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Bringing “Justice to Every Man’s Door”: John Jay’s Struggle to Build the Supreme Court

By
Sean Gray
HIS 490 Honors Thesis in History

Department of History and Classics
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Spring 2021

To my mom and my dad, who instilled in me a deep interest in and commitment to pursuing justice.

"All that the best men can do is to persevere in doing their duty to their country and leave the consequences to Him who made it their duty; being neither elated by success however great nor discouraged by disappointments however frequent or mortifying." - John Jay, 1785.

"Few books (if properly read) afford more useful lessons than the lives of great men…to enjoy the experience of others without paying the price which it often cost them is pleasant as well as profitable—mankind is the same in all ages, however diversified by color, manners, or customs."

- John Jay, 1791.

Bringing "Justice to Every Man's Door": John Jay's Struggle to Build the Supreme Court

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INTRODUCTION: “A SYSTEM SO DEFECTIVE”

As the presidential election of 1800 unfolded in favor of the Democratic-Republicans, John Adams began to pack the judiciary with Federalist nominees. In December, after Oliver Ellsworth resigned as Chief Justice of the Supreme Court due to health concerns, Adams needed to find someone to fill that office immediately. He first wrote to John Jay, the inaugural Chief Justice of the Supreme Court. “In the future administration of our country the firmest security we can have against the effects of visionary Schemes or fluctuating theories, will be in a solid Judiciary,” Adams explained, “and nothing will cheer the hopes of the best Men so much as your Acceptance of this appointment.” Realizing that the reign of the Federalists might be over, Adams thought that the “visionary schemes” of Thomas Jefferson and his Democratic-Republicans endangered the young country. A Federalist judiciary with Jay at its head provided the United States “the firmest security” against the instability of a new administration. Adams concluded, “It appeared to me that Providence had thrown in my Way an Opportunity not only of marking to the Public, the Spot, where, in my Opinion the greatest Mass of Worth remained collected in one Individual but of furnishing my Country with the best Security, its Inhabitants afforded, against the increasing

dissolution of Morals." Adams affirmed his faith in Jay as a leader—a man who Adams could trust in preserving the laws of the Republic. As flattering as the letter was, it also emanated a certain Federalist desperation.[1]

Jay responded about two weeks later, on January 2, 1801. He started by reflecting on his experience as Chief Justice, beginning twelve years prior. With nothing but Article III of the Constitution and the Judiciary Act of 1789 to guide him, Jay held the great responsibility of establishing and leading the national court system. This task proved much easier said than done. "Such was the Temper of the Times, that the Act to establish the judicial courts of the U.S., was in some Respects more accommodated to certain Prejudices and Sensibilities, than to the great and obvious Principles of sound Policy," Jay wrote. "The Efforts repeatedly made to place the judicial Departmt. [*sic*] on a proper Footing, have proved fruitless." Initially eager to establish the judiciary as equal in power and privilege to the legislature and the executive, Jay quickly became disillusioned with the court system. After only five years, he "left the Bench perfectly convinced that under a System so defective, it would not obtain the Energy weight and Dignity which are essential to its affording due support to the national Governmt.; nor acquire the public Confidence and Respect, which, as the last Resort of the Justice of the Nation, it should possess." All that said, he had no desire to lead "a system so defective" again. Ostensibly citing his poor health, he respectfully declined Adams' offer.[2]

Adams went on to nominate John Marshall as the next Chief Justice of the Supreme Court. A staunch Federalist, Marshall undoubtedly delivered on Adams' wishes. For nearly forty years,

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[1] From John Adams to John Jay, December 19, 1800. https://founders.archives.gov/documents/Adams/99-02-02-4718

[2] From John Jay to John Adams, January 2, 1801. https://founders.archives.gov/documents/Adams/99-02-02-4745

he revolutionized the Supreme Court's power, most notably establishing the principle of judicial review in the case of *Marbury v. Madison*. It often seems that Marshall's great achievements dwarfed anything Jay accomplished in his tenure. Yet Adams' initial request suggested that Jay was more than worthy of holding the position of Chief Justice again. Jay's response illustrated his frustration with the judiciary and his struggle to establish it as an effective, equal branch of government. The different perspectives expressed in these two letters raise important questions about the early years of the Supreme Court, and, more specifically, Jay's involvement in it.

Given John Marshall's achievements, many historians of the early Republic and legal scholars alike quickly dismiss the Jay Court as insignificant in the Supreme Court's institutional development. Histories of the Supreme Court often gloss over these early years, and one scholar has even gone so far as calling the court's first decade a "play's opening moments with minor characters exchanging trivialities."[3] Even dedicated Jay biographers like Richard Morris use Marshall as the standard of judicial greatness: if Jay had returned to the high court in 1801, Morris argues, then seminal decisions like *Marbury v. Madison* "would very probably have been written by Jay, whose views Marshall so completely shared."[4] Time and time again, historians and legal scholars have portrayed Jay as only a precursor to Marshall.

Comparisons between the two jurists rest on three assumptions that often go unquestioned. First, scholars assume that as Federalists, Jay and Marshall had the same understanding of legal jurisprudence. As explained above, historians like Richard Morris believe that as members of the same party, Jay and Marshall would have naturally come to the same conclusions about landmark

[3] Robert McCloskey, quoted in Sandra Van Burkleo, "'Honor, Justice, and Interest': John Jay's Republican Politics and Statesmanship on the Federal Bench," in *Seriatim: The Supreme Court before John Marshall* (New York: New York University Press, 1998), 28.

[4] Robert Morris, in Sandra Frances Van Burkleo's "Honor Justice Interest" in *Seriatim*, 28.

cases. Second, scholars assume that the political situations of Jay and Marshall were similar enough to claim that Jay could have, if he tried hard enough, elevated the Supreme Court to the stature that Marshall did. Finally, and most fundamentally, scholars assume that Jay and Marshall had the same vision for the court. If that is true, then we must see Jay's tenure as Chief Justice as a failure to execute that vision in comparison to Marshall's tenure.

This thesis disputes all three of those assumptions. Using the 1801 exchange between Jay and Adams as our point of departure, this project is an attempt to understand the Jay Court on its own terms, without the shadow of Marshall looming over it. It will build on the work of a small but convincing group of historians and legal scholars who have attempted to articulate Jay's unique vision for the court and the challenges he faced in executing it. This project, in turn, contributes to the fields of early American history and legal history in three ways. First, unlike other legal histories, this thesis transcends legal procedure to reconstruct a vivid picture of life as a Justice on the Supreme Court in the 1790s. Mixing the institutional, the political, and the personal, the project considers how the duties of the court frustrated Jay and even drove him to the disillusionment he expressed to Adams in 1801. The Judiciary Act of 1789 established that Supreme Court Justices had to do much more than simply hold sessions of the Supreme Court twice a year in the nation's capital. They also had to trek across the United States on three established "circuits" to hear cases at an appellate level. Traveling hundreds of miles on these circuits twice a year, the Justices experienced the loneliness that came with life on the road, the dissatisfaction that came with lodging in public houses for weeks at a time, the health issues that long stretches of hard travel brought on the body, and the myriad of experiences that came with meeting citizens from all walks of life.

Second, the project examines the Founders' diverse views on federalism in the years immediately following the Constitution's ratification. Modern conservative jurists and scholars often argue that the Founders had an "original intent" in creating the Constitution or that there was an original commonly understood interpretation of the Constitution's words in the public sphere. The legal, cultural, and political battles of the 1790s demonstrate otherwise. The case of *Chisholm v. Georgia* best illustrates this tension between different strains of federalism, as the battle between federalism as nationalism and federalism as state sovereignty becomes apparent in the opinions of Jay and Associate Justice James Iredell.

Finally, the thesis seeks to help Jay claim his place among our most well-known and well-respected Founders. Today, Washington, Franklin, Hamilton, Madison, and Jefferson sit at the forefront of American historical imagination surrounding this period. Popular historians and American culture at large have neglected Jay for many reasons, but three stand out above the rest. The first is that he lacked the revolutionary character, fervor, and vision that other Founders brought to the narrative of the new nation's earliest years. As Walter Stahr notes, "John Jay was the most conservative of the leading founders. He was a reluctant revolutionary, and many of his friends and relatives became loyalists."[5] A member of New York's aristocratic class and a student at Queen's College, Jay undoubtedly found the Revolution troubling at first. Indeed, he did not get involved in anti-imperial activities until 1774, and even in revolutionary activities, he always presented himself as a moderate.

The second reason is that his personal life lacked the drama that invigorated other Founders' lives. While Washington led the new nation to victory in war, Jay pushed papers around in Albany. While Hamilton famously pulled himself up from the bottom of society to establish the

[5] Walter Stahr, *John Jay: Founding Father* (New York: Diversion Books, 2005), xi.

nation's financial system, had an illicit affair during the height of his power, and died in a duel with the sitting vice president, Jay's generational wealth ensured that he never suffered from want, his faith led him to be a devout and diligent husband, and he quietly retired from politics without any bad blood.[6] While Jefferson penned the Declaration of Independence and Madison played a major role in writing the Constitution, Jay focused on supporting those movements in his home state of New York. He became too ill to play a major part in the *Federalist* project, and the circuit court often took him away from the conflicts within Washington's cabinet. In modern American popular culture, as the Founders undergo a resurgence in popularity through new biographies, documentaries, and even musicals, Jay has never taken a central role in the narrative of the nation's founding.

These popular narratives are deceptive, as Jay undoubtedly played a pivotal role in the American Revolution and the early American Republic. His contributions to the Revolution, first as a member of the Continental Congress and then as a diplomat in Spain and France, were essential in securing independence for the new nation. Likewise, as a dedicated Federalist, he vigorously fought for the ratification of the new Constitution in newspapers and on the floor of the New York ratifying convention. Finally, as Chief Justice, Jay not only led the Supreme Court in its most infant moments, but he also helped develop the system of appellate courts central to our judiciary today. All the while, in his later years as Chief Justice, he negotiated a treaty with Britain that, while unpopular, prevented war for another decade.

The third and perhaps most practical reason that historians have neglected Jay is because so many of his personal papers have been lost. Historically conscious and intensely private, Jay and his sons destroyed many of his personal papers before his death in 1829. Though Columbia

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[6] Indeed, *John Jay: The Musical* certainly would not be produced on Broadway or receive several Tony awards. This author is not even sure that he would watch it if it were produced.

University and the Founders Online Archive are working to make all of his extant papers available, any historian of Jay must recognize that the surviving documents, to a certain degree, were curated by the man himself. More than most Founders, Jay challenges historians to read between the lines, make inferences about his emotions, and work vigorously to discern his private perspectives.

Despite these challenges, some historians have delved into John Jay and his judicial legacy and produced rich scholarship about his time on the Court. Sandra Van Burkleo situates Jay in his unique political and cultural context to argue that he deserves to be known as more than simply Marshall's predecessor. She explains that Jay wove together several different legal, political, and economic philosophies to create his own understanding of jurisprudence. "Jay merged High federalism and political conservatism with free-trading economic liberalism," she contends. "For this rigidly principled man, and for many of his friends, conservative republicanism and Smithian political economy coexisted quite peaceably, bound together by an encompassing framework of moralizing, stabilizing public law."[7] First examining his "road to reluctant patriotism," she contends that as a revolutionary, Jay "urged internal centralization, reliance upon a few enlightened statements, and strict attention to federal law—the embodiment of reason and divine morality—in order to secure" the nation's prosperity.[8] She highlights the Calvinistic fatalism imbedded within his thought, and she moreover emphasizes his deep concerns with democratic rule, as well as his fear of mobocracy. Interested in trade and economics, Jay always sought to be a diplomat; he avoided burning bridges in his personal and professional life.

The most interesting part of Van Burkleo's argument comes as she examines Jay's conception of the court. She writes that Jay was excited about being nominated in 1789, as he saw

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[7] Van Burkleo, 29.

[8] Van Burkleo, 33.

the Court as an excellent institution for "the cultivation of domestic unity, equitable trade relations, and a working alliance between executives and judges."[9] Moreover, he thought that the national judiciary had a special responsibility in instilling civic virtue into the people. The laws of the republic served as "rules for regulating the conduct of individuals" not only in a legal sense, but also a moral one. By 1794, however, Jay realized that his vision of the court as an "arbiter of the 'common good'" and a "diplomatic and moral umpire" would not come to fruition. The harsh response to *Chisholm v. Georgia* drove him away from the judiciary and back into the realm of diplomacy. Van Burkleo concludes that the Jay Court's story, above all else, "increases the distance between 1789 and 1801, clarifying and complicating our understanding of how the third branch came to occupy modern ground."[10] While Jay and Marshall had led only twelve years apart, their worlds were vastly different—Jay had no court to inherit, as he built it out himself. Marshall, conversely, had more than a decade of national precedent to draw from. For Van Burkleo, Jay's legacy laid not in his ability to advance the vision that Marshall saw, but in his leadership in establishing the Court as an institution and trying to use it to serve the ends he saw fit.

William Casto explores how the Jay Court, more than later courts, found itself enmeshed in almost every aspect of federal governance: the handling of debt, issues of state sovereignty, and even foreign policy and the enforcement of peace treaties. Like Van Burkleo, Casto sings Jay's praises as Chief Justice, but he does so for different reasons. While Van Burkleo championed Jay for his unique vision, Casto presented him as a practical leader who gave the court political capital. In filling the court, George Washington "sought men whose public reputation would enhance the government's political legitimacy," and the selection of Jay "exemplified this concern." Jay's

[9] Van Burkleo, 52.

[10] Van Burkleo, 56.

extensive career of national service gave the Court the legitimacy it needed, and once heading it, he proved to be a strong leader. "Although Jay's service on the Court was brief and his only major opinion was in the Chisholm case," Casto contends, "his appointment was a success because his presence assured the nation that the Court would be led by a man of sound judgement."[11] Moreover, Jay contributed significantly to the statecraft that Washington and his administration engaged in throughout the 1790s. Jay and the Associate Justices "sought to assist in the establishment of an energetic national government that could effectively defend itself from attacks by foreign and domestic foes, and they were successful in those efforts."[12] For Casto, Jay served as a symbol of national power, and his court was essential in transforming the Constitution from a piece of parchment to a set of vigorous, effective institutions.

Not all scholars of Jay are so straightforward in their praise of his tenure on the court. Matthew Van Hook takes a more nuanced approach to the Jay Court when he argues that Jay "achieved a type of founding success, but missed an opportunity to achieve the sort of lasting judicial greatness that his Federalist heir John Marshall realized."[13] Closely examining three of Jay's most pivotal cases—*Heyburn's Case*, *Chisholm v. Georgia*, and *Glass v. Sloop Betsy*—Van Hook claims that Jay might have been able to take "first steps in entrenching his Federalist political goals into the judiciary, not by ruling differently, but by ruling more explicitly."[14] Van Hook carefully considers several other important facets of the Jay Court, like Jay's unique role as a presidential advisor in foreign policy and the conflicts that arose from the circuit court. His

[11] William Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995), 248.

[12] Casto, *The Supreme Court in the Early Republic*, 253.

[13] Matthew Van Hook, "Founding the Third Branch: Judicial Greatness and John Jay's Reluctance," *Journal of Supreme Court History*, 40, no. 1 (March 2015), 1.

