southern representation. The practical setbacks of circuit riding endured predominantly through the old southwest did not simply vanish with this legislation, since the Act provided that the Supreme Court justices

102 Burke, *The Path to the Court*, 61.
would continue to hold circuit court once every two years, a justice of the high court would still have to travel using these modes of transport, albeit far less frequently. Justice Grier, a southern-sympathizing Democrat from Pennsylvania, resigned shortly after Grant took office.

Presented with two vacancies, Grant appointed William Strong to fill Grier’s seat, and Joseph P. Bradley, to fill Campbell’s.\textsuperscript{103} Since Bradley never lived in the south, his appointment angered many “carpetbagger” senators, or those who had moved to the south after the war to profit from the disenfranchisement of southern leaders. Still, Congress confirmed Bradley on March 21, 1870. Bradley, the only northerner to hold court continuously in the south, now had to traverse through Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas using much of the same infrastructure that existed before the Civil War.

To make matters worse, Bradley would commence circuit riding after the Court adjourned in May. The New Jersey native then battled blazing hot summers and lethal wildlife for which he was not prepared. The entire region, to Bradley, was terra incognita. Moreover, Bradley’s judicial experience and legal training could not prepare him for the diverse laws within his region. During this era laws were very localized and differed greatly amongst states and, unlike the northeast, many of the states within the Fifth Circuit fell under other the control of European monarchs before their admittance to the union.

Louisiana, with heavy French influence, based laws on the civil law doctrine, which emphasizes codified statutes, whereas the common law tradition, practiced

\textsuperscript{103} Ibid., 62.
throughout much of the country, stresses the importance of case law, or judicial precedent. Texas, too, founded its laws on a Spanish tradition that differed slightly from the typical common law Bradley was accustomed to. Moreover, even admiralty law, which followed the common law tradition in Florida, was still semi-foreign to Bradley. Bradley could not, however, delay the circuit courts anymore to learn the law, as cases already piled up from the nine-year limbo in which no justice rode circuit throughout that region.\textsuperscript{104}

Cortlandt Parker, a fellow New Jersey native, wrote in 1894 that Justice Bradley not only met these formidable tasks, he excelled at them. While on the road, Bradley amassed a substantial collection of civil law books and studied them carefully.\textsuperscript{105} Residents of Louisiana and Texas admired Bradley and his jurisprudence, an achievement that stunned the bar in both states. This excellence, however, was made possible by Bradley’s personal brilliance. It is doubtful whether another northern attorney could have attained the same level of distinction on the Fifth Circuit.\textsuperscript{106}

In this instance, a more practical appointment from the south may have eliminated the necessity of Bradley’s extensive studies and certainly a less eager, driven man would have crumbled under such pressures. While important, the necessity for the right geographical background during Reconstruction could be overcome to aid the transition to a newer national, rather than regional, identity.


\textsuperscript{105} Although most stage coaches had a ten pound weight limit so bringing books often meant leaving something else behind.

Under President Rutherford B. Hayes’s administration, the south clamored for their first appointment since Justice Campbell’s in 1853. The Midwest dominated the Court at this point, followed closely by the Northeast, with one lone Californian thrown in the mix. The lack of geographical diversity prompted Hayes to appoint William Burnham Woods, to fill the vacancy left by Justice Strong’s resignation. Though Congressional documentation considers Woods “of Georgia,” he was a “carpetbagger” former Union soldier who had moved to the south a mere eleven years earlier. He did, however, win over many southern legislators and attorneys, resulting in a 39-8 confirmation vote in 1880.\textsuperscript{107}

Woods died in 1887, leaving President Grover Cleveland, the first Democratic president in nearly a quarter-century, with a vacancy to fill. Southerners at this point eagerly clamored for representation. Though content with Woods, the Old South had had no true representation in over thirty years. Cleveland looked to L.Q.C. Lamar to fill the opening. Lamar possessed immense legal and intellectual talent, working as an attorney, a professor of mathematics, law, and ethics, as a Congressman and Senator, and finally as the Secretary of the Interior under Cleveland. However, Lamar also obtained the rank of Colonel in the Confederate Army. Many northerners still wished to wave the bloody shirt in the name of injustices committed two decades prior. Lamar’s historic confirmation vote of 32-28 resulted in the first former Confederate justice in the Court’s history and the first Democrat appointed in 25 years.\textsuperscript{108}

