My fascination with, and indeed love for, the Supreme Court of the United States and its Justices began in my teens—a long, long time ago—and it has never wavered. Like other youthful and some not-so-youthful students and observers of the Court, I grew up thinking that John Marshall was our first Chief Justice, and that he wrote all of the Court’s opinions. Ultimately, it became fortuitously clear that he was not our first but fourth (counting John Rutledge’s unconfirmed service of a little more than four months in the center chair) and that Marshall did not write all of his Court’s opinions, just most of them, including a healthy majority of cases at constitutional law. Thus, of the 1,215 cases his Court handled during his long tenure of thirty-four and a half years—exceeded, to date, only by Justice Douglas’s thirty-six and a half and Justice Field’s thirty-four and three-quarters—Marshall penned 519. He wrote thirty-six of the sixty-two that were decided on constitutional grounds, dissenting only once. He completely dominated his Court, effectively “Marshalling” it. One example is John Adams’s first appointment, Bushrod Washington, George Washington’s favorite nephew, who served with Marshall for twenty-five of his thirty-one years on the Court. He disagreed with the Chief only thrice, and thus was commonly referred to as Marshall’s second vote. In his long tenure on the Court, Washington wrote only seventy majority opinions, two concurrences, and but one formal dissent.

No wonder, then, that the fifteen Associate Justices who served with Marshall during his reign from 1801 to 1835 are hardly well known to even a majority of the involved polity, with the exception of the great Joseph Story and William Johnson, the Court’s first important dissenter. It is apposite to note here an observation by Johnson’s biographer, Professor Donald G. Morgan, who quoted a letter dated December 10, 1822, that Johnson wrote to Thomas Jefferson, the President who had appointed him in 1804:
While I was on our state bench I was accustomed to delivering seriatim opinions in our appellate court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote. But I remonstrated in vain; the answer was he is willing to take the trouble and it is a mark of respect to him. I soon however found out the real cause. Cushing was incompetent. Chase could not be got to think or write—Patterson was a slow man and willingly declined the trouble, and the other two judges you know are commonly estimated as one judge.  

The contemporary overall lack of acquaintance with the jurisprudence and even the personae of the other thirteen Associate Justices who sat on the Court two centuries or more ago probably accounts for the fact that the seven or so rating/ranking surveys of all Justices conducted by law-school deans and professors of law, history, and political science between 1960 and the present (in two of which, including the first, I had the privilege of participating), all of which evince a remarkable and indeed gratifying concurrence in their judgments of judicial performance, broadly agree on the relative insignificance of the on-Bench service of those thirteen. On the other hand, the Chief Justice, of course, was unanimously accorded a ranking of “great”—indeed, in the first survey he was the sole Justice to receive that accolade from all sixty-five of the participating evaluators. Brandeis was second with sixty-two and Holmes was third with sixty-one; Story was also accorded the top appraisal, and Johnson a “near great.” Of the other thirteen Associate Justices on Marshall’s Court, eleven were viewed as “average” (Cushing, Paterson, Chase, Washington, Livingston, Todd, Duvall, Thompson, McLean, Baldwin, and Wayne), while Moore and Trimble came in as “below average” (along with pre-Marshall’s Barbour, Woods, and Howell Jackson). None was rated as a “failure,” that designation being reserved for eight twentieth-century Justices: Van Devanter, McReynolds, Butler, Byrnes, Burton, Vinson, Minton, and Whittaker.

The fifteen Associate Justices who served with John Marshall were appointed by six Presidents: three by Washington, two by John Adams, three by Jefferson, two by Madison, one each by John Quincy Adams and Monroe, and three by Jackson. Politically, they were majoritarianly marginally Democratic, chiefly due to Charlottesville’s Mr. Jefferson and his poli-philosophical offspring, Madison and Monroe. It might have been easy for that trio of Virginia Presidents involved in the fifteen appointments to finger several prominent Virginia lawyers for the high Court, but geographic diversity played an infinitely more prominent role in the selection of putative Supreme Court members then than it does today, or in fact since Theodore Roosevelt was the first President publicly and firmly to reject it as a major criterion for eligibility. Yet at the dawn of our Republic it mattered prominently, and the resolve of the first six Presidents to have a geographically representative Court resulted in the following appointments: two each from Kentucky, Maryland, Massachusetts, and New York, and one each from seven other states: Georgia, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, and Virginia. The latter state’s George Washington’s three Justices came from Massachusetts, New Jersey, and Maryland; Massachusetts’s John Adams’s two were from Virginia and North Carolina; Virginia’s Jefferson’s three from South Carolina, New York and Kentucky; Virginia’s Madison’s two from Maryland and Massachusetts; Virginia’s Monroe’s one from New York; Massachusetts’s John Quincy Adams’s one from Kentucky; and Tennessee’s Jackson’s three from Ohio, Pennsylvania, and Georgia. Ergo, no President chose one from his
home state. Apropos of presidential selections of putative Justices, we hear a great deal about so-called “litmus tests.” Yet none of our forty-two Presidents has been as avowedly specific in invoking such tests as was our first, George Washington. All fourteen of his nominees, of whom twelve were confirmed and eleven served, met his septet of criteria cum litmus tests, to which he adhered religiously and predictably: (1) support and advocacy of the Constitution; (2) distinguished service in the Revolution; (3) active participation in the political life of state or nation; (4) prior judicial experience on or litigation in lower federal or state tribunals; (5) either a “favorable reputation with his fellows,” as Washington put it, or personal ties with the President himself; (6) geographic suitability; and (7) “love of our country.”