[14] Van Hook, 2.

historical research is sound, but he relies on counterfactuals to bolster his argument too often. In the introduction, for example, Van Hook asks readers to consider an alternate history: "if Jay had remained Chief Justice until his death in 1829, his forty-year tenure would have included the opportunity to rule on nearly all of the "great" cases that came before John Marshall and placed him as the longest serving Supreme Court Justice to this day."[15] Likewise, in the conclusion, he claims, "Had Jay remained and established a more vocal Supreme Court, less supportive of the other branches and more detached from the national government, he may have been the first name in American law."[16] While interesting, these sorts of remarks detract from his well-grounded historical analysis. Van Hook likewise falls into the trap of claiming that Jay and Marshall would have ruled the same way on landmark cases. This assumption is dangerous insofar as it ignores that Marshall and Jay had vastly different temperaments, philosophies, and leadership styles. In spite of these shortcomings, Van Hook offers readers a detailed and nuance analysis of Jay's judicial decision making.

While Van Burkleo, Casto, and Van Hook focus particularly on Jay's time as Chief Justice, Walter Stahr offers the first full biography of Jay written in the twenty-first century, and perhaps more importantly, in more than seventy years. Unlike most academic works, Stahr sets out to write a biography of Jay simply for the purpose of telling "the story of Jay's life to a new generation of Americans."[17] Stahr indeed accomplishes that goal, as he tours through every part of Jay's life in detail, dividing his chapter primarily by the many different posts he held through his illustrious career in public service. Stahr presents Jay as a virtuous man, steadfast in his convictions yet

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[15] Van Hook, "Founding the Third Branch," 2.

[16] Van Hook, "Founding the Third Branch," 17.

[17] Stahr, *John Jay*, 6.

always willing to make compromises with his political opponents in order to advance the common good. His narrative is primarily a triumphal one, but it is nonetheless filled with the trials and tribulations that Jay faced throughout his life. Regarding his time on the Supreme Court, Stahr writes:

> Above all, Jay suffers by comparison with his great successor, John Marshall. To the extent that one can forget about Marshall and focus on Jay, however, he accomplished much in his four years on the court…Both in his work in the Supreme Court and especially in his work as a circuit justice, he helped to make the federal courts a reality, to bring federal justice "to every man's door."[18]

Of the works examined above, Stahr undoubtedly has the best narrative and pace. His work is a refreshing reminder that Jay's service on the Supreme Court was only a small part of his storied career of service. In writing for a popular audience, Stahr falls short only insofar as he sacrifices depth for pace, as he merely scratches the surface on a number of important essays, opinions, and treaties that Jay wrote. For the scholar or the student of history interested in learning about Jay, however, Stahr's work would serve as an accessible foundation.

Drawing from the strengths of each of these authors—the intellectual aspects of Burkleo's analysis, the practical politicking ingrained in Casto's argument, the nuance of Van Hook's piece, and the narrative style that Stahr produced—as well as Jay's public and private papers, this thesis is an attempt to blend the personal, the political, the legal, and the institutional aspects of the Jay Court into a singular cohesive narrative. Chapter One offers a detailed intellectual history of Jay. Beginning in New York City, it follows Jay through the first forty-five years of his life—from his time as a plucky young law clerk in New York City to his frustrating and tragic time as an ambassador in Madrid, all the way through his first public address as the first Chief Justice of the Supreme Court. Primarily concerned with his writings on law and government, the chapter centers

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[18] Stahr, *John Jay*, 295.

around analyses of his *Federalist* essays, his famous *Address to the People of New York*, and his role in crafting treaties. It relies primarily on the work of Walter Stahr in establishing context for these pieces. It concludes with a close reading of his earliest address to grand juries on the circuit, where he conveyed great optimism about the Federalist project and meditated the value of republican government and the common good. Ultimately, this chapter reveals how Jay's extensive career in public service shaped his understanding of federalism as nationalism. Though a jurist at heart, Jay cared deeply about all three branches of government, and he wanted to build out the entire federal government to be powerful so it could defend American interests and promote national prosperity.

Chapters Two and Three explore why Jay found the judicial system so "defective" that he refused to return in 1801. Chapter Two examines the benefits and burdens of riding the circuit. Beginning with a plea from Jay to Washington and Congress, the chapter explains how the circuit courts presented the Justices both logistical and constitutional conundrums. Jay's circuit court diaries, a useful, unique, yet puzzling source base, are used to reconstruct his life riding the circuit. Likewise, Jay's decisions, primarily about debt cases in the Eastern circuit, are examined to illustrate the role of the circuit court in the judiciary, and newspapers are considered to demonstrate the circuit court's relative popularity throughout the young nation. It soon became clear to Jay that "bringing justice to every man's door" came at a serious cost to the court: infighting, division, and even physical and emotional pain. The chapter concludes by examining exchanges between Jay and his colleagues about riding the circuit. For years, they bickered amongst themselves and battled against Congress for relief and reform in the duty, but they had little to show for it. When Jay exited the Court, riding the circuit was just as demanding as when he had begun.

Chapter Three begins twelve years before Jay was appointed Chief Justice. In 1777, a South Carolina merchant tried to recoup payment from the state of Georgia regarding war supplies he sold it. Long after the merchant's death, Georgia remained steadfast in its refusal to pay his executors, and the claim ended up on Jay's docket in 1793. Georgia refused to appear before the Supreme Court, leaving Attorney General Edmund Randolph to argue on behalf of the plaintiff unopposed. The court ruled against Georgia 4-1, with James Iredell dissenting. The opinions of Jay and Iredell sit at the center of the chapter, as they offer the reader two different understandings of federalism. Iredell's dissent offers a foil to Jay's federalism as nationalism examined throughout the first two chapters, since Iredell establishes federalism first and foremost as a system designed to protect states' rights. Jay's opinion defended his national vision, and he argued that only a vigorous national government can provide individuals justice and equality under the law. Though Jay ruled in the majority among the Justices, the majority of Americans—both Federalist and Anti-Federalist alike—rejected Jay's vision. Congress quickly passed the Eleventh Amendment, a total rebuke of Jay's opinion that affirms the states' power over the federal government, and they submitted it to the states for ratification less than a year after Jay's opinion became public. Disturbed by this response, Jay shifted his attention away from the judiciary to focus on foreign affairs, as tensions between England, France, and the United States flared. While Chief Justice, Jay went to England to negotiate a treaty, and upon his return, he resigned from the court to serve as the Governor of New York. Above all else, the chapter demonstrates that *Chisholm v. Georgia*, serves as a turning point in Jay's determination to execute a national vision. Whereas before, he saw himself as a central actor in that plan, he afterwards became a much more passive jurist and a much more serious diplomat.

This project is not an exhaustive biography of Jay, nor is it an all-encompassing study of his career on the Court. It only briefly considers his two candidacies for the governor of New York and his participation in the Jay Treaty, all of which occurred while he was Chief Justice. Nor does it break ground in evaluating Jay's deep faith, his confounding stance on slavery, or his loving relationship with his wife. Instead, this thesis is only a humble attempt to tell the story of the birth of America's most enigmatic national institution and the man who tried to bring it from Article III of the Constitution to "every man's door."

CHAPTER ONE:
AN ARCHITECT OF AMERICAN UNION:
JOHN JAY'S RISE TO NATIONAL PROMINENCE

"While reason retains her rule, while men are as ready to receive as to give advice, and as willing to be convinced themselves, as to convince others," John Jay wrote, "there are few political evils from which a free and enlightened people cannot deliver themselves." These words began Jay's *An Address to the People of the State of New York* published on April 15, 1788, in the midst of New York's fierce battle over the ratification of the Constitution. Almost a year earlier, delegates from across the young United States gathered in Philadelphia to amend the Articles of Confederation. As they struggled to make changes, however, their course quickly changed; they soon abandoned the Articles entirely in favor of a new Constitution. Though Jay did not attend the convention in Philadelphia, he was pleased with its final product—so much so that he swiftly became one of its most fervent proponents. Jay's *Address* defended the new Constitution with vigor and verve.[1]

Jay began by explaining the "political evils" of his day, namely the structural flaws inherent in the Articles and the problems that consequently emerged. Under the Articles, Jay argued,

[1] John Jay, *An Address to the People of the State of New York on the Subject of the Constitution*, Samuel and John Loudon: April 15, 1788. 3.

Congress paradoxically held all the power and none of it. Congress could "make war, but are not empowered to raise men or money to carry it on. They may make peace, but without power to see the terms of it observed," he wrote, "They may borrow money, but without having the means of repayment." Jay explained that Congress, in sum, "may consult, and deliberate, and recommend, and make requisitions, and [the states] who please, may regard them." But, of course, the states were not obliged to accept any of those suggestions. The federal government lacked any authority to act on its own behalf, and the United States was worse for it.[2]

The new Constitution had the potential to strengthen the federal government and thus the country. Presenting the document as a collaboration across all thirteen states, Jay praised the members of the Convention. He found it impressive "that they were able so to reconcile the different views and interests of the different States, and the clashing opinions of their members as to unite with such singular and almost perfect unanimity in any plan whatever, on a subject so intricate and perplexed." Concerned citizens from across the new nation had come together to create a new system that could bind the states closer together and form a strong union, rather than a weak confederation.[3]

Throughout his career, Jay often reflected on the value of American union. Only by directing the competing interests of the young nation towards a national common good, he believed, could the United States grow strong and prosperous. This belief did not develop overnight; instead, it was the result of years of public service. As President of the Continental Congress in the late 1770s, Jay witnessed how the Articles' structure inhibited the war effort. Likewise, as a diplomat to Spain and France in the early 1780s, he experienced serious frustrations

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[2] Jay, *Address to the People of New York*, 3.

[3] Jay, *Address*, 3.

as thirteen states tried to conduct foreign policy independently and simultaneously. Eager to replace the Articles with a document that created an effective national government, Jay became an ardent Federalist in the late 1780s. He penned essays and pamphlets that defended the proposed Constitution, and he played an important role in New York's ratifying convention.

By the time that George Washington appointed him Chief Justice of the Supreme Court in 1789, Jay was less concerned with the narrow goal of crafting a powerful judiciary and more concerned with American statecraft writ large: the process of building a strong, cohesive national government in the years immediately following ratification. Rather than one of three competing branches, he saw the courts as a tool that could help keep harmony in the early nation and even "bring justice to every man's door."[4] But to understand Jay's tenure as the Chief Justice of the Supreme Court, we must consider how he ended up leading the high court in the first place. To that end, this chapter will explore Jay's early life and career with particular attention to the development of his political and legal philosophy. Ultimately, Jay articulated and worked to implement a vision of American union as robust as anyone from the period. That vision of union was an outgrowth of his years of varied public service, and it, in turn, had a significant influence on his jurisprudence and his conception of the courts.

"A Youth Remarkably Sedate"

Born to Peter Jay and Mary Van Cortlandt Jay in 1745, John Jay grew up comfortably in New York City. The studious son of a wealthy mercantile family, he entered King's College at fourteen. There, he studied the Classics, philosophy, theology, literature, and natural science. While New York's hustle-and-bustle, taverns, and even brothels tempted many college-aged boys,

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[4] John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

Jay prudently stuck to his studies. His father described him as "a youth remarkably sedate," and in a letter to a friend, Jay described himself as "bashful" and "pertinacious." Often attending services at Trinity Church, Jay demonstrated a strong attachment to his faith that would serve as the foundation for his worldview for years to come.[5]

Towards the end of his time at King's College, Jay took an interest in law. Entering the legal profession was not easy, however, because as Walter Stahr explains, "There were, at this time, no law schools; the only way to become a lawyer was to serve as a clerk to a senior lawyer." Lawyers in the eighteenth century rarely received a formal legal education, so they had to learn by clerking, or helping a senior lawyer with administrative duties. To start his career, Jay began clerking for Benjamin Kissam, a prominent New York City lawyer, in June of 1764. He spent four years working with Kissam, and those years were invaluable for the budding attorney. Often left to his own devices to do research in Kissam's expansive law library, Jay soon became regarded as "remarkable for strong reasoning powers, comprehensive views, indefatigable application, and uncommon firmness of mind."[6] He and Kissam developed a close professional relationship, and Jay flourished under Kissam's tutelage.

After clerking for four years, Jay opened his own practice in November of 1768. Partnering with his close friend and King's College classmate Robert Livingston, Jay sought to establish himself as a serious lawyer in an incredibly competitive profession. One prominent case he undertook involved a border dispute between the colonies of New York and New Jersey. Serving as the clerk to the commission charged with this case, Jay had a hefty responsibility: "to take notes

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[5] Stahr, *John Jay,* 12. In "Honor, Justice, and Interest," Sandra Frances Van Burkleo writes on Jay's faith further: "A devoted Anglican, [Jay] nevertheless remained conscious for a lifetime of his family's Huguenot origins; indeed, his notorious admiration of Great Britain reflected considerable gratitude that his forebears had been provided 'an Asylum.' Old Testament and apocalyptic imagery punctuated his prose, alongside pointed analogies between public and private salvation or states of grace" (33).

[6] Richard Morris, *John Jay: The Making of a Revolutionary* (New York: Harper and Row, 1975), 67.

and prepare the official record [of the commission's proceedings], which ran to over seven hundred pages of questions, answers, and arguments." Yet that project was an anomaly in Jay's legal career. "The majority of his cases were simple actions to recover commercial debts. And there were many, many such cases: in 1773 he had more than a hundred cases pending in the [New York] Supreme Court and another hundred pending in the Westchester court," Stahr writes. [7]

Rising in wealth and reputation, Jay soon became one of New York's most successful lawyers. He soon married Sarah Livingston, a daughter of the wealthy Livingston family. By the early 1770s, Jay seemed to have built a comfortable, complete life for himself. Surprisingly absent from Jay's correspondence in the early years of his career is any discussion of imperial politics. Aside from brief mentions of more local New York political issues, Jay seemed to neglect the rapidly deteriorating relationship between Great Britain and her colonies.[8]

Reluctant Revolutionary, Proficient President

That changed in 1774. Distressed by the harsh British response to the Boston Tea Party, Jay threw himself into local and continental politics. After he joined a city committee to respond to the events in Boston, the people of New York City quickly nominated him, along with four other men, to represent the colony at the Continental Congress in Philadelphia. Far younger and less experienced than the other delegates, Jay was nevertheless eager to "do his part in resolving the differences between the 'mother country' and the 'daughter colonies,'" Stahr explains.[9]

Jay established himself as a forceful writer with his *Address to the People of Great Britain*, read to the Congress on October 29, 1774. His message to Great Britain's citizens was simple:

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[7] Stahr, *Jay*, 27-29.

[8] Stahr, *Jay*, 31-33.

[9] Stahr, *Jay*, 35.

though the actions of their Parliament had been destructive to the colonies, the people of America were eager to retain their relationship with the people of Britain. "This unhappy country has not only been oppressed, but abused and misrepresented," he wrote. But at the same time, he claimed that the colonies "hope that the magnanimity and justice of the British Nation will furnish a Parliament of such wisdom, independence and public spirit, as may save the violated rights of the whole empire." Ultimately, he wanted the colonies and England to "restore that harmony, friendship and fraternal affection" that was "so ardently wished for by every true and honest American."[10] In this address, Jay distinguished himself in the delegation for his conservative approach, appealing to the notions of reconciliation and repair. While others were advocating for an immediate break from Britain, Jay's message of moderation carried the day; he received applause and approval from his peers, and Congress left on the agreement that they would only boycott British goods, not separate from the empire entirely.[11]

Returning to New York satisfied with the results of the Congress, Jay stepped out of politics for several months. He entered again during the Second Continental Congress in the summer of 1775, where Morris writes that he "assumed a prominent role as a leader of the moderate faction."[12] As the boycott had improved relations with Britain, the Continental Congress needed to reassess its strategies. Jay held a particularly important position on the Congress: a seat on the committee to draft another petition to the king, serving alongside John Dickinson and Ben Franklin among others. Jay's papers reveal that he wrote an early draft of what became the Olive Branch Petition—

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[10] John Jay, "Address to the People of Great Britain, 21 October 1774," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-01-02-0071. [Original source: The Selected Papers of John Jay, vol. 1, 1760–1779, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2010, pp. 100–107.]