\textsuperscript{107} Burke, \textit{The Path to the Court}, 66.  
\textsuperscript{108} Ibid., 68-69.
Mindful still of geography, Cleveland searched for a Democrat from Illinois when Justice Waite died in 1888 to give the Court better geographic balance. Cleveland nominated Melville Fuller, a Maine native who had moved to Illinois 24-years prior. With the help of Maine and Illinois Senators, Fuller received commission.\textsuperscript{109}

The passage of the Evarts Act in 1891, during President Harrison’s administration, codified many of Lincoln’s suggestions. Richard Burke sums up perfectly the importance of geography in this era, “After the Reconstruction period, Presidents again became conscious of the geographical distribution of the Court members, although the custom of a particular position on the Court belonging to a certain circuit was gone forever.”\textsuperscript{110} When Bradley died in early 1892, President Harrison felt immense pressure from New Jersey politicians to keep the traditionally Southern seat within their state’s grasp.

However, representatives from the more politically powerful Pennsylvania also wanted the seat, as their state had continuous representation from the very founding of the judiciary until 1880 when Justice Strong resigned. James G. Blaine, the Secretary of State, recommended his cousin, George Shiras Jr., for the vacancy. Although Shiras, born in Pittsburgh, achieved fame amongst Pennsylvanian attorneys, the two Pennsylvania senators opposed his nomination. Still, Shiras received commission in July of 1892.\textsuperscript{111} Even though Harrison shirked senatorial

\textsuperscript{109} Ibid., 69-70
\textsuperscript{110} Ibid., 70.
\textsuperscript{111} Ibid.
courtesy by not first consulting the Pennsylvania senators before selecting Shiras, he did still ensure their state’s continued representation on the Court.

The preceding sections illuminate the importance of geography for practical reasons during circuit riding, but what about near that practice’s end? After all, with the Judiciary Act of 1869 when Congress just about eliminated circuit riding, the country neared its first centennial and had just survived a civil war. In 1870, district court judges, ruling alone, adjudicated about 66% of the circuit court caseload. Ten years later, that figure rose to an astonishing 90%. When the Evarts Act passed in 1891, the judiciary itself was 102 years old. The need for justices of the high court to travel around the nation decreased and this diminished necessity enabled separate, lower court judges to fill the void. Congress needed to restructure the judiciary in such a way that accommodated the rapidly increasing workload, but still preserved contact between the justices and the daily business of the judiciary. Richard K. Burke ends his first chapter of The Path to the Court by eloquently stating:

Geography, age, religion, and education are difficult factors to evaluate. But it can be stated positively that they are secondary considerations. Since the Civil War, the practice of maintaining circuit representation has been ignored...One may wonder why geography should be important at all. One answer is that if the Court is a policy-making body requiring no expertise, it ought to be representative; if it is a judicial body, then it should have persons who are familiar with the peculiarities of the law in various sections of the country. Excellent lawyers and judges can be found in every section of the country.  

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113 Ibid.
114 Burke, The Path to the Court, 191-192.
In the postbellum era geography and other considerations, with diminished practical importance, fell second to ideological concerns of candidates. Reconstruction can be seen as the beginning of a more unified nation separated less by regional differences. Now, geography's secondary importance related to comprehension of local law.115

In the later years of this study, geography's practical importance declined. The advent of the telephone, with the first call from New York to San Francisco in 1915, propelled communication abilities.116 Moreover, the increase of railroad lines, the radio, telegraph, plane, and car all eroded geographic lines. No longer could regions remain totally isolated from the outside world. These immensely important inventions eradicated stark ideological differences between regions and ushered in a new, inter-connected area. With the changing importance of geography ideologically came the decreased importance practically.

VI. Ideological Concerns: Why Geography Mattered on the Large Scale

In it's simplest sense, geography matters for the impact it has on a candidate's upbringing and ideological formation. This aspect, however, proves nearly impossible to isolate. Instead, one can narrow the focus on geography's importance to presidents for rewarding states, appealing to senate leaders, and nation building.