I hope that you will bear with me as I take a brief summary look at a handful of the fifteen who served with John Marshall. Chronologically senior in terms of appointment was William Cushing, the last of the initial group of five Justices chosen by President Washington in 1789 and the oldest at 57-plus. He came to the Court with considerable judicial and legislative experience in Massachusetts, as well as having been successfully active in securing his state’s ratification of the Constitution and its abolition of slavery. While sitting as an Associate Justice on the Court, he became Washington’s second choice to succeed John Jay in the center chair (the first, John Rutledge, having failed of confirmation 14:10). The Senate approved Cushing, but, then sixty-four years old, he pleaded advanced age, ill health, and a disinclination to take on what he viewed as the Chief Justice’s “additional burdens.” Thus, he opted for continued service as an Associate Justice until his death fourteen years later. Not a particularly joyful camper on the Court and, like his Brethren, distinctly unhappy with the hated chores of circuit-riding, Cushing wrote only nineteen opinions in his almost twenty-one years there. However, three of those nineteen constituted support of highly significant pre-Marshall holdings in 1793, 1796, and 1798, the first case addressing conflict between state sovereignty and federal jurisdiction and resulting in the Eleventh Constitutional Amendment barring federal jurisdiction in cases against the states by citizens of another or foreign state (Chisholm v. Georgia, Ware v. Hylton and Calder v. Bull). Painfully brief—no great worker, Cushing—these represented one of the prevailing seriatim opinions in these cases by the fervent champion of judicial review. Although by no means universally so, Cushing’s record on the Court has often been generally regarded as negative. In the words of one of his observers: “William Cushing served longer with minimal effect than any of the fourteen Supreme Court justices whose terms overlapped his.”

Born in Ireland but soon a New Jersey resident and Princeton graduate, 47-year-old William Paterson was appointed by Washington in 1793 while serving as a U.S. senator from New Jersey, where he had been state chancellor as well as attorney general. He had been a foremost leader in the Constitutional Convention who, among other contributions, offered the small-state or New Jersey Plan for equal representation of all states in the national legislature. It was Paterson, second only to Oliver Ellsworth, who labored assiduously for the adoption of the Judiciary Act of 1789, which implies the power of judicial review that was so vital to Washington’s hope for a strong federal judicial system. The first nine sections of the significant statute, establishing federal district and circuit courts, were in Paterson’s handwriting. During his thirteen years on the Court, he proved to be a fervent Federalist as well as a staunch philosophical Hamilton ally. Like Cushing, he was in the controlling seriatim opinions—such opinions being the custom prior to John Marshall’s Chief Justiceship—in Ware v. Hylton and Calder v. Bull, and, together with Samuel Chase and James Iredell, wrote another one in the significant 1796 case of Hylton v. United States.
1803 *Marbury v. Madison* decision establishing the Court’s power of judicial review, implicitly recognized such a power by upholding Congress’s authority to enact a carriage tax against a major constitutional challenge. *Ware v. Hylton* established the supremacy of national treaties over state laws, and *Calder v. Bull* held that the Constitution’s prohibition against passing ex post facto laws extended only to criminal cases, not to civil ones. Like Cushing, Paterson loathed circuit-riding and seemed to be almost pleased when a serious circuit-riding-induced injury truncated that chore in 1804, probably contributing to his failing health and death two years later.