[11] Stahr, *John Jay*, 42.

[12] Morris, *The Making of a Revolutionary*, 147.

a last-ditch effort to restore the colonies' relationship with the Crown. The well-known moderate from Pennsylvania John Dickinson wrote the final draft of the petition, and, as Stahr notes, comparing it with Jay's draft "suggests that Jay was more conciliatory than even the members of Congress known as the leader of the conciliators."[13] Neither the content of the petition nor its author could change what seemed to be the inevitability of war, however. Recognizing the situation, Jay began corresponding with the French to establish a new alliance; playing both sides, he was simultaneously "working to reconcile with Britain and to establish relations with Britain's mortal enemy, France." Demonstrating serious pragmatism, he knew that if relations with Britain continued to deteriorate, the colonies would need new European allies to defend themselves.[14]

Jay's intuition was right. Though the Congress would not receive word until much later, the Crown received the Olive Branch Petition and rejected it entirely in September of 1775. Britain demanded absolute submission from the colonies. The imperial crisis continued to worsen, and almost a year later, the colonies were in complete revolt. They declared their independence in July of 1776. At first, Jay was not especially eager to break with Britain, but, as Stahr explains, "when faced with the difficult choice between the British King and British freedom, [Jay] chose freedom." Stahr continues, Jay "chose *to fight* for freedom: for it was far from clear in the summer of 1776 that the American rebels, opposed not only by British troops but also German mercenaries and loyalist enemies, could defend their independence and their freedom."[15] A piece of parchment alone could not establish American independence. Instead, the newly created United States was now at war with Great Britain, the world's largest, most powerful empire.

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[13] Stahr, *John Jay*, 48.

[14] Stahr, *John Jay*, 53-54.

[15] Stahr, *John Jay*, 63.

Jay's contributions to the war effort were wide-ranging. First focusing on establishing defenses for the city and then the state of New York, Jay soon turned to working with spies and conspiratorial committees.[16] Still occasionally publishing essays, he wrote to the public to inspire hope after the war effort took a grim turn in 1776. His pamphlet from December of that year, *An Address of the Convention of the Representatives of the State of New York to Their Constituents*, passionately defended the war effort, no matter how grim it seemed in the moment.[17] "It is," he began, "not only necessary to the well-being of society, but the duty of every man, to oppose and repel all those, by whatever name or title distinguished, who prostitute the powers of government to destroy the happiness and freedom of the people over whom they may be appointed to rule." No matter how tempting it might be to give into King George's pressure, he argued, the colonies would never be free under his rule again. Jay's words invoked patriotism, duty, and honor: "When your country is invaded and cries aloud for your aid, fly not to some secure corner of a neighbouring State," he advised his fellow Americans, "but share in her fate and manfully support her cause." Speaking to the best of the American citizenry, he urged, "Let universal charity, public spirit and private virtue, be inculcated, encouraged and practised. Unite in preparing for a vigorous defence of your country, as if all depended on your own exertions."[18] Jay's pamphlet, emphasizing the

[16] Kyle Burgess briefly mentions Jay's involvement with spies in Chapter Two of his thesis. Burgess writes, "The ring members would also incorporate other forms of trickery in their writings, such as the usage of 'sympathetic ink' which future Supreme Court Justice John Jay supplied to Washington and Tallmadge and the addition of a code dictionary which replaced names and nouns for certain numbers." For more information, see Burgess and Alexander Rose's *Washington's Spies: The Story of America's First Spy Ring*, 104-120. Quoted with permission from the author.

[17] Jay's creativity and ingenuity in law, writing, and government did not shine through when he sat down to title his essays.

[18] "Final Version of an Address of the Convention of the Representatives of the State of New York to Their Constituents, 23 December 1776," *Founders Online,* National Archives, https://founders.archives.gov/documents/Jay/01-01-02-0198. [Original source: *The Selected Papers of John Jay*, vol. 1, *1760–1779*, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2010, pp. 337–347.]

stakes of the moment, came at a critical juncture in the war: just days before Washington crossed the Delaware and won the Battle of Trenton.

In the summer of 1777, Jay also began serving as the Chief Justice of the Supreme Court of New York. His first tenure in a judicial post, albeit brief, was important insofar as he helped direct the state government as it struggled to fight the British. He sat on a committee for Public Safety, met with Governor George Clinton often, reviewed legislation, and held both civil and criminal trials. A British invasion soon forced Jay and other officials to flee from Kingston, where the court was located, towards Connecticut. Jay was right to leave—the Battle of Saratoga took place right nearby Kingston almost as soon as he departed. While today, Saratoga is considered a turning point in the war in favor of the revolutionaries, Stahr explains that Jay and his family viewed the battle much differently. Stahr writes:

> Jay probably agreed with his sister-in-law Susan, who wrote to denounce the generous surrender terms [Horatio] Gates offered to Burgoyne, allowing all the troops to leave America. 'The British troops will go home and garrison the forts abroad, and let those garrisons come to America, so it will be only an exchange of men.' Jay probably also agreed with his friend James Duane, who wrote to rejoice in 'Burgoyne's total defeat' but also to caution that Washington's troops were 'ill clad and the weather is uncommonly severe.'[19]

Despite the war going on around him, Jay presided over New York's Supreme Court for two terms. While the cases he dealt with were often local in scale—murder trials, for instance—he nonetheless developed an appreciation for the judiciary's broader institutional power during this time. Trying to keep the spirit of the Revolution alive in his words, he reminded one jury of the value of New York's new state constitution. "Let it be remembered, that whatever marks of wisdom, experience, and patriotism there may be in your constitution," he wrote, "from the people it must receive its spirit, and by them be quickened. Let virtue, honor, the love of liberty and of science be, and remain, the soul of this constitution, and it will become the source of great extensive happiness to

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[19] Stahr, John Jay, 84.

this and future generations." Aware of the significance of the bench, Jay was unafraid to be political in his tone and spirit during these early years as a judge. Yet, given how the war demanded so much from public servants, he would not be able to stay in this position for long.[20]

Jay soon moved from the judicial branch to the legislature, as he served as the President of the Continental Congress from the winter of 1778 to the fall of 1779. After Henry Laurens of South Carolina stepped down, Jay was elected. Gouvernour Morris noted that "the weight of his personal character contributed as much to his election as the respect of the state." Yet Jay's new job was hardly prestigious. Its powers were never clearly defined and it boasted a high turnover rate. Jay's primary responsibilities were twofold: to preside over meetings of the Congress and to be its primary correspondent with the states. Although the first role was somewhat limiting, Stahr notes that the president's role after debates had a judicial tinge: "prior to each important vote, the President would summarize the issue, somewhat like a judge summarizing for a jury." But Jay spent most of his presidency fulfilling his second duty, writing letters on behalf of Congress. In his ten-month term, he wrote over five-hundred letters himself, where he made recommendations to states, asked for payments on loans, requested movement for troops, and worked to guide the war effort.[21]

Separated from his family and residing in Philadelphia alone for four months, Jay corresponded often with Sarah. Eventually, he found a home for them to rent, and they shared it with her two siblings who assisted Jay in his duties. There, Sarah and John hosted diplomats from Spain and France, and Jay established his prowess as a negotiator and a cultural ambassador. All the while, states clashed about resources, land, and money—the events across the continent led

[20] Quoted in Stahr, *John Jay*, 82-85.

[21] Stahr, *John Jay*, 92-93.

some to dub 1778-1779 as the "year of frustration." Yet Jay held the Congress together with firm leadership. "Jay performed capably the basic tasks of the President: presiding over the sessions, handling the correspondence, and meeting the dignitaries," Stahr writes, but "perhaps his greatest contribution may have been in preventing a quarrelsome Congress from descending into fistfights. In light of the circumstances, he was a good President, indeed one of the better Presidents of the Congress."[22] Above all else, Jay's experience as president was edifying. It exposed him to the weaknesses of the Articles, especially the ineffectiveness of the executive leadership under the current system. Likewise, he developed important diplomatic skills that would serve him well for years to come.

Troubles in Spain, Successes in France

Jay's time as the president of the Continental Congress came to an end when he received an invitation for a new post. Impressed with his skill in entertaining diplomats, the Continental Congress named him Minister to Spain in September 1779. He quickly accepted the position, but the new job posed a serious question for the Jay family: what would Sarah and Peter, their infant child, do?

The couple decided that Peter would remain in the care of his maternal grandparents, the Livingstons. Sarah, however, would join John abroad. This decision surprised many. As Stahr explains, "Sarah was unusual, unique, in deciding to join her husband on his revolutionary diplomatic mission. Other similarly situated wives, including Elizabeth Dean and Abigail Adams, remained at home." Eleven years John's junior, Sarah was only twenty-three in 1779. A trip across the ocean was always dangerous, especially during wartime, and her family had their hesitations about her decision. Despite her youth, the daughter of the famous Livingstons had risen to the

[22] Stahr, *John Jay*, 119.

occasion in the past few months. Receiving diplomats at the Jays' home in Philadelphia had sparked her interest in helping John with his diplomatic work. Though little of Sarah's correspondence from this period survives, the extant letters reveal that duty to her husband and her country drove her decision to travel with him.[23]

John and Sarah departed for Spain in October of 1779 with simple instructions: seeking "recognition, alliance, and financial support" from the empire. But John believed these goals were much easier said than done, as he wrote to George Washington that they, "however just, will probably not be easily attained, and therefore [the mission's] success will be precarious, and probably partial."[24] As Stahr explains, "Even these modest expectations were to prove too high." This diplomatic mission would soon prove to be a disaster.[25]

After a tumultuous journey by sea, the Jays arrived in Spain early in 1780. In tow were Jay's secretary William Carmichael and Sarah's brother Brock Livingston. Upon his arrival, Jay also purchased a fifteen-year-old enslaved boy named Benoit to assist him with his duties.[26] Landing at the port of Cadiz, Jay quickly sent Carmichael ahead to Madrid, the capital, with a letter announcing his arrival and intent. Months later, after mishaps with letters and ministers, Jay received a response from the foreign minister, the Conde de Floridablanca. Floridablanca's letter was not encouraging, since Spain did not yet formally recognize the United States as a nation, and thus, as Stahr explains, "it would not officially receive Jay as a Minister, merely as a private citizen." Jay's arrival in Madrid did little to help. Floridablanca refused to even begin negotiations,

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[23] Stahr, *John Jay*, 117.

[24] Quoted in Stahr, *John Jay*, 123.

[25] Stahr, *John Jay*, 123-124.

[26] As Stahr explains, this decision is surprising, considering his repugnancy towards the slave plantations in Martinique and his later participation in the New York Manumission Society.

and after several months of trying, Jay was only able to secure a few thousand dollars for the war effort. Unable to build an alliance or even secure official recognition for the young United States, Jay had become increasingly frustrated with his task. Yet Stahr suggests that the mission's failure did not rest squarely on Jay's shoulders. "Perhaps the real error was with Congress," Stahr wrote, "which should have realized that he would not be able to secure recognition or assistance." Jay's friendly correspondence with Benjamin Franklin, an ambassador in Paris at the time, strengthens Stahr's claim here. Franklin, too, was appalled at Spain's treatment of the young United States, and he often offered his younger colleague words of advice and financial support.[27]

The Spanish mission took a personal toll on the Jay family as well. Both John and Sarah had, during different parts of their stay, become incredibly ill with a strain of the flu going throughout Spain. Likewise, Sarah had become pregnant soon before their departure in October of 1779, and she gave birth to a girl in July 1780. But only a few weeks later, tragedy struck; the newborn passed away. The Jays had to remain steadfast in their important work, but their correspondence reveals the deep sadness the death of their daughter brought them. At the same time, their relationships with their convoy became strained: Carmichael and John became increasingly distant, and Sarah became fed up with Brock's less-than-diplomatic activities, like going to taverns and brothels late at night. Sarah believed he did not represent the United States properly, and they often fought about his behavior. Between the political failures and the personal struggles that the Jays endured during their two years in Spain, this voyage had proved itself to be far more destructive than productive by 1781.[28]

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[27] Stahr, *John Jay*, 128-144.

[28] Stahr, *John Jay*, 144.

The news of victory at Yorktown came as much needed relief for both John and Sarah. Working in Paris on behalf of the American government, Benjamin Franklin quickly wrote to John urging him to come to Paris. "Here you are greatly wanted, for messengers begin to come and go," he wrote, "but I can neither make or agree to propositions of peace without the assistance of my colleagues." With Franklin's words in mind, the Jays left Spain in May of 1782 and never looked back.[29]

The Jay family arrived in Paris almost a month later. Meeting up with Franklin, who had established himself not only as a prominent diplomat but also a favorable socialite, John soon was introduced to "the Spanish Ambassador Aranda, the British representative Grenville, and the Marquis de Lafayette, who was acting as a self-appointed liaison between the Americans and the French." Yet before Jay's work really began, the flu struck him for almost two months. Franklin, refusing to act without his partner, held up much of the talks, because he did not want to "enter into particulars without Mr. Jay, who is now ill with the influenza." Upon Jay's return to the table, there was a new British representative: Richard Oswald. More than seventy years old, Oswald had little experience in government; he was a successful merchant whom the British government thought could represent their interests well. In the months that followed, Jay and Oswald worked closely together to draft a peace treaty that satisfied the young United States and Britain. [30]

Above all else, Jay wanted Britain's recognition of the United States as a sovereign and independent nation. That did not come easily from Oswald, who often waffled in the scope of his commission's charge. The two diplomats debated about lines of jurisdiction, trade routes, and most importantly, how the two nations, if Britain accepted the United States as a nation, would treat

[29] Quoted in Stahr, *John Jay*, 144.

[30] Stahr, *John Jay*, 149.

each other. In November 1782, they agreed on the *Preliminary Articles of Peace*, a document that demonstrates Jay's strength as a negotiator.[31] He wrote the original preamble himself, and it remained in the final document ratified by both diplomacy teams. The document begins:

> Whereas reciprocal Advantages, and mutual Convenience are found by Experience, to form the only permanent foundation of Peace and Friendship between States; It is agreed to form the Articles of the proposed Treaty, on such Principles of liberal Equity, and Reciprocity, as that partial Advantages, (those Seeds of Discord!) being excluded, such a beneficial and satisfactory Intercourse between the two Countries, may be establish'd, as to promise and secure to both perpetual.[32]

Emphasizing a new, "permanent foundation" of amiable relations between the two nations, Jay secured from Britain a commitment to recognize the United States as a sovereign nation. Stahr writes that Jay's role in the initial negotiations was essential. Jay "secured the trust and administration of the British negotiators, making them in many cases effective internal advocates for the American position." Likewise, he and his team "secured for the future United States an immense territory" and above all else laid the "permanent foundation of peace and friendship" between the two nations.[33]

Yet this document was only a *provisional* peace treaty—something more permanent was necessary to settle the conflict between the governments, not just the diplomats, and begin to rebuild relations practically. While Franklin had the unenviable task of selling a peace plan to the French, Jay took up the mantle for convincing Congress to get on board. Stahr writes, "Jay was concerned about reports of quarrels among the American states, and about the possibility that European nations might try to exploit any divisions" as disputes about boundaries and trade

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[31] *Preliminary Articles of Peace*, November 30, 1782. https://avalon.law.yale.edu/18th_century/prel1782.asp

[32] *Preliminary Articles of Peace*, November 30, 1782. https://avalon.law.yale.edu/18th_century/prel1782.asp

[33] Stahr, *John Jay*, 174.

continued to dominate negotiations. "To Washington," Stahr notes, Jay "wrote that 'the increasing power of America is a serious object of jealously to France and Spain as well as Britain. I verily believe they will secretly endeavor to foment divisions among us.'" And to his friend Gouvernor Morris, Jay explained, "I am perfectly convinced that no time is to be lost in raising and maintaining a national spirit in America. Power to govern the confederacy, as to all general purposes, should be granted and exercised." [34] These early letters reflect concerns that Jay would eventually expand upon in the *Federalist* papers: above all else, the independence of the states created more problems than it solved. A strong, unifying national government was the solution.