116 “Phone to the Pacific From the Atlantic.” New York Times.
President Washington established seven criterions for judicial nominees, including “geographic suitability”. According to Henry Abraham, Washington wanted to be president of all the states and thus wanted to see each section and each regional interest represented on the Supreme Court. With President Washington began the tradition of rewarding politically strategic states for their admission to the union.\(^{117}\) Washington wished to create a diverse court that embodied the varied cultures of the states. On several occasions Congress passed legislation increasing the number of justices on the Court to incorporate new states. However, this practice stopped around the time of Florida’s admittance when Congress struggled to achieve the benefits of appointing a geographically relevant candidate while also keeping the number of justices manageable. Congress feared that too many justices and too many opinions, as President Lincoln suggested, would make adjudication nearly impossible. Congress decided in 1869 that nine justices would be an appropriate number for the Court.\(^{118}\)

Often, presidents appoint candidates from a key party or key state to appeal to certain senators, raise political capital, and get their nominee through the committee hearing. For the selection of the first Chief Justice, John Adams supposedly told George Washington, “If ability is to decide, take Rutledge; if politics, Jay.”\(^{119}\) Washington’s selection of the well-established New Yorker was the first of

\(^{117}\) Abraham, *Justices, Presidents, and Senators*.
\(^{119}\) Burke, *The Path to the Court*, 38.
many politically motivated judicial nominations.\textsuperscript{120} All of Washington’s nominations, and subsequently the first justices of the Court, were members of the Federalist Party.\textsuperscript{121}

In the antebellum period, the geographical background of a candidate was important ideologically for all of the same reasons mentioned above for Florida. Understanding this, President Lincoln initially refused to fill the seats left by the death of Justice McLean and Campbell’s resignation because those seats traditionally belonged to the south and were meant to represent southern interests. However, Congress passed the 1862 Act reorganizing the circuits to secure or block the nominations of certain men. According to Richard Burke, the geographical composition of the Court was so gerrymandered that making a new southern appointment was no longer necessary.\textsuperscript{122} This Act denied southerners representation and protection of their regional interests, which was most significant in the post-war period.

When Justice L.Q.C. Lamar died in 1893, President Harrison, a Republican, appointed Howell Jackson, of Tennessee, a Democrat. Jackson and Harrison both served in the Senate and maintained a friendship. Although Grover Cleveland, a Democrat in a Republican era, was about to be inaugurated, Harrison articulated that he did not believe in partisan appointments so long as the justice possessed

\begin{itemize}
\item \textsuperscript{120} Washington nominated Rutledge to the first Associate position on the court but Rutledge, without ever hearing a case, resigned. When John Jay resigned in 1795 to govern New York, Washington nominated Rutledge again to the high court, this time as Chief Justice. The recess nomination allowed Rutledge to adjudicate, but some inflammatory remarks lost Rutledge his confirmation hearing in 1796.
\item \textsuperscript{121} Burke, \textit{The Path to the Court}, 41.
\item \textsuperscript{122} Ibid., 58-59.
\end{itemize}
amenable views on constitutional powers. This marks the second time a Republican appointed a member of the Democratic Party, but in consideration of the Democratic control of the Senate, the appointment made sense politically, demonstrating that party concessions could be made for the right ideological candidate.\textsuperscript{123}

Finally, presidents valued the geographic background of candidates for nation building. As republican schoolmasters riding circuit, justices would improve the sentiments of the public toward the federal government though direct contact with the highest-ranking members of the judiciary. This would provide a solid foundation for the budding, individualized nation. Simply by enabling contact with the nation’s foremost judges, circuit riding set out to win over Americans at the local-level. Moreover, it kept the judiciary connected with the citizens and their unique needs when every region had its own interests and communication proved difficult.

\textbf{VII. Conclusions}

Geographical background of Supreme Court appointments reached its utmost importance in the early days of the nation and the antebellum years. During these times, circuit riding was the main form of communication between the federal government and the citizens. Moreover, the selection of candidates represented an overarching national picture where the young federal government still questioned whether representation of states is conceivable when there is no physical

\textsuperscript{123} Ibid., 71.
connection, a debate that played out since the earliest days of the United States, and specifically in Federalist No. 10 where James Madison argued that a larger republic was the surest safeguard against factions. In this way, the Supreme Court acts similarly to the electoral college in that the justices are not elected directly by the people but are supposed to represent the best interests of their constituents. The judiciary thus played an important and unique role in the formation of the country, working to create a federalist nation.