When the Senate rejected Washington’s selection of Rutledge as Chief Justice in late 1795, the President’s initial choice was Maryland’s 54-year-old chief justice, Samuel Chase. A signer of the Declaration of Independence, a hero of the Revolution, and a key member of the Continental Congress—although not a supporter of the Constitution (he campaigned against it and *The Federalist Papers*)—the acid-tongued, outspoken, cantankerous but brilliant Chase had to settle for a vacant Associate Justice seat in 1796. Washington felt strongly that Chase’s service to the cause of independence simply justified the latter’s selection. Although Chase had begun to temper his criticisms of the Constitution and indeed become a vocal, zealous supporter of the Union, once on the high Bench he immediately began to make a specialty of denouncing democracy and condemning the principles of the Republican Party. He rendered himself thoroughly obnoxious to the latter. Thus, to cite just a few examples, as soon as he joined the Court he predicted gratuitously, while charging a Baltimore grand jury, that under Jefferson “our republican constitution will sink into a mobocracy, the worst of all possible governments”6; and he charged Jefferson, both before and after his election as President in 1800–1801, with “seditious attacks on the principles of the Constitution.” For these and similarly imprudent assaults launched from both on and off the Bench, the House of Representatives impeached Samuel Chase on grounds of eight articles of “high crimes and misdemeanors” by a vote of 73:32 in March 1804—the sole impeachment on record to date against a Justice of the Supreme Court of the United States. Fortunately for the tenets of judicial independence and the separation of powers, when the Senate voted on the charges brought by the House on March 1, 1805, enough Republicans joined the Federalists to acquit the controversial figure 19:15 on the most grievous charge, six of the other seven not even receiving a simple majority, let alone the necessary two-thirds to convict. Although, as Irving Dilliard put it cryptically, “One Samuel Chase on the Supreme Court of the United States may be said to have been enough,”7 Chase did make notable jurisprudential contributions during his fifteen years on the Court, such as his persuasive *seriatim* opinions in the important rulings in the aforementioned *Ware v. Hylton* and *Calder v. Bull*.

President John Adams’s second appointee, Alfred Moore, resigned from the Marshall Court because of ill health in 1804 after barely four, but by all accounts unremarkable, years of service. Although only 49 years of age, he, like most of his contemporaries, was worn out by the hated, arduous circuit-riding obligations. Though Moore was a distinguished and successful lawyer, his short on-Court career made “scarcely a ripple in American judicial history.”8 He delivered but one opinion, a *seriatim* one in an admiralty case in 1800.9

The departure of the loyal Federalist enabled President Jefferson to make the first of his three Democrat-Republican appointments, all designed to redress the sway of his arch political rival, distant cousin John Marshall, whose mind Jefferson referred to as that “gloomy malignity.” His choice devolved on a 32-year-old young attorney in private practice, William Johnson, a Charleston native and Princeton graduate who had already been a judge of the South Carolina Supreme Court.
Johnson was the sole member of the Marshall Court to stand up to the Chief consistently, despite the gradual addition of seven Democrat-Republican kindred political members who would soon become quasi-Marshallians. He also stood up to Jefferson when he deemed that appropriate. Johnson wrote what scholars regard as the first real dissenting opinion on the Court in 1805. Viewed broadly as the earliest practitioner of formal dissents, he penned one-half of the Supreme Court’s dissenting opinions during his three decades on the high Bench, all but one of these during Marshall’s tenure. He also wrote significant concurring opinions, such as his often-quoted one in Gibbons v. Ogden, the famed New York Steamboat Case of 1824, in which Marshall pronounced the plenary power of Congress over interstate and foreign commerce. Johnson’s concurrence pleaded for an even broader articulation of that national power, one still very much at issue in our own day. Only the Chief Justice and Justice Story authored more opinions during the Marshall era than the hard-working, energetic Johnson, who penned 112 majority, 21 concurring, 34 dissenting, and 5 seriatim opinions. He was a major contributor to the development of constitutional jurisprudence as well as to the developing nature of the judicial process in our governmental constellation. He richly merits the approbation bestowed upon him by the pages of history.

Last, but assuredly not least, of the quintet to which the dictates of time and prudence limit me for today’s purposes is the great Joseph Story, Madison’s second and last appointment, late in 1811, to fill the seat of William Cushing, who had died in the fall of 1810. The President had first selected Jefferson’s able first-term Attorney General, Levi Lincoln of Massachusetts, but despite the Senate’s enthusiastic confirmation, Lincoln, citing poor eyesight, refused to accept his commission. Madison then nominated New England’s prominent Democrat-Republican leader, Alexander Woolcott of Connecticut, but the Senate’s Federalists, citing “extreme partisanship both in and out of office,” rejected him decisively 24:9. Nor was the by-now-exasperated Madison’s third try, John Quincy Adams, his minister to Russia, willing to serve, despite the Senate’s unanimous bipartisan confirmation of John and Abigail Adams’s son, who pleaded “insufficient legal acumen.” Actually, Adams had a distinct distaste for the judicio-legal process, which he viewed as “taxing and dull.” He had bigger fish to fry—acute political ambition. Madison decided to pout for seven months and then turned to the youthful Story, a Massachusetts legal whiz, Harvard graduate in 1798 at 19 years of age, a nominal Democrat-Republican, yet a close friend of John Marshall, who had given every indication of leaning toward federalism and economic proprietarianism.