But Jay's concerns about the Articles, for now, were a digression from his priorities as a diplomat. After extensive, sometimes frustrating, correspondence between Jay and Secretary Livingston, Jay received initial confirmation of Congress' approval for the treaty in late 1783. Franklin, Jay, and John Adams signed the American-British treaty in Paris in September, and later that day, they travelled to Versailles to watch the British sign peace treaties with the other governments involved in this conflict. Reflecting on this day, Jay wrote, "We are now thank God in full possession of peace and independence. If we are not a happy people now it will be our own fault." Months later, in March 1784, the formal ratification from Congress came to Jay, Franklin, and John Adams, and they knew their job was complete. After nearly five years abroad, with two new children and the passing of another one, with their nation's independence and reputation secured, John Jay and Sarah embarked on the *Edward* to return to their beloved home city of New York in June 1784.[35]

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[34] Quoted in Stahr, *John Jay*, 186.

[35] Stahr, *John Jay*, 186-194.

"Let Congress legislate. Let others execute. Let others judge."

Returning home, Jay found more time to write to his friends and colleagues. His correspondence from this time reveals a deep dissatisfaction and even frustration with the Articles of Confederation. Expressing his feelings in a letter to Thomas Jefferson, Jay wrote that the structure of their government was "fundamentally wrong." Too much power had been invested in the Continental Congress; instead, he believed, the powers of government needed to be "so distributed [across the three branches] as to serve as checks on each other."[36] Or, as he put it so simply to George Washington, "Let Congress legislate. Let others execute. Let others judge."[37]

The news of a convention to amend the Articles in the summer of 1787 must have come as a relief to Jay. Though he did not attend the convention, he corresponded with many of its participants, and soon after the document was released to the public, he quickly jumped to its defense. The historical record suggests that the idea for the *Federalist* papers may have even originated at Jay's house. On October 22, 1787, Jay held a dinner party at his home in New York, and according to Sarah's records of dinner guests, Alexander Hamilton and James Madison were both in attendance. Though no further details about the party exist in the papers of Jay, Madison, or Hamilton, Stahr speculates that it could have been the inception point of the *Federalist* essays: "Hamilton and Jay and perhaps Madison discussed how to best respond to [anti-Federalist] opposition and agreed to work together on a series of essays."[38] Only five days later, Hamilton anonymously published the first *Federalist* piece in New York's *Independent Journal*.

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[36] John Jay to Thomas Jefferson, August 18, 1786.

[37] John Jay to George Washington, January 7, 1787.

[38] Stahr, *John Jay*, 248-249. See footnote #17 on pg. 435 for further information about this interesting story.

Jay then picked up his pen, writing the next four installments. On October 31, 1787, he published the second *Federalist* essay. There, he argued that the new nation's success was dependent on cooperation, not competition, between the states. "This country and this people seem to have been made for each other," he wrote, "and it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties." If the states remained a loose confederation that resembled a trade agreement more than a unifying government, they might begin to develop competitive, even hostile relationships with each other. To close, he wrote, "It is worthy of remark that not only the first, but every succeeding Congress, as well as the late convention, have invariably joined with the people in thinking that the prosperity of America depended on its Union."[39]

Three days later, on November 3, Jay expanded on the importance of union in *Federalist* III. In the case of the United States, that union is best established under "an efficient national government," as it "affords them the best security that can be devised against HOSTILITIES from abroad." In foreign affairs, he claimed, a single national government would be superior to "thirteen separate states" or "three or four distinct confederacies" for three reasons. First, the national government would draw from the talent of the whole country, not just a single state, and as a result, the best citizens would rise to the highest levels of government to serve the nation and its interests. Second, since one government, rather than thirteen, would deal with foreign nations, international policies "will always be expounded in one sense and executed in the same manner." Finally,

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[39] John Jay, *Federalist* II, New York *Independent Journal*, October 31, 1787, 2.

because thirteen states composed the national government, actions or problems in one or two states could not jeopardize the national government's relationship with foreign powers.[40]

Jay wrote that if the governing party in a single state attempts to act contrary to the interests of the union at large, the new constitution's system ensures that it will have "little or no influence on the national government, the temptation [to deviate] will be fruitless, and good faith and justice be preserved." Moreover, he claimed that the strength and power that came from the United States government as a single union dwarfed any that could come from thirteen smaller, weaker confederate states' governments acting independently. "It is well known that acknowledgments, explanations, and compensations are often accepted as satisfactory from a strong united nation," he wrote, "which would be rejected as unsatisfactory if offered by a State or confederacy of little consideration or power." Sensitive to foreign relationships due to his own time spent as an ambassador, Jay knew that executing foreign policy from one channel, rather than thirteen, paved the best path forward for national and global success.[41]

Jay emphasized the international benefits of union further in *Federalist* IV, published on November 7. First summarizing his arguments from the previous essay, he wrote that a national government "can move on uniform principles of policy. It can harmonize, assimilate, and protect the several parts and members, and extend the benefit of its foresight and precautions to each. In the formation of treaties," he continued, a strong national government "will regard the interest of the whole, and the particular interests of the parts as connected with that of the whole." Diplomacy, of course, was important to Jay, but he also valued the military advantages of a national government. He asked, "Leave America divided into thirteen or, if you please, into three or four

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[40] John Jay, *Federalist* III, New York *Independent Journal*, November 3, 1787, 2.

[41] Jay, *Federalist* III.

independent governments—what armies could they raise and pay—what fleets could they ever hope to have? If one was attacked, would the others fly to its succor, and spend their blood and money in its defense?" Sitting at his desk writing this essay, he likely thought back to his time as the president of the Continental Congress. Under the Articles of Confederation, Jay struggled with the same issues he wrote about nearly a decade later, especially raising and paying thirteen separate armies during a period of crisis. While the Revolution had been successful, that military system was surely unsustainable.[42]

Jay ended the essay with two disparate visions of the United States going forward. On one hand, if foreign powers saw "that our national government is efficient and well administered, our trade prudently regulated, our militia properly organized and disciplined," Jay wrote, "they will be much more disposed to cultivate our friendship than provoke our resentment." But, on the other hand, if the states failed to unite under a national government and foreign powers "find us either destitute of an effectual government (each State doing right or wrong, as to its rulers may seem convenient), or split into three or four independent and probably discordant republics or confederacies," he worried, "what a poor, pitiful figure will America make in their eyes!" With some states or confederacies finding an ally in France, others in England, and others in Spain, Jay feared that anything but a national government would allow foreign powers to sow division in the newly established United States.[43]

Moving inward, Jay next concerned himself with the domestic implications of anything less than a strong, vigorous national government in *Federalist* V. If there was no overarching structure to guide the interests and harness the energies of the states, Jay believed, disaster would

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[42] John Jay, *Federalist* IV, New York *Independent Journal*, November 7, 1787, 2.

[43] Jay, *Federalist* IV, 2.

ensue. “Instead of [the states] being ‘joined in affection’ and free from all apprehension of different ‘interests,’” Jay wrote, “envy and jealousy would soon extinguish confidence and affection, and the partial interests of each confederacy, instead of the general interests of all America, would be the only objects of their policy and pursuits.” Rather than a single nation, multiple confederacies might form, and North America might soon resemble Europe with rigorous borders and warring nation-states. Jay prudently envisioned that the primary division would be between Northern and Southern states, and he worried especially that if separate confederacies formed, the powers of Europe might play the confederacies against each other to weaken them further. “It is far more probable that in America, as in Europe, neighboring nations, acting under the impulse of opposite interests and unfriendly passions, would frequently be found taking different sides,” he concluded.[44] After publishing this essay, Jay became seriously ill with rheumatism, and he stepped away from the *Federalist* project.

Six months later, in March of 1788, Jay returned for one final contribution. Titled “The Powers of the Senate,” *Federalist* XLIV explored the Constitution’s delegation of foreign policy affairs to the President and the Senate. “The convention have done well,” he claimed, “in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.” By giving the president the authority to act and negotiate on behalf of the county, the Constitution lends him significant power. Yet because he can receive “advice and counsel” from the Senate, he can pull from what Jay saw as a body of America’s finest statesmen. “Thus,” he wrote, “we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information,

[44] John Jay, *Federalist* V, New York *Independent Journal*, November 10, 1787, 2.

integrity, and deliberate investigations, on the one hand, and from secrecy and despatch on the other."[45] The "Advice and Counsel" clause, then, had two benefits: giving the president the access to the finest talent in the nation while at the same time giving him the flexibility to act and negotiate independently as needed.

Jay then responded to some objections to the "Advice and Counsel" clause, especially uncharitable interpretations of it. Some Anti-Federalists worried that the President and the Senate might work together in a cabal, yet Jay rejected that argument. "He must either have been very unfortunate in his intercourse with the world, or possess a heart very susceptible of such impressions" who can imagine such corruption in the government. "The idea is too gross and too invidious to be entertained," he said. Likewise, since all "the States are equally represented in the Senate, and by men the most able and the most willing to promote the interests of their constituents," the majority of the population could never create a treaty that negatively impacts a minority unless it garnered more than half of the states as well.[46]

Soon after his final *Federalist* submission, Jay released his own anonymous meditations on the Constitution in his *Address to the People of New York*. Published in April 1788, the pamphlet first critiqued the Articles of Confederation and offered an argument in favor of ratification. Jay proceeded to answer three questions New Yorkers might have had about the proposed Constitution: whether or not a better plan could be made, whether or not a new plan could be crafted "in season," and lastly, "what would our situation be, if after rejecting this, all our efforts to obtain a better plan should prove fruitless?" To answer that first question, he again emphasized the sensibilities of those at the Convention. "They tell us very honestly that this plan

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[45] John Jay, *Federalist* XLIV, New York *Independent Journal*, March 7, 1788, 2.

[46] Jay, *Federalist* XLIV, 2.

is the result of accommodation—they do not hold it up as the best of all possible ones, but only as the best which they could unite in, and agree to." Three months of deliberation from delegates across the United States had produced this document, "the best of all possible ones," a system grounded in compromise and collaboration, rather than competition, amongst the states. He doubted, then, the practicality of repeating that feat and establishing another new plan if this one failed. "Although contrary causes sometimes operate similar effects, yet to expect that discord and animosity should produce the fruits of confidence and agreement, is to expect 'grapes from thorns, and figs from thistles,'" he explained.[47]

Even if a new plan could be made, Jay argued, the delays involved would put the nation at risk of further political instability. He painted a villainous picture of other nations acting against the United States "in our present humiliated condition." England might take the opportunity to "alienate the hearts of our citizens from one another." France and other foreign creditors may not "continue patient" with American delays on payments. The young nation might not be able to build an army to defend itself as needed. He concluded by meditating on the common good of the nation: the need for unity in order to prosper. He asked New Yorkers to "Consider then, how weighty and how many considerations advise and persuade the people of America to remain in the safe and easy path of Union; to continue to move and act as they hitherto have done, as a *band of brothers*." He wanted them "to have confidence in themselves and in one another; and since all cannot see with the same eyes, at least to give the proposed Constitution a fair trial, and to mend it as time, occasion and experience may dictate."[48] Emphasizing compromise, collaboration, and progress,

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[47] Jay, *Address to the People of New York*, 11-13.

[48] Jay, *Address to the People of New York*, 11-13.

Jay saw the debates on the Constitution as a way for the American citizenry to become more engaged, educated, and involved in the political process.[49]

But Jay did not just write pamphlets and essays during the Ratification period. He was also an active participant in the ratifying convention at Poughkeepsie in the summer of 1788. After weeks of unproductive deliberation and debate between the Federalists and the Antifederalists, Jay crafted the final document that bridged the gap between the two on July 26. In a circular letter that would be sent out to the states upon New York's ratification, he wrote:

> Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest Confidence of obtaining a Revision of them by a general Convention, and an invi[n]cible Reluctance to separating from our Sister States could have prevailed upon a sufficient number to ratify it without stipulating for previous Amendments. We all unite in opinion that such a Revision will be necessary to recommend it to the approbation and Support of a numerous Body of our Constituents.[50]

Jay brought together these two factions to ratify the Constitution with the understanding that the newly formed Congress would amend and improve it immediately. The next day, Jay's compromise won the day; it got the convention to vote in favor of ratification thirty to twenty-seven. New York became the eleventh state to ratify the Constitution, and the pressure from the circular letter, in turn, played an important role in establishing the need for a Bill of Rights, the anti-Federalists' greatest objection to the proposed Constitution. Stahr summarizes Jay's achievements during the ratification period nicely: "He helped form the consensus that strong national government was necessary; he provided several key concepts, such as the supremacy of national laws; he wrote powerful essays in support of the new Constitution; and above all, through

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[49] Although Jay was weary of "the People," referring to the masses, he nonetheless believed that an educated citizenry was the only pathway to maintaining republican governance and not descending into despotism.

[50] "John Jay's Draft of the Circular Letter from the Convention of the State of New York to the Governors of the Several States, 26 July 1788," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0040. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 56–57.]

quiet compromise, he persuaded the Antifederalists at Poughkeepsie to accept and ratify the Constitution."[51] Again, Jay's temperance, moderation, and willingness to compromise paved the way for a stronger conception of American union.

A Court for the Common Good

Enough states ratified the Constitution that a new national government began that same month, July 1788, and George Washington quickly became the first president of the United States. Now, together with the newly elected Congress, Washington had the great task of taking the abstract framework that the Constitution laid out and turning it into a living, breathing set of institutions. This work was demanding and time-consuming, and Washington took it seriously. Regarding the Supreme Court, "Washington was keen to have as Chief Justice not only an eminent lawyer, but a man well known and well respected throughout the nation," Stahr writes.[52] Given his esteemed record of public service to the young nation, John Jay fit that description perfectly. Though he had not expressed his wish to Jay yet, Washington nominated him to the Senate on September 26, 1789, and he was confirmed the same day. Writing to Jay just a few days later with his commission, Washington expressed his excitement at the potential of Jay leading the federal judiciary. He wrote:

> I have a full confidence that the love which you bear our Country, and a desire to promote general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the Key-Stone of our political fabric.[53]

[51] Stahr, *John Jay*, 269-270.

[52] Stahr, *John Jay*, 273.

[53] "From George Washington to John Jay, 5 October 1789," Founders Online, National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0094. [Original source: The Papers of George Washington, Presidential Series, vol. 4, 8 September 1789 – 15 January 1790, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 137–138.]

Washington's language here, describing the judiciary as the "key-stone of our political fabric," demonstrated his deep interest in the third branch of government. Not only was Jay's career of public service impressive enough for him to earn the nomination for the Chief Justice of the Supreme Court; Washington also took special note of his "talents, knowledge, and integrity." Washington wanted moral leaders, not just lawyers, at the head of the judiciary. Jay fit that mold perfectly. The next day, Jay graciously responded, "With a Mind and a Heart impressed with these Reflections, and their correspondent Sensations, I assure you that the Sentiments expressed in your Letter of Yesterday, and implied by the Commission it enclosed, will never cease to excite my best Endeavours to fulfill the Duties imposed by the latter."[54] With that letter, Jay accepted the nomination and became the first Chief Justice of the Supreme Court.