With the reduction of circuit riding in 1869, the importance of a particular geographical background also declined. The passage of the Judiciary Act of 1891 completely eradicated the need for a geographically relevant Supreme Court appointment.

Unfortunately, Florida did not even belong to a federal judicial circuit until 1862, meaning no Supreme Court justice rode circuit in Florida in the antebellum era making it unnecessary to have representation on the Supreme Court based on circuit riding tradition. Once added to the Fifth Circuit in 1862, Florida, territorially, was ravaged and preoccupied with the Civil War. No justice could ride circuit through the state during this time. At the conclusion of the war, most of Florida’s possible candidates were either excluded due to participation in the Confederacy or were appointed to other “Union” positions during Reconstruction.

In the following years, geographical consideration of candidates was simply a nod to tradition. It no longer mattered for nation building or winning over the citizenry on the new federal government, for local law knowledge, or for rewarding new states. In this latter age, geography is a secondary factor, whereas ideology and
party play a particularly important role in judicial selections. Presidents began to look at the best-suited candidates in general, not the best suited candidates within a confined region. The preeminent Floridians during this time were either members of the wrong party or paled in comparison to candidates located elsewhere. Since presidents no longer felt the need to reward new states, they were not so limited in their selection that they need make concessions elsewhere to fulfill a geography requirement. It is for this plethora of reasons, all coincidentally packaged together, that no Supreme Court justice ever called Florida their home.

Using Florida as a case study to illustrate the larger issue, we can answer several essential questions regarding geography’s importance when it comes to appointing justices. First, while there is a major cut-off point in regards to geography’s importance, namely after the Evarts Act, Burke’s account chronicles a slow decline in perceived importance. While the reasons for appointing geographically relevant candidates vanished, presidents considered the factor important at a slowly declining rate, eventually ending with Nixon.

Second, there are several instances, for example President Fillmore’s appointment of George Badger, where a candidate’s geographical background prohibited him from obtaining confirmation. However, the only time this happened to an entire region was during Reconstruction, where geography impeded southern candidates en masse, making the south during this era important for understanding geography’s true importance through its limitations.

Initially, the practicality of judicial circuit riding mandated the formation of a pool of geographically relevant candidates, from which a president could select one
that was competent and had an ideology in line with the president’s. Later, though, geography was important when regional differences, particularly between north and south, created clear ideologies tied to particular areas.

Still, the question remains of how to determine a justice’s geographical background, but often the answer results in a matter of opinion or set guidelines. In the early years, one could easily determine a man’s geographical background. However, during the period of this study, that determination becomes harder. For instance, Justice McKinley, born in Virginia, moved to Kentucky as an infant. At the age of 39, McKinley moved to Alabama to practice law. However, John McKinley made his biggest mark and most of his prior experience in Alabama. Later, many northerners considered “carpetbaggers” who moved to the south at the conclusion of the Civil War seemingly good candidates for southern seats, whereas southern citizens refused to accept them as true southerners. Outside the scope of this essay and in more modern years, geographical background is nearly impossible to pin down as many people move several times and spend substantial time in different regions, such as G. Harrold Carswell.

Nixon’s last Supreme Court appointment of Justice Rehnquist to replace Justice John Marshall Harlan II, of Illinois, closed an important chapter in the Supreme Court’s history, namely one where presidents considered the geographic background of candidates at all during the selection process. As Eric Pearson commented in 2010 about the current state of appointments:

This is no longer an era in which sitting justices ride circuit; but more importantly, no region of the country continues to possess interests so
Travel and the interconnectedness produced by technology have blurred the lines between geographical boundaries. Now, the consideration of geography for Supreme Court appointments is an antiquated one; a consideration that no longer holds importance except in the name of tradition.


Sixth Circuit.” Federal Judicial Center.


“In War and In Peace: The Supreme Court and the Civil War.” Supreme Court of the United States.


“Railroads of the Confederacy.” *Civil War Trust*.