Jefferson was not amused by his disciple’s choice, a man who, among other (to the ex-President) unacceptable actions, had refused to support Jefferson’s Embargo Act of 1807. The sage of Monticello flew into a veritable rage, pronouncing Story a “pseudo-Republican,” a “political chameleon,” and an “independent political schemer,” and he warned Madison that Story was an “inveterate Tory, who would ‘out-Marshall’” Marshall in his nationalist-Federalist and propertarian jurisprudence. He did! The Senate, although less than enchanted with the nominee, was eager to terminate what had become an appointment charade and confirmed the eighth of Dr. Elisha Story’s seventeen children viva voce, without a roll call, three days after Madison sent his name over. At a mere 32 years of age, a month-and-a-half younger than Johnson, he was the youngest appointee ever to attain the Court, a record that undoubtedly stands securely. (William O. Douglas, at age 40, would be the third youngest.)

Story’s appointment proved to be one of the most fortuitous in the history of Court and Country. In terms both of intellectual leadership and of jurisprudential commitment, he was an outstanding Justice. Standing with Marshall for almost a quarter of a century, and
continuing for another decade after Marshall’s death in 1835 until his own in 1845, Story was arguably perhaps even more determined than the Chief to further the national posture in the face of mounting storm signals to the Union. Obviously, Story—who strongly disliked both Jefferson and Jackson—was neither a democrat nor a confirmed majoritarian, and thus he personified the intellectual antithesis of the Democrat-Republican creed, notwithstanding his formal political adherence label. Yet the role this towering common-law jurist played in the stabilization of the Republic and in its growth and security was second only to Marshall’s. It would be futile as well as unproductive to endeavor to pinpoint the “most significant” among the 270 Court majority opinions he penned—he participated in 1,340 cases and wrote thirteen dissents and one concurrence. Most observers agree, nonetheless, that among the most influential—if not the most—was his authorship of Martin v. Hunter’s Lessee, which he delivered for the Court in 181613 and which delighted John Marshall. Challenged in the case was a key section of the Judiciary Act of 1789 that enabled the U.S. Supreme Court to review state judicial rulings interpreting federal laws and the federal Constitution. Not only did Story uphold the contested section of the Act in his learned, lengthy, and eloquent opinion, but he ruled that it represented a constitutionally mandated obligation. No wonder that the Chief Justice was pleased with this seminal expansion of federal judicial power.

Story left lasting monuments to constitutionalism, nationalism, and legal scholarship with his famed lectures at the Harvard School of Law, where he served as the Dane Professor while a member of the Court, his cosponsorship (with Chancellor James Kent of New York) of the American equity system, his work on copyrights and patents, and his elucidation of property, trust, partnership, insurance, commercial, and maritime law. Unlike his dalliances with poetry, his seminal Commentaries on the Constitution of the United States—published in three volumes in 1833, repeatedly republished since, and still available in an abridged one-volume form—remains an indispensable work in the study of constitutional law and history. Story’s treatises went through seventy-one editions, and he continues to hold the record as the most frequently published Supreme Court Justice to date. He was indubitably one of the Court’s giants.

If not all, or even none, of the other fourteen Associate Justices who served with Marshall merit that accolade—and, with the possible exception of William Johnson, they do not—they nonetheless deserve well of the Republic. All had served faithfully in state and/or federal legislative capacities; all had some prior judicial experience on lower federal and/or state courts; the first eight had participated actively in the Revolution; the first nine were delegates to their state and/or the national constitutional conventions; all either were or became supporters of the Constitution of 1787; all gave their weary bodies to circuit-riding; all had practiced law following college and legal training; all loved their home states and their fledgling nation; and, after all, they were members of the Supreme Court of the United States under Marshall’s defining universe and constellation of the judicial authority of the United States.

Whatever one’s view of the achievements of the early Justices may be, they testify to the crucial role the now 108 Justices have performed so remarkably well in the Court’s more than 211 years of life. They provide proof positive of promises fulfilled and achievements rendered. Indeed, notwithstanding the often tiresome and not infrequently self-serving (albeit exasperating) sniping that has sporadically characterized the Court’s existence—sniping that has regrettably, although hardly surprisingly, emanated most loudly from prestigious centers of learning located near bodies of water on both our East and the West coasts—it has, I submit with conviction and affection, generally been, in James Madison’s hopeful plea, “a bench happily filled.”
wish, expressed in 1787, has stood the test of time admirably.

ENDNOTES


2 U. S. (2 Dall.) 419, 3 U.S. (3 Dall.) 199, and 3 U.S. (3 Dall.) 386, respectively.


4 3 U.S. (3 Dall.) 171 (1796).

5 5 U.S. (1 Cranch) 137 (1803).


9 Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

10 Huidekoper’s Lessee v. Douglass, 7 U.S. (3 Cranch) 1 (1805). Actually, it was Thomas Johnson (1791–1793) who dissented in the first case in which opinions were delivered formally: Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792).


13 14 U.S. (1 Wheat.) 304 (1816).