One of Jay's first duties as a justice was to "ride the circuit," or to adjudicate cases throughout the country.[55] In order to make sure that Supreme Court Justices were well-acquainted with the whole nation, the Judiciary Act of 1789 divided the country into three circuits and mandated that the judges hear cases on them for a portion of the year.[56] Riding across the Eastern Circuit in April and May of 1790, Jay opened every session of court with a charge to the grand jury. Stahr explains, "Today a charge to a grand jury is generally a dull recital of the details of the relevant criminal laws. At this time, however, a grand jury charge was a chance for the judge to discuss general legal and political principles." Jay's April 1790 "Charge to the Grand Juries of the

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[54] "From George Washington to John Jay, 5 October 1789," Founders Online, National Archives, https://founders.archives.gov/documents/Washington/05-04-02-0094. [Original source: The Papers of George Washington, Presidential Series, vol. 4, 8 September 1789–15 January 1790, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 137–138.]

[55] The duty and burden of riding the circuit, established by the Judiciary Act of 1789, will be considered in Chapter Two.

[56] This decision was also a financial one: rather than paying judges specifically to serve on the circuit courts, Congress double-dipped on their Supreme Court Justices here. There were three courts: Eastern, Middle, and Southern. This practice tested Jay's patience and his resilience, as expressed in Chapter Two.

Eastern Circuit" was his first public reflection on the formation of the new government and how he saw the judiciary as a part of it. Jay was eager to explain the democratic importance of the jurors' and the judiciary's role in the new government. He delivered this charge four times: to the juries of New York and Connecticut in April 1790 and to the juries of Massachusetts and New Hampshire the next month.[57]

Jay began the charge by reminding the jurors of the question at the heart of the American experiment: "Whether any People can long govern themselves in an equal uniform & orderly manner." Jay then offered his own thoughts on how the new Constitution could help Americans govern themselves. "It is pleasing to observe that the present national Government already affords advantages, which the preceding one proved too feeble and ill constructed to produce," he said. "How far it may be still distant from the Degree of Perfection to which it may possibly be carried Time only can decide." Where the Articles of Confederation decentralized power, the Constitution centralized federal power into the three branches of government: executive, judicial, and legislative. As he had often argued before, he believed that the Constitution's distribution of power among three federal branches was its greatest advantage compared to the Articles.[58]

Yet, as Jay observed, creating the separate spheres of these branches had not been easy. "Much Pains have been taken so to form and define them, as that they may operate as checks one on the other, and keep each within its proper Limits," he explained. For the success of the new government, it was essential "that they who are vested with executive legislative & judicial Powers, should rest satisfied with their respective Portions of Power." These new government

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[57] Stahr, *John Jay*, 275.

[58] John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

officials should neither "encroach on the Provinces of each other, nor suffer themselves, nor to intermeddle with the Rights reserved by the constitution to the People." The Constitution demanded that all three branches partake in a sort of balancing act, where they must exercise their own power to the fullest extent while not overstepping into the spheres of the other branches.[59]

So far, Jay had only reflected on the Constitution writ large; he had not offered his opinion on the court system itself. "These Remarks may not appear very pertinent to the present occasion," he said, "and yet it will be readily admitted, that occasions of promoting good will, and good Temper, and the Progress of useful Truths among our Fellow Citizens should not be omitted." Finally, Jay pivoted towards the construction of the courts. Referring back to the promotion of "good will" and the "progress of useful truths" among citizens, Jay explained, "These motives urge me further to observe, that a variety of local & other circumstances rendered the Formation of the judicial Department particularly difficult."[60]

He expanded on those difficulties. In theory, he believed that a "judicial controul, general & final, was indispensable." The application of that theory, however, had proven difficult. "The manner of establishing [judicial control], with Powers neither too extensive nor too limited; rendering it properly independent, and yet properly amenable, involved Questions of no little Intricacy." Like the executive and legislative branches, defining the judicial branch's powers was a balancing act. On one hand, the judiciary needed to be "properly independent," so that it could

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[59] John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

[60] John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

check the other two branches; on the other hand, it could not be too powerful that it would compromise the new system of checks and balances. "The Expediency of carrying Justice as it were to every Man's Door, was obvious," he explained, "but how to do it in an expedient manner was far from being apparent."[61]

Defining the relationship between the states and the national government was, in Jay's estimation, the greatest challenge facing the court. "To provide against Discord between national & State Jurisdictions, to render them auxiliary instead of hostile to each other; and so to connect both as to leave each sufficiently independent, and yet sufficiently combined, was and will be arduous." Here, Jay provided an interesting interpretation of federalism. Rather than conflicting over power, the states and the federal government should be "auxiliary" to each other. Many Antifederalists and even some Federalists expected the relationship between the states and the federal government to be adversarial, as each fought to define their sphere of power and influence as robustly as possible. In Jay's estimation, the two should ideally complement, not conflict with, each other in order to form the strongest, most efficient, and most effective government.[62]

Building off his idea of auxiliary federalism, Jay concluded the charge with a meditation on the common good. "It cannot be too strongly impressed on the minds of us all," he wrote, "how greatly our individual Prosperity depends on our national Prosperity; and how greatly our national

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[61] John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

[62] This auxiliary federalism that Jay presented seemed to be a departure from the sort of productive tension that Madison saw as foundational to the country's success in *Federalist* X. Where Madison saw potential conflict, Jay seemed to see potential avenues of collaboration. John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

Prosperity depends on a well organized vigorous Government, ruling by wise and equal Laws, faithfully executed." Individual prosperity was only possible in times of national prosperity, he believed, and for any sort of national prosperity to occur, the government must wisely and faithfully execute the laws. Yet each individual citizen had an important role to play in the success of the national prosperity. Their freedom and their liberty "consists not in a Right to every Man to do just what he pleases— but it consists in an equal Right to all the citizens to have, enjoy, and to do, in peace Security and without molestation, whatever the equal and constitutional Laws of the country admit to be consistent with the public good."[63] Each time, after delivering this charge, Jay took his seat and began holding court.

Over the next few years, Jay struggled to build the courts for a number of logistical and structural reasons, just as he anticipated. But this charge, given right at the beginning of his tenure as Chief Justice, reflected a sort of cautious optimism absent from much of his later writings. That optimism was well-deserved. Jay had been working to create an American system of government that was independent, effective, and powerful for more than fifteen years. As he made clear, this charge was more than just pomp and circumstance to begin a court session—it was a culmination of his life's work. Jay had come a long way from being the plucky law clerk at Benjamin Kissem's office nearly two decades earlier. He had since struggled as the president of the Continental Congress and suffered both personal tragedy and political hardship as a diplomat in Spain, negotiating on behalf of a nation that no one yet recognized as sovereign and free. He had rejoiced in the halls of Versailles with Benjamin Franklin and John Adams when the Paris Peace Treaty was signed, and he had written and fought alongside Alexander Hamilton and James Madison in

[63] John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

order to ratify a new Constitution to strengthen the federal government. Now, with George Washington's confidence, Jay was the highest magistrate in the land, responsible for building a court system to be the foundation of the new nation's code of law. While a long road, both literally and metaphorically, laid before him as he traveled the circuit and implemented his vision for the judiciary, his life thus far demonstrated that Jay—the "remarkably sedate" young man, the moderate revolutionary, the frustrated diplomat, and the compromising Federalist—had become, above all else, an essential architect of American union.

CHAPTER TWO:
BRINGING "JUSTICE TO EVERY MAN'S DOOR":
THE BENEFITS AND BURDENS OF THE CIRCUIT COURT

Reality quickly tempered Jay's hopes for the judiciary. Each Justice's annual duties—to hold two sessions of the Supreme Court in Philadelphia and to ride their respective circuits twice—soon proved overwhelming. After nearly three years of grueling service, the Justices decided to make their struggles public. A letter written in Jay's penmanship, signed by all six Justices, and sent to George Washington and the United States Congress in August 1792 illustrated their collective frustration. "We really, Sir, find the burthens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms," they wrote to the president. "On extraordinary Occasions we shall always be ready as good Citizens to make extraordinary exertions; but while our Country enjoys prosperity, and nothing occurs to require, or justify such severities, we cannot reconcile ourselves to the idea of existing in exile from our families." Justices William Cushing, James Wilson, John Blair, James Iredell, Thomas Johnson, and Chief Justice Jay all were accomplished lawyers and patriots eager to serve the fledgling republic, but the strenuous nature of traveling the circuit weighed heavily on their shoulders. Washington, they

hoped, would advocate for them in Congress, and in their letter to him, they enclosed a harsher message for the legislature.[1]

The Justices were under the impression that that the Judicial Act of 1789, the law that established their double duty of Supreme Court sessions and circuit riding, established only "a temporary expedient, [rather] than a permanent System, and that it would be revised as soon as a period of greater leisure should arrive." Of course, they recognized that the First Congress had plenty on its ledger, and they could not spend too much time ironing out the details of the judiciary before it even sat for court. Yet, as the Justices explained, the system as it stood took a serious toll on the six-man team. "The task of holding twenty seven circuit Courts a year, in the different States, from New Hampshire to Georgia, besides two Sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year," they claimed, "is a task which considering the extent of the United States, and the small number of Judges, is too burthensome." The time for reform, they believed, was now.[2]

Riding the circuit was problematic for two reasons: one logistical and one constitutional. Logistically, holding circuit courts demanded that the Justices travel in April and May and then again in November and December. For those in the Eastern Circuit, like Jay, these winter trips across New York, Massachusetts, New Hampshire, Connecticut, and Rhode Island proved brutal. Likewise, for those condemned to the expansive and humid Southern Circuit, like James Iredell, the early summer voyages through Virginia, the Carolinas, and Georgia were unbearable. "Some of the present Judges do not enjoy health and strength of body sufficient to enable them to undergo

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[1] "The Justices of the Supreme Court to George Washington, 9 August 1792, enclosing The Justices of the Supreme Court to Congress, [9 August 1792]," *Founders Online*, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0238. [Original source: *The Selected Papers of John Jay*, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 445–447.]

[2] The Justices to Washington, August 9, 1792.

the toilsome Journies through different climates, and seasons, which they are called upon to undertake," the Justices contended, "nor is it probable that any set of Judges however robust, would be able to support and punctually execute such severe duties for any length of time." Both time-consuming and physically punishing, these circuit ventures were logistically unsustainable.[3]

Yet the Justices' concerns with the circuit courts were not singularly self-interested. They also argued that the initial arrangement of the federal judiciary established a system that could produce serious conflicts of interest. "The distinction made between the Supreme Court and its Judges, and appointing the same men, finally to correct in one capacity, the errors which they themselves may have committed in another," they explained, "is a distinction unfriendly to impartial justice, and to that confidence in the Supreme Court, which it is so essential to the public Interest should be reposed in it." The Judiciary Act of 1789 created several levels of federal courts, and by assigning the Justices to work on two different levels concurrently, the Act laid the groundwork for them to have to hear and rule on the same case on two different levels. Given that the Supreme Court had only heard four cases in its three years of existence thus far, this situation seemed unlikely at the time.[4] Nevertheless, in an attempt to promote "impartial justice" and "confidence in the Supreme Court," the Justices pursued this line of argument diligently.[5]

With this letter in mind, this chapter will examine how the experience of riding the circuit shaped the Jay Court, with a particular focus on Jay's experiences and opinions on the matter. First considering the provisions regarding circuit courts in the Judiciary Act of 1789, the chapter will proceed to explore the law's practical implications by analyzing Jay's travel diaries,

[3] The Justices to Washington, August 9, 1792.

[4] For reference, the Supreme Court hears between 100 and 150 cases annually today. The docket then was not nearly as loaded as it is now.

[5] The Justices to Washington, August 9, 1792.

correspondence, opinions, and the public's response to the Justices' circuit journeys. It will conclude by surveying the conflicts that arose between the Justices about their circuit duties and their advocacy for reform. I argue that the duty of riding the circuit had a complicated impact on the Jay Court. On the one hand, it surely burdened the Justices physically, mentally, and emotionally. They spent months away from their families, always at the mercy of the weather and often in less-than-ideal lodging. On the other hand, by traveling across the country and meeting citizens from all walks of life, the Justices, especially Jay, helped establish trust in the new federal government—a necessary step in achieving the sort of union that Jay had envisioned for so long.

Filling in the Gaps: The Judiciary Act of 1789

Article III of the Constitution laid out only a barebones framework for the federal judiciary, leaving Congress the power to build it out.[6] Congress took up the task early into their first legislative session in April 1789. Oliver Ellsworth, a practical, experienced attorney and legislator, led the committee that crafted the bill. Six months of intense deliberation ensued, and the resulting piece of legislation reflected the complexities of the committee's legalistic debates.[7]

The first sections of the Judiciary Act of 1789 clarified the federal judiciary's operating structure. First, it established the size of the Supreme Court, declaring that it "shall consist of a chief justice and five associate justices."[8] It proceeded to divide the nation into thirteen districts, primarily across state lines, and it then established a district court, led by one judge appointed by

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[6] Article III has only three sections, and each is brief. Section 1 declares, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Sections 2—which establishes the scope of judicial power—and Section 3—a definition of treason—are significant but not relevant to the study at hand.

[7] For a detailed narrative of these deliberations and Ellsworth's role in the bill, see Casto's *The Supreme Court in the Early Republic*, "The Judiciary Act of 1789," 27-53.

[8] "The Judiciary Act," September 24, 1789, §1, *The Avalon Project,* https://avalon.law.yale.edu/18th_century/judiciary_act.asp. [Hereafter cited to as the Judiciary Act of 1789.]

the president and confirmed by the Senate, in each of those districts. Next, it grouped those thirteen districts into three circuits—Eastern, Middle, and Southern—and established special circuit courts to hear appeals of decisions from the district courts. These courts would meet twice a year at each district within the circuit to do so.[9]

The Act then explained the composition of the circuit courts, what Jay and his associate justices would take issue with three years later. Though it proved problematic in practice, it was originally written with a spirit of equality in mind. Section 4 articulated that "any two justices of the Supreme Court, and the district judge of such districts" would compose each circuit court, and these circuit courts would meet twice a year. Though the law itself did not offer the rationale behind the circuit court's makeup, legal historian William Casto explains:

> The basic purpose of the circuit courts was to provide Supreme Court supervision of the federal trial courts without requiring expensive and inconvenient appeals from local federal trial courts to the national capital. Instead, circuit riding Justices would in effect make Supreme Court decision making more accessible to litigants throughout the country.[10]

Given the expenses of travel and the early Republic's lack of national infrastructure, this reasoning promoted equality of access to the most powerful judges in the land. Ideally, the merits of the case, not the ability of any participants to travel across the nation for lengthy hearings, would determine if the case would be taken up by the federal judiciary. In Jay's words during his initial grand jury charge, he thought these courts would allow the federal government to "bring justice to every man's door."[11] Casto points to Senator William Paterson of New Jersey to illustrate this rationale further. While deliberating on the bill, Paterson publicly remarked that this system of circuit

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[9] Judiciary Act of 1789 §2-5.

[10] William Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995), 45.

[11] Jay, Charge to the Grand Jury. For a closer analysis of this piece, see Chapter One.

courts' most appealing feature was its ability to "carry law to [The People's] homes, courts to their doors." Aside from the postal service, these courts were likely the only interaction an ordinary citizen would have directly with the federal government. This opportunity to get the judiciary out of the capitol and into local communities was exciting, innovative, and promising.

The Act also set the scope and power of the various courts. Section Eleven explained, "The circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity."[12] Likewise, Section Twenty-Two established, "That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be reexamined, and reversed or affirmed in a circuit court."[13] These two clauses, one concerning the relationship between state and circuit courts and the other concerning the relationship between district and circuit courts, together ensured the circuit court's power to review decisions from lower tiers. Nevertheless, by mandating that the value of the civil dispute must be more than fifty dollars to be heard by the circuit court, Section Twenty-Two intended to prevent too many small claims from burdening its docket with small suits.

Finally, the Judiciary Act established how a case could reach the Supreme Court. Section 22 of the legislation continued:

> And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice.[14]

[12] Judiciary Act of 1789 §11.

[13] Judiciary Act of 1789 §22.

[14] Judiciary Act of 1789 §22.

This one clause, more than one hundred words long, delineated several things in relation to the Supreme Court's scope and process. First, it explained that decisions from circuit courts, state courts, or district courts—with the caveat that the "dispute exceeds the sum or value of two thousand dollars exclusive" of legal fees—can all be evaluated by the Supreme Court. The Supreme Court holds the power to reexamine, and then reverse or reaffirm, any decisions made by these lower courts, provided that either a member of the Circuit Court or a Supreme Court Justice signs on to review the case. Finally, the parties involved, especially the "adverse" party, or the one disposed against further review, need at least thirty days' notice to prepare for the Supreme Court's rehearing of the case. The Act, complex and robust as it was, easily passed through Congress, and Washington began appointing judges to fill out the new judiciary.

Reconstructing Life on the Circuit: Jay's Travel Diaries and Road Correspondence

Though the Judiciary Act was passed in September 1789, the first circuits were not held for another seven months. As the time neared for Jay and the other Justices to ride the circuit, Washington wrote to them expressing high hopes for their journeys. "As you are about to commence your first Circuit, and many things may occur in such an unexplored field, which it would be useful should be known," he explained, "I think it proper to acquaint you, that it will be agreeable to me to receive such Information and Remarks on this Subject, as you shall from time to time judge expedient to communicate." Echoing the sentiments of the Judiciary Act's proponents like Senator William Paterson, Washington thought that the Justices' travels would be a valuable resource for him. Just as Paterson thought the circuit courts would bring justice to "the People's Doors," so did Washington think the Justices would bring a better understanding of the people back to him and those leading the new federal government.[15]

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[15] "From George Washington to the United States Supreme Court, 3 April 1790," *Founders Online*, National Archives, https://founders.archives.gov/documents/Washington/05-05-02-0201. [Original source: The

Jay did not personally respond to this letter, but he must have agreed with Washington that information he acquired while on the road would be valuable. Only days later, he began keeping a travel diary of his first circuit journey. Over the next five years, he would fill several more. Containing concise, often difficult to decode entries, these diaries likely reflected Jay's primary concerns as he adjudicated his way throughout the Northeast. Jay rode the Eastern Circuit nearly ten times, and the entries in the diaries that accompany those trips revealed three of his main interests: the weather and climate, his lodgings, and the various people he met on his travels. Although those three aspects of life appear mundane on first glance, putting Jay's travel diaries in conversation with his correspondence, other contemporary sources, and the work of other historians can help us reconstruct a fuller, more instructive, and more interesting understanding of life as a Supreme Court Justice in the 1790s. Indeed, these documents together reveal a deep tension between the federal and the hyperlocal in Jay's life. Jay's robust understanding of the federal government, neatly assembled across pamphlets, newspapers, and correspondence from the last twenty years, became much more difficult to enact in the real world than he anticipated. The difficulties of practical governance, of truly bringing "justice to every man's door," become all the more evident as we plumb what Jay wrote as he rode the circuit.

Historians have spilled much ink over the complicated nature of diaries as sources, and a brief survey of their scholarship can help us better understand the value of Jay's travel diary. Martha Ballard, a midwife from Maine, kept over thirty years' worth of journals, and her entries range from episodic dramas of seafaring adventures to long lists of daily chores. While many historians dismissed Ballard's diary as an insignificant, uninteresting source, Laurel Thatcher

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Papers of George Washington, Presidential Series, vol. 5, 16 January 1790–30 June 1790, ed. Dorothy Twohig, Mark A. Mastromarino, and Jack D. Warren. Charlottesville: University Press of Virginia, 1996, pp. 313–314.]

Ulrich argues that the mundane had great significance in understanding the "sinews of this earnest, steady, gentle, and courageous record…For [Ballard], living was measured in doing. Nothing was trivial."[16] Upon first glance, Jay's travel diaries are similarly mundane. The topics that frequent his journals were certainly not heroic, nor were they dramatic or interesting. But, given that Jay spent so long traveling on the road, these typical entries are the "sinews" of Jay's own "earnest, steady…and courageous record." We cannot understand what life was like on riding the circuit without, as Jay did, thinking extensively about the weather, the lodgings, and the various encounters he had with citizens from so many backgrounds.

Likewise, the diary of Elizabeth Drinker, an upper-class woman from Philadelphia, helps us understand the value of working against the grain in unpacking this type of source. Drinker's diary lacked the gossip, scandals, and other personal touches that one might expect from the diary of a wealthy socialite. Drinker "possessed both wit and a sense of humor, and even as she tried to suppress them, both escape to the pages of the journal," Elaine Forman Crane writes, "Yet her diary is a cautious document, clearly designed to avoid personal and intimate revelations."[17] Throughout his diaries, Jay often quipped about certain stories that do not belong in a diary. Crane accounts for the diary as an incomplete document, but one with gaps that are as helpful as they are frustrating. "In some cases," she explains, "Drinker's omissions are as revealing as her entries, although her forbearance was meant to illustrate her self-declared sensitivity to others."[18] Some of

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[16] At the heart of Ulrich's work sits this quotation: "It is in the very dailiness, the exhaustive, repetitious dailiness, that the real power of Martha Ballard's book lies. To extract the river crossings without noting the cold days spent "footing" stockings, to abstract the births without recording the long autumns spent winding quills, pickling meat, and sorting cabbages, is to destroy the sinews of this earnest, steady, gentle, and courageous record…For [Ballard], living was measured in doing. Nothing was trivial." Laurel Thatcher Ulrich, *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary* (New York: Knopf, 1990), 9.

[17] Crane, *The Diary of Elizabeth Drinker Volume 1* (Boston: Northeastern University Press, 1991), XV.

[18] Crane, *Elizabeth Drinker*, XVIII.

Jay's omissions were similarly striking: though he was traveling through port cities and central economic hubs, he never mentioned encountering any enslaved people or witnessing anything to do with the slave trade. Given that he was a leader in the New York Manumission Society, that absence is noteworthy. Similarly, though he was a man of deep faith, Jay's diaries rarely if ever reflected trips to church, conversations with ministers about theology, or personal reflections on religion. He rarely reflected on anything at all in these diaries; indeed, they were "cautious documents" in the strongest sense of the term. Keeping these two tropes—the value of the mundane and the idea of the "cautious document"—in mind allows us to analyze the diaries critically and holistically.

Notes about the weather were abundant throughout Jay's diaries. In April and May of 1790, for example, Jay was on the road for about twenty days, and he referenced the weather in at least half of his entries on those days. As he set out on April 16, it was a "Cloudy & chilly" day. The next day, he noted "wind at northeast & raw," and the day that followed, there was a "violent Storm of Snow & afterwards Rain wind at No. East." Curtly describing the scene, he explained that "much Rail Fence blown down."[19] Likewise, on the winter circuit from the same year, he noted rain four times, marked one day's entry as simply "weather unpleasant," and wrote about another where he lodged with "Mesrs. Gore & Trumbull" at the Adams' Tavern at Ipswich Hamlet because they were all "confined by the weather."[20] Since Jay traveled throughout the Northeast in all four seasons of the year, the weather severely impacted his experiences. Nature, above all else,

[19] John Jay, "Circuit Court Diary, 16 April–30 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0134. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 240–258.]

[20] Jay, "Circuit Court Diary, 28 September–15 December 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0151. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 277–293.]

determined the difficulty of his trip. Jay was often confined to a carriage that was either too hot or too cold, depending on the weather; snow trapped him at taverns, rain delayed the start of his treks, and the summer heat bore down on him, his servants, and his horses as they took long, unkempt, and winding roads. Delivering "justice to every man's door," it seemed, was easier said than done.

Though Jay wrote little about the act of traveling itself, scholars have reconstructed maps from his diaries that illustrate how he moved throughout the Eastern circuit. In his Spring 1792 circuit trip, for example, he departed from New York and rode north along the coastline for several days, arriving in New Haven. He held court there for a week, then traveled northward through central Connecticut to arrive in Springfield, Massachusetts. Next, Jay moved eastward through rural western Massachusetts, and he arrived in Boston almost ten days after leaving New Haven. He held court in Boston for five days, traveled almost fifty miles north to Portsmouth, New Hampshire, to hold court for four days, then nearly another one hundred miles south over nine days to do so in Newport. Moving again through Connecticut, this time westward, Jay made his way up to Bennington to hear cases in Vermont at the end of June. Finally, to return home, he traveled south along the Hudson River.[21] Moving hundreds of miles and leading five different court sessions in two months was no small feat, but Jay did so for years. He held himself to a strict and rigorous travel schedule, demonstrating discipline and devotion to his circuit court duty irrespective of its inconvenience.

[21] "Circuit Court Diary, 15 April–1 June 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0210. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 389–395.]

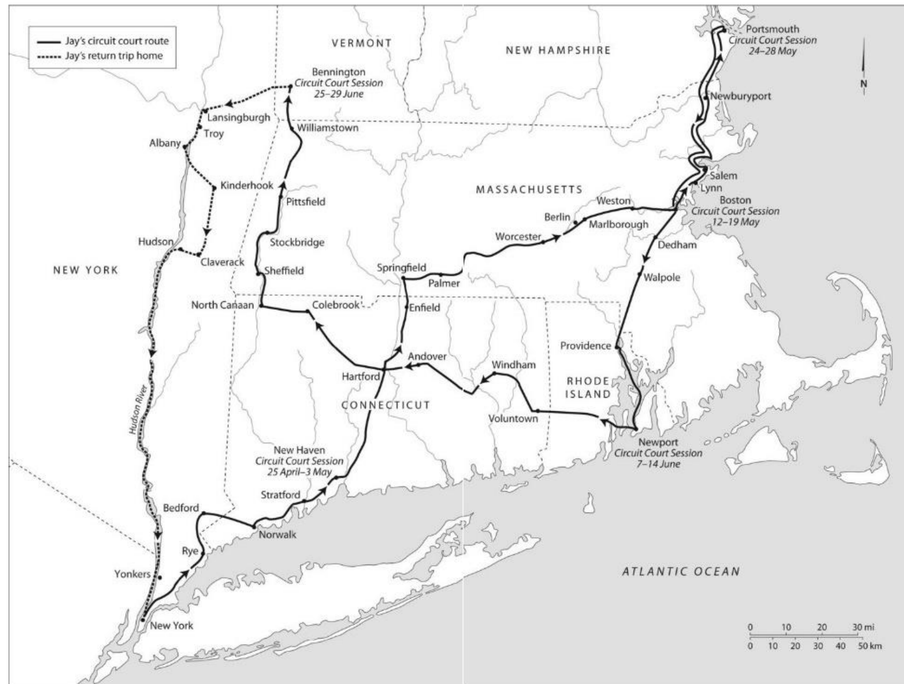

Figure 1: Map of Jay's Travels on the Eastern Circuit, Spring 1792
SOURCE: "Circuit Court Diary, 15 April–1 June 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0210. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 389–395.]

Jay's "zig-zagging" travel routes from the map above speak to the nature of travel and roads in the early Republic (Figure 1).[22] Postal roads and travel channels were still in the early stages of their development; only decades into the nineteenth century did travel across the nation become easier. As historian William MacIntosh explains, "Travelers at the beginning of the nineteenth century generally thought of their travel as something that they produced themselves, out of the raw materials of geographical knowledge, means of transportation, and provisions for the road." MacIntosh uses the travel account of a young man named William Richardson from 1815 to illustrate the burdens of early American travel. "Richardson had to know where to go, how best to

[22] "Riding the Circuit: Editorial Note," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0132. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 214–233.]

get there, and what the current conditions along his route were," MacIntosh explains. "He also had to choose and acquire the means of getting to his destination, including transportation, lodging, and provisions. He acquired these raw materials for travel haphazardly and improvisationally as he went, and used them to construct a journey for himself that was as idiosyncratic as it was exhausting."[23] Traveling almost twenty-five years earlier than Richardson, Jay likely encountered similar challenges, and some were certainly exacerbated given how much younger the nation was. The complex route that we see above, followed in the Spring of 1792, was the result of years of circuit-riding; Jay had ridden the Eastern Circuit four times before, and by Spring 1792, he likely had developed a strong understanding of the fastest ways through the Northeast. Yet Jay's wealth and status ensured that he traveled more comfortably than most—as Landa Freeman observes, often in a carriage rather than on horseback and often in a private carriage rather than a public one. Jay even had the luxury of bringing his law library with him as he rode across the country, further demonstrating his special access to resources as he traveled.[24]

One letter Jay sent to Washington further illustrated his own perspective on the nation's roads. Along with several other advisory opinions, Jay argued that Congress had the "power to establish post Roads." Nevertheless, he explained, simply establishing those roads would do little to help connect and grow the nation. "This would be nugatory," he explained, "unless it implied a power either to repair these Roads themselves or compel others to do it."[25] Given the timing of

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[23] William Mackintosh, "'Ticketed Through': The Commodification of Travel in the Nineteenth Century," *Journal of the Early Republic*, Spring 2012, Vol. 32, No. 1 (Spring 2012), 63.

[24] As much as this fact demonstrated privilege, it was also likely out of necessity: Jay could never have been sure that he would have easy access to legal materials as he landed in a town. Landa Freeman, "Mr. Jay Rides the Circuit," *The Journal of Supreme Court History Volume 31 Issue 1 March 31 2006,* 19.

[25] "From John Jay to George Washington, 13 November 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0153. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 294–297.]

this letter, Stahr argues, Jay "was not only commenting on the atrocious quality of the roads: he was creating the legal basis for the federal government to become involved" in the act of "building and maintaining national roads."[26] This letter not only demonstrates how Jay believed that Congress should be more active in helping build the young nation, but it also further exemplifies how greatly he valued national union. Only with a robust network of postal roads, turnpikes, and toll bridges, much improved from the ones he found himself on, could letters, goods, and people move easily across the thirteen states.

Jay also commented on his lodgings across the circuit, but he rarely wrote highly of them. A series of entries from the Winter 1790 circuit diary illustrate his discomforts. He began his journey on difficult footing, since he "put up at Hiltons Tavern at Albany— they seem poor—& are extravagant in Charges." In three consecutive entries only two weeks later, as he passed through New York, he remarked that he dined at Colonel Pratt's "pretty good house," then lodged at the Sheffield's "not extraordinary" house, then "Took breakfast at Canaan at Bushs—House but middling."[27] Remarks like these appear often throughout the diaries, demonstrating how Jay actively examined, evaluated, and judged the places that he ate and stayed.

Since Jay so frequently complained about his lodgings, we might ask why he—the Chief Justice of the Supreme Court and one of the nation's most eminent political figures—put up with conditions he disliked for so long. The answer lies in his firm dedication to impartiality. Jay received plenty of invitations to reside in the homes of friends and local officials, but he almost always declined. As Stahr explains, Jay "wanted to avoid the appearance that he owed favors to

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[26] Stahr, *John Jay*, 279.

[27] "Circuit Court Diary, 28 September–15 December 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0151. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 277–293.]

those whose interest, in one way or another, would come before the federal courts."[28] This principle meant that Jay found himself refusing everyone from Governor of Massachusetts John Hancock to U.S. Senator and prominent New Hampshire merchant John Langdon.[29]

Instead, Jay found himself at the mercy of tavernkeepers to provide him food to eat, a bed to sleep in, and company to spend time with. As Jay initially noted and historians have since reaffirmed, the average tavern's conditions were often less than ideal. Nonetheless, David Conroy explains that taverns had great value as a place of cross-class engagement. Staying in them was likely an enlightening experience for the upper-class, seemingly stiff Jay. Conroy writes, "In taverns, men did not ordinarily sit according to their place in the local social hierarchy or merely listen to sermons and exhortations. Here there was at least the possibility for greater assertation in posture and conversation." The tavern, unlike the ballroom, the salon, or even the courtroom, was a more equal place among white men, leading to new and interesting exchanges.[30] The tavern's services likely aided this cultural mixing, since, "In drink, men might abandon the constraints that governed interaction in most public situations and thus make taverns a fertile breeding ground for new possibilities in social and political relationships."[31] There is little evidence to suggest that Jay was a heavy drinker, and plenty to oppose that characterization, but plenty to suggest that he was

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[28] Stahr, *John Jay*, 275.

[29] John Jay, "Circuit Court Diary, 16 April–30 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0134. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 240–258.]

[30] Women and non-white men, however, remained on the outside of these exchanges.

[31] David Conroy, *In Public Houses: Drink and the Revolution of Authority of Colonial Massachusetts* (Chapel Hill: University of North Carolina Press, 1995) 2.

sociable and good company to keep. By staying in these environs, he surely met and mixed with Americans from all walks of life.[32]

Historically, taverns also served an important public function: the courthouse. Writing in the context of the Puritan Massachusetts colony, Conroy explains that since taverns already provided heat, light, and residence, they served as the perfect place to hold court for traveling judges. The judges “often did not arrive on time or together,” so waiting for others to arrive in court seemed nonsensical. Further, Conroy writes, “Rather than move back and forth between tavern and town house (if one existed) and duplicate fires and other services in less convenient chambers, Massachusetts judicial officers simply made public houses into their seats of authority.” Nearly eighty years differentiated the social context that Conroy writes about and that Jay lived in; in many ways—especially the rigid social hierarchies of Puritan society—they were a world apart. But these more practical concerns, the necessities of life, likely remained true for traveling judges trying to administer justice in various social contexts across whole regions.[33] Jay never explicitly commented about where circuit courts took place, so the possibility remains that he held at least one in a tavern.

Finally, Jay kept diligent records of who he spoke to while traversing throughout the circuit. He spent time with pastors, soldiers, farmers, politicians, and fellow judges. In his first circuit court diary, for example, he detailed a conversation with “an elderly man.” Jay explained, “He told me he had learned from my Servants who I was—and that he was the Presbyterian Minister of” the town Jay was passing through. The minister told Jay that “he had been removed to York State

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[32] Jay’s moderate disposition, his faith, and his general reputation all help refute the idea that Jay was an active drinker. Indeed, during his time in Spain, he and Sarah got into a serious fight with one of his helpers over their debaucherous behavior, including excessive drinking. See Stahr, Chapter 6.

[33] Conroy, *In Public Houses*, 16-17.

28 Y^{rs}. & had not in all that Time voted at any Election, nor intermeddled in any politics—deeming it inconsistant [*sic*] with his professional character & Duties." Interested in how the minister remained a part of the town's life without involving himself in politics, Jay dubbed the man "a case not common."[34] In another entry, he explained that he "passed the [evening] with M^{r}. Thatcher in [company] with Deacon Mason, Judge Sullivan, Mr Tudor, Justice Barret."[35] Notes like these demonstrate how Jay spent plenty of time with merchants, farmers, attorneys, men of the cloth, and other judges.

Jay did not write down the conversations simply for the sake of remembering revelry; instead, he often noted them for the valuable information he learned from fellow citizens. At one tavern, for example, he wrote with great detail about his conversation with a tavernkeeper about the man's methods for grafting apple trees. Jay explained, "He cuts an oblique Gash into the Side of a small tree or Branch, & in it inserts a Graft cut like a Wedge, then covers the wound with Clay, & ties it with Rope yarn to keep it close."[36] Keenly interested in agriculture, Jay thought this new method was worth remembering. Another time, Jay noted how one of his fellow judges had cured a mysterious leg pain. Writing in fragments, Jay explained:

> Judge Law told me at N Haven that he had cured his Leg—by taking for a Week or ten Days a Tea spoon full, every morng before Breakfast of burnt oyster Shell, reduced to a fine

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[34] "Circuit Court Diary, 16 April–30 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0134. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 240–258.]

[35] "Circuit Court Diary, 28 September–15 December 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0151. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 277–293.]

[36] "Circuit Court Diary, 15 April–1 June 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0210. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 389–395.]

> powder—for many Months his Leg inflamed, broke out & swelled—& he had in Vain followd. the Prescriptions of his Physicians— this Powder was a thought of his own.[37]

One final example demonstrated how information often spread anecdotally through the early Republic. Writing about a "Judge Chauncey," Jay said that "he mentioned to me a Singular Case of the Effect of Tobacco Smoke—a Carpenter whom he knew & employed, always fell instantly into Convulsions if Tobacco Smoke reached him when he was eating—at other Times it was harmless to him— The Judge said he knew it to be true and that the Fact was capable of unquestionable Proof."[38] Jay's letters from his later years indicate that he often suffered from poor health, perhaps explaining his early interest in leg pain, tobacco smoke, and other similar issues. As wide-spanning as these entries are, they demonstrate one thing for certain: Jay was deeply interested in the material world around him and what he could learn from fellow citizens.

Jay was nevertheless keenly aware that his words, even in those private diaries, might be read by others. In May of 1790, for example, he wrote, "The atty Genl. [Christopher Gore, Massachusetts Attorney General] made me a visit. Judge Cushing passed the Day with us—much interesting conversation [which] I think had better not be written."[39] Two years later, soon after the story from Judge Chauncey, Jay wrote that he "learnt sundry anecdotes [were] not proper to be written, but to be remembered."[40] Conscious of the fact that his personal belongings might fall into

[37] "Circuit Court Diary, 15 April–1 June 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0210. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 389–395.]

[38] "Circuit Court Diary, 15 April–1 June 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0210. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 389–395.]

[39] "Circuit Court Diary, 16 April–30 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0134. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 240–258.]

[40] "Circuit Court Diary, 15 April–1 June 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0210. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 389–395.]

the wrong hands, and also possibly aware of how his words might end up on the historical record, Jay thus complicated his own diaries for historians. We must wonder how much he curated and censored them with those concerns in mind.

These diaries, however, were not the only records that remain from Jay's travels. He kept up correspondence on the road, writing often to family and sometimes to Washington, Hamilton, and others with advisory opinions and news. Jay's familial correspondence reveals the Chief Justice's deep dedication to his family, and, of course, how his time away from them frustrated him. As an influenza epidemic ravaged across the United States in early 1790, for example, he wrote to Sarah, "I had hoped that you and our little ones would have escaped the Influenza; and feel no little anxiety at learning that has not been the case." Eager to return to them, he promised to travel as quickly as the weather allowed. The next line demonstrated the unreliability of written communication in the eighteenth century. "It would give me great Pleasure to receive a Letter from you, informing me that your Health & that of our little boy is reestablished," he wrote, "but as I shall be on the Road before the next Post will arrive here, it is uncertain when and where your Letter will come to my Hands."[41] He returned home weeks later, and by then, all the family had recovered from their illnesses.

Months later, as he led a session of the Supreme Court, he wrote a letter to his sister-in-law that illustrated his perspective on his work-life balance. "It is the Fortune of few to chuse their Situations," he wrote, but "it is the Duty & Interest of all to accommodate themselves to the one which Providence chuses [*sic*.] for them." A man of deep faith and reverence for God, he thought that Providence had set him on his path, however difficult, for a reason, even if he could not

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[41] "From John Jay to Sarah Livingston Jay, 20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0137. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 259–260.]

comprehend it himself. He continued, "On my Return from Europe I was placed in an office which confined me to my Desk & Papers— I am now in one which takes me from my Family half the Year, and obliges me to pass too considerable a part of my Time on the Road, in Lodging Houses, & Inns."[42] Briefly referencing his years as the Secretary for Foreign Affairs under the Articles of Confederation, Jay seemed to lament about work in all form: when he was working in foreign affairs, he felt trapped at his desk, but as Chief Justice, he could not find a moment's rest. His longing for his family and his distaste for a lifestyle on the move were becoming increasingly evident. Nevertheless, a Calvinist at his core, Jay believed that everyone had a lot dealt to them in life by God and a duty to work to the best of one's abilities. He continued, for years, to put his head down and carry out the mission of the new federal government. [43]

On the road, Jay also kept correspondence with his son, and he tried to instill in him the value of learning, and, particularly, the value of history. In one letter, John wrote to Peter, "Few Books (if properly read) afford more useful Lessons than the Lives of great Men; and among Biographers Plutarch is certainly entitled to the first Place." An intellectually curious man and a life-long learner, Jay believed that history, at its best, was instructive. "To enjoy the Experience of others without paying the Price which it often cost them," Jay explained, "is pleasant as well as profitable— mankind is the same in all Ages, however diversified by colour, manners, or

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[42] "From John Jay to Catharine Livingston Ridley, 1 February 1791," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0165. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 307–308.]

[43] It is thus significant to note here that Jay was a serious candidate for the office of the Governor of New York less than a year later. Although he did not actively campaign for the office, he was nominated and nearly won, losing to George Clinton by only a few hundred votes. By 1792, then, Jay was already, looking for a new job. He would eventually take that job in 1795, and a close friend remarked that it was a serious promotion from Chief Justice. For more on this story, see the conclusion.

customs."[44] Arguing that humans have a fixed nature and a common tradition of experience to draw from, Jay here revealed his explicitly Christian worldview. Further, his interest in Plutarch demonstrated how the classical education he enjoyed at King's College remained in him. Above all else, however, letters like these demonstrated that Jay wanted the best for his son, no matter if they were separated. He hoped to instill in Peter the same values that his father and his education had instilled in him: a sense of duty, an attentiveness towards civic virtue, and a deep Christian faith.

Taken together, Jay's diaries and correspondence paint a complicated picture of life on the road for him. On one hand, he met people across classes, had interesting conversations with them, and learned some took valuable lessons. On the other, all of Jay's writing reveals how burdensome and mundane life on the circuit was. A snowfall or rainstorm could delay him for days, he spent much of his time cramped in a carriage or an uncomfortable tavern, and he needed to maintain a strict travel schedule in order to keep the courts running as they should. He spent months away from his family at a time, and with communication as unreliable as it was, he never knew if his letters of encouragement, affirmation, or education would reach them safely. Jay's diaries and letters from the period demonstrate that establishing a court system accessible to the entire nation was a demanding, arduous process that took a serious toll on its participants.

The Process and the Press: Jay's Circuit Court Decisions and the Public Response

A brief article from the Providence *Gazette* illustrates how the public learned about the circuit courts. Writing on December 11, 1790, the author began: "On Saturday last, the Circuit

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[44] For more about the relationship between the Founders and the Classics, see Carl J. Richard's aptly titled *The Founders and the Classics*. "From John Jay to Peter Augustus Jay, 29 November 1791," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0186. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, p. 350.]

court of the United States for Rhode Island's District was opened at the Court House in This Town. On the following Monday, the Court, consisting of Chief Justice Jay," as well as Justice Cushing and a state judge by the name of Marchant, "proceeded to business." Beginning ceremonially, Jay gave a charge to the grand jury, and the author explained that it was "full of good sense and learning, though expressed in the most plain and familiar style." That charge seemed to be the focal point of the session, however, as little came of the courtroom business. "A number of actions were commenced in this court," the author wrote, "but they were either settled or continued, without a trial on the merits of any of them, either before the Court or Jury. And on Tuesday evening, the Court adjourned." The issues at hand, undescribed in this article, all were resolved through settlement or arbitration, so neither the grand jury nor the Justices needed to adjudicate any cases. The article concluded by praising the benefits of this new federal court system poetically: "At length have the mild beams of national justice began to irradiate this state, and opened a dawn of hope for better times."[45] Though Rhode Island had a serious Anti-Federalist culture and was the last of the thirteen states to ratify the Constitution, this citizen was quick to praise the federal government's new mechanism for involving itself in local judicial issues.

The Newport *Mercury* published a similar article a year later. This time, it seemed that the court had some serious business to handle. After several days of hearing cases and debating verdicts, "The grand jury returned to the court seven bills of indictment. Stephen Pettis and Caleb Church were charged with having forged and counterfeited, and offered for sale, the final settlement certificates of the United States." These alleged counterfeiters were "tried and acquitted," and so was Ichabod Darrow, a man charged with selling an "altered and forged Loan-Office certificate." To conclude, the author offered their own commentary on the Court's actions.

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[45] Providence *Gazette*, December 11, 1790, 3.

"In all their decisions," Jay and his fellow Justices "gave great satisfaction. Their candour and impartiality and discernment were universally acknowledged and applauded. Justice herself seemed to preside at the bench and inspire it. The scales were held in every instance with an even hand, and gave true weight and measure."[46] Going so far as to say the circuit court personified the virtue of justice, the author clearly approved of Jay's leadership in the judiciary, especially the "even hand" with which he "held the scales" of justice. While this piece was originally published in the Newport *Mercury* on June 25, 1791, it soon circulated throughout the country.[47]

These articles speak to two essential aspects of the circuit court system: its interesting caseload and its near universal popularity. Elizabeth Nuxoll writes that during Jay's rides on the Eastern Circuit, he heard:

> fifteen common law cases and one chancery case in New Hampshire; sixteen common law cases and three criminal cases in Massachusetts; one common law case in Vermont; eighty-eight common law cases, eleven chancery cases, and five criminal cases in Connecticut; forty-two common law cases and eight criminal cases in Rhode Island; and five common law cases, one criminal case, and one chancery case in New York.

As Nuxoll indicates, Jay generally heard three types of cases. Criminal cases involved the government's prosecution of someone formally charged with a crime, and these cases were often violent in nature. Common law cases and chancery cases more often involved disputes between citizens, corporations, or political bodies that could not be solved informally. These disputes were often over property, contracts, lands, and debt. In common law cases, Jay had the foundations of law to guide his decisions. In chancery cases, however, these principles did not cleanly apply, so

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[46] Newport *Mercury*, June 25, 1791, 3.

[47] Elizabeth Nuxoll traced this article to at least three other publications: the July 6 edition of Philadelphia's *General Advertiser*, the July 9 edition of Philadelphia's *Gazette of the United States*, and the July 14 edition of Worcester's *Massachusetts Spy*.

Jay had to rule on the more abstract principles of fairness and equity to ensure that the outcome was just for all parties involved.[48]

Nuxoll, Stahr, and other scholars have lamented that the source base surrounding pre-Marshall circuit court decisions is rather narrow. "The sparse and scattered nature of the documentary evidence presents difficulties for the study of Circuit court cases" during the Jay Court. In fact, Nuxoll explains, the "basis for the opinion rendered is not explained in the records, and can only occasionally be ascertained from newspaper coverage. The best-known cases are those that were appealed to the Supreme Court and those that involved judicial review of state or federal laws." Though Jay might have ruled on ten cases during a single session, his opinions would not have been widely circulated like if he were sitting in the Supreme Court. Instead, a summary of the events compiled at the discretion of local newspapers editors informed the public about the Circuit court's proceedings. Similar to Jay's diaries, the decisions of the Circuit courts and the brief newspaper articles that convey those decisions force historians to work backwards in discerning how the system operated.[49]

In April 1791, as he held court in New Haven, Jay heard a case that involved many contentious legal issues—the relationship between creditors and debtors, the enforcement of the Treaty of Paris, and the power of the new Circuit court system. As the executor of a deceased British merchant from Massachusetts, Samuel Elliot sued Comfort Sage "for the payment of a note for £255 lawful money of Connecticut given" to his deceased client "for merchandise purchased from him." Despite the challenges that these cases present historians, scholars have concluded that

[48] "Riding the Circuit: Editorial Note," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0132. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 214–233.]

[49] "Riding the Circuit: Editorial Note," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0132. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 214–233.]

the Court found in favor of Elliot. They "required full payment of principal and interest without any abatement for the period of the war, for a total of £527.17.0. lawful money of Connecticut, or $1,759.50, plus court costs amounting to £4.0.6 or $13.41." Though the rationale behind the opinion was not public, Jay's personal opinions on debt and his involvement in the Paris Peace Treaty negotiations can help us understand his decision-making process. Jay firmly believed that debtors were responsible for repaying debts. Nuxoll writes, "Prompt payment of debts and avoidance of incurring debts that one would be unable to repay were among Jay's strongest personal values, and as a trustee for various family estates he was often involved in the collection of debts, including in suits before the Circuit court." Likewise, a central issue in the Treaty of Paris was the settling of debts across sovereign nations. The former colonies and Britain were so deeply interconnected through various chains of debtors and creditors, and an absolute severance of those chains because of the war would be disastrous for American and British creditors alike. Jay was aware of the stakes of the case: if he ruled in favor of Sage, enforcing contracts between Americans and Britons would become increasingly difficult for the federal government to enforce. Moreover, given that the peace treaty required that such contracts stay in fact, Jay would be complicit in a breach of it by ruling in favor of Sage.[50]

Several days later, the Middlesex *Gazette* offered its interpretation of the court's decision. They believed that the question at hand was whether or not "obligations in favor of real British subjects, or those who had joined the armies of the King of Great Britain during the war, should draw interest during the time the creditors were inaccessible by reason of the war." Soon after the war ended, Connecticut established a law barring these loans from accruing interest. The *Gazette*

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[50] "Riding the Circuit: Editorial Note," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0132. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 214–233.]

explained that the Court struck down the law—perhaps the first instance of a federal court nullifying a state's law. "The statue law of Connecticut enabling the state courts to deduct interest in such cases," the author explained, "was an infringement of the treaty of peace, and that upon common law principles, interest was recoverable." Beyond that, the author did not offer any details about the case. Nevertheless, they seemed satisfied with the result, as they concluded, "The learned and ingenious arguments from the bench on this question were highly interesting and gave general satisfaction." Yet again, Jay impressed the public with his conduct on the bench.[51]

Below that summary, a satirical piece highlighted the implications of the decision. "Died last Thursday," began this political obituary, "much lamented by those who wish to defraud their creditors, an act or law of Connecticut entitled, 'An act relating to debts due to persons who have been and remained within the enemies' power or lines during the late war.'" The author clearly thought that the statute from Connecticut was wrong—the creditors, no matter if they were from Great Britain, deserved to receive payments on loans with the interest agreed upon initially. The author proceeded to criticize the political culture of his state: "This statue, though of a weakly habit, hath yield great service to the people of this state. It has been productive of at least 100,000 pounds in cash." Even though the law was poorly made and unjust, it still proved profitable for Connecticut residents; as the author indicated, they might have voided up to 100,000 pounds' worth of contracts using it. Jay and his associates, however, brought justice to the situation and satisfied the author. Describing how the act fell apart, the author explained:

> It received its death wound by the adoption of the new Constitution, and hath languished in extreme agony ever since. On Thursday the 28th, the two-edged sword of justice gave its last fatal stroke, and it expired without a groan. Numerous spectators beheld its corpse with a smile, and hoped that it might never rise again in this world to our shame, or the world to come to our confusion.

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[51] Middlesex *Gazette*, May 7, 1791, 2.

The new Constitution gave the federal government the power to enforce treaties, so with its passage, this 1784 law became susceptible to federal interference. Presenting Jay and his associates like knights slaying a beast, the author dubbed the court's decision the "two-edged sword of justice." For the author and many other Connecticut citizens, this decision was a satisfying one.[52]

The circuit court also wrestled with federal law, and the first known instance of that took place in 1792. That year, Congress passed the Invalid Pensions Act, which "required circuit courts to hear the claims of Revolutionary War veterans residing in their districts, to decide which of them should receive pensions, and to fix the proper amount of each veteran's pension." No records indicate that Jay heard any pension cases on his first trip around the circuit that year.[53] Nevertheless, once the Justices gathered together in April, they released a letter evaluating the validity of the act.

The letter began by establishing a basic truth about American government: it is "divided into three distinct and independent branches and that it is the duty of each to abstain from and to oppose encroachments on either." Based on that principle, the Justices believed that neither Congress nor the President "can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in a judicial manner." How, exactly, they defined judicial was unclear throughout the letter. Nevertheless, they concluded, "The duties assigned to the Circuit Courts by this act, are not of that description, and that the act itself does not appear to contemplate them as such." In other words, the Justices deemed this law unconstitutional insofar as Congress was asking them to act outside of their judicial capacity.[54]

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[52] Middlesex *Gazette*, May 7, 1791, 2.

[53] Stahr, *John Jay*, 290.

[54] The Justices did not use the term unconstitutional here. "Minutes of the Circuit Court for the District of New York, 5 April 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-

Yet in the fourth section of the letter, the Justices took a turn in tone. Though they did not consider the duty judicial nor the act constitutional, they did believe that the law allowed for them to execute its tasks in another fashion. “The business assigned to this Court by the act, is not judicial, nor directed to be performed in a judicial manner,” so “the act can only be considered as appointing commissioners for the purposes mentioned in it by official, instead of personal descriptions.” They argued that the law established new posts: commissioners designated specifically to hear these cases. The Justices then explained that they actually “regard themselves as being the Commissioners designated by the act, and therefore as being at liberty to accept or to decline that Office.” Though the constitutionality of the law was in question, they believed that the spirit with which it was written demanded its execution. “The objects of this act are exceedingly benevolent, and do real Honor to the humanity and justice of Congress,” they declared, “and as the Judges desire to manifest on all proper occasions, and in every proper manner their high respect for the national legislature, they will execute this act in the capacity of Commissioners.” Finally, in a confusing fashion, the Justices addressed the letter to George Washington in hopes that he would deliver it to Congress and thus the public. Jay and the Justices here straddled a fine line. On one hand, they believed that this act violated the Constitution given its construction. On the other, they believed that the pension applications should be processed through the circuit court, as it was the most far-reaching branch of the federal government.[55] The personal gave way to the political,

02-0207. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 384–387.]

[55] “Minutes of the Circuit Court for the District of New York, 5 April 1792,” Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0207. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 384–387.]

as the sympathies of Jay and the other Justices, combined with their vision of the judiciary as the branch of the government, led them to take on the duty irrespective of its additional burdens.

Jay and the Associate Justices proceeded to hear many pension cases while riding the circuit. In one report, Jay told the story of Yale Todd, a private injured while serving in the continental army. In 1775, Todd "was with the rest of [Second] Regiment ordered into Canada where by the hardships to which he was Exposed he Contracted a lameness which terminated in a fever sore or ulcerated leg." Seven years later, as Todd was serving as a "Matross in the Artillery Regiment of New York," he was deemed an "invalid" because of long-term complications from the 177 illness and thus "discharged by his Excellency the Commander in Chief." Jay observed that Todd's leg, at the time he appeared before Jay, was "still greatly affected thereby and to such a degree as almost entirely to disqualify and disable him from pursuing his Usual Employment and day labor." Jay, Cushing, and the district judge thus concluded that Todd "be placed on the Pension List that he ought to be paid at the rate of two third parts of his former Monthly Wages." Overall, Todd received a pension of eight dollars a month, as well as one hundred and fifty dollars to cover time that his pension was deemed invalid.[56]

While certainly burdensome on the Justices, the circuit court was almost universally popular among the public. Newspapers throughout the Eastern circuit praised Jay's ability as a fair-minded and knowledgeable jurist. In the early years of the Republic, as many were likely still skeptical of the Constitution, the circuit court offered citizens an opportunity to work with the federal government in their own communities. Further, through the circuit court, Jay was able to

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[56] "Minutes of the Circuit Court for the District of Connecticut, 3 May 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0214. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 398–399.]

review and overturn state and federal statutes. Perhaps most importantly, however, Jay was able to come closer to bringing "justice to every man's door." From the creditors and merchants affected by the Paris Peace Treaty to the veteran seeking compensation for his service in the war for independence, Jay and the Associate Justices met and served citizens from all walks of life in these traveling courts.

The Tolls of Travel: The Justices Conflict Over Their Circuit Duties

As the Justices adjudicated their way throughout the nation, they internally bickered about riding the circuit. They established initial rotations in the February 1790 session, but by the time they met again in August, only their second meeting ever, they began to disagree about their duties. Stahr explains that Jay quickly conflicted with James Iredell, who "argued in August that the circuits should be rotated among the justices so that the burden would be shared equally." Iredell missed the first meeting of the Supreme Court where they established the initial circuit assignments, and he was frustrated by the results. Nevertheless, the assignments—Jay and Cushing in the Eastern Circuit, Blair and Wilson in the Middle Circuit, and Iredell and Rutledge in the Southern Circuit—remained as they were. The Justices departed with no changes to their rotations. This small disagreement in the summer of 1790 was the first of many fights about the circuit rotations.[57]

Next February, soon after the Supreme Court met for another session, a letter from Iredell to the other Justices demonstrated his perspective on the situation. "I submit to you," he began, "that some more equitable rule in the allotment of Circuits so unequal in point of duty ought to take place, than that they should be forever fixed in the same manner in which they were for a temporary reason at first." As the last man to join the court, Iredell had gotten the worst assignment,

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[57] Stahr, *John Jay*, 278.

and he was deeply frustrated. "A fixed duty is not annexed to any of the Judges by the law," he observed, "Had I continued to live to the Southward, and constantly attended the Circuit, I must have travelled the same distance in a year, as my duty requires me to be twice in a year at the seat of Government." These Circuit court assignments were not fixed in law, he claimed; instead, the Justices had the liberty to assign circuits to themselves as they saw fit. The double duty of Southern circuit riding and holding court in New York meant that Iredell was almost always on the road, as he had to travel between the Southern Circuit, his home, and the Supreme Court in New York.[58]

Iredell then appealed to the physical burdens and dangers that came with all that travel. "I will venture to say no Judge can conscientiously undertake to ride the Southern Circuit constantly, and perform the other parts of his duty," he explained, "Besides the danger his health must be exposed to, it is not conceivable that accidents will not often happen to occasion a disappointment of attendance at the Courts." In undertaking a mission to execute the vision of the judiciary as laid out in the Judiciary Act of 1789 and the Constitution, Iredell argued that his own constitution, his health and wellness, had suffered from the burdens of travel. Writing about the challenges of being on the road like Jay often did, Iredell believed that sustaining such a nomadic lifestyle was unrealistic. A carriage accident, an illness, or weather could force a Justice to fall behind his strict schedule and throw the entire schedule into disorder. Likewise, trying to repeat the longest circuit year after year, although it would bring experience and wisdom in traveling, also would bring great strains to Iredell's health. "I rode upon the last Circuit 1900 miles: the distance from here and back again is 1800," he wrote. "Can any Man have a probable chance of going that distance twice a

[58] "James Iredell to John Jay and the Associate Justices, 11 February 1791," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0167. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 313–316.]

year, and attending at particular places punctually on particular days?" While Jay only traveled about five hundred miles for each Eastern Circuit trip, Iredell had done nearly four times that for each Southern Circuit ride. Moreover, while Jay already resided in New York, where the Supreme Court met, Iredell was from South Carolina. Rarely over the past year did he get to see his family.[59]

Iredell's desperation for a rotation, even a temporary one, also stemmed from a personal dilemma. "I now beg leave to state to you one, why I apprehend it would be peculiarly improper that I should for some time go the Southern Circuit," he explained. "A Writ of *Certiorari* issued from the Circuit court of North Carolina, by the direction of Mr. Wilson, Mr. Blair, and Mr. Rutledge, directed to the Judges of the Court of Equity in North Carolina, for bringing up a Cause in which (as an Executor) I am one of the Defendants." The other Justices had recently granted a writ of *certiorari*—a commitment to review a lower court's decision—to a civil case involving an estate that Iredell was the executor of. The conflict of interest became evidently clear here. Iredell concluded the letter with a passionate plea. He wrote:

> My situation is a very hard one. I had no reason to suppose any thing but a rotation would take place, and accordingly when I had the honour to be appointed one of the Judges of the Supreme Court I resolved to remove my Family to the seat of Government, in order that I might be enabled to perform the duty of my office more faithfully than I thought I could possibly do in so remote a situation.[60]

He had expected that a rotation would come, and he was devastated to learn the opposite. He even moved his family from South Carolina to New York in order that he could spend more time with them, but another 2,000-mile trip down south meant that move would be moot. Perhaps even more than Jay's correspondence, this letter illustrated the awful impact of riding the circuit on a Justice's life.

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[59] Iredell to Jay and the Associate Justices, February 11, 1791.

[60] Iredell to Jay and the Associate Justices, February 11, 1791.

Jay responded briefly and politely the next day. Recognizing the gravity of the situation, he assured Iredell, "I have not the least objection to re-examining the merits of the Question of Rotation. If the Decision on it at New York should on further Consideration appear to have been erroneous, it ought to be relinquished." Further, he explained that the burdens placed on Iredell were "doubtless great and unequal," but nevertheless, "an adequate Remedy can in my opinion be afforded only by legislative Provisions." It would be difficult to get any Justice to volunteer for the arduous Southern circuit willingly, so much so that Jay believed Congress would have to legislate the requirement into existence. Finally, Jay passed the responsibility of helping Iredell onto the other Justices: "Judge Cushing & myself have points of some Importance reserved, on which we expect to decide this Spring in the Eastern Circuit. Perhaps Judge Wilson & Judge Blair may be differently circumstanced— if so, I think it would be expedient for one of them to attend that court in your Stead." This polite yet cold and unhelpful response from Jay further illustrated how divisive this issue was. Only ten days before, Jay had written that letter to his sister-in-law in which he complained at length about how his duties took him away from his family. Now, as another Justice complained of the same problem, he chose not to assist him. Though no further correspondence on this matter exists between the two, it surely did not help their already tenuous relationship.[61]

Jay and Iredell met again at Supreme Court sessions throughout 1791, but their next correspondence that dealt with the issue of rotations came nearly a year later. Writing to Jay, Iredell expressed his frustration that no change had come of the incident from last year: "I did think the particular circumstances of my situation made it necessary, for the honour of the U.S., that at least

[61] "From John Jay to James Iredell, 12 February 1791," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0168. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 316–317.]

a temporary change should take place." Again referencing the conflict of interest involving the execution of a will, Iredell saw the issue as one of honor. Nevertheless, he made it clear that he had hoped some more serious change might come about. "I certainly however can no longer agree to be placed on the unequal and distressing journey upon which I have so long been," he wrote, "although I trust no other will be more zealous than I always shall be to discharge my duty so far as it is practicable." Practically threatening to remove himself from the court, Iredell nonetheless remained committed to fulfilling his responsibilities so long as they were "practicable." To that extent, he then commented on his hopes for future reform efforts. Iredell observed, "I see no prospect of any radical change, although I have some hopes Congress will amend the law in such a manner as to express the sense whether there will or will not be rotation." To this point, Congress had not taken any action on the issue. Nevertheless, Iredell remained optimistic. He concluded the letter with an interesting remark unrelated to the issue of circuit riding. He wrote, "I hope you will forgive my regretting the danger we are in of losing you for our Chief Justice, though it might by means of your appointment to another more agreeable to you personally."[62] Given the timing of this letter, Iredell was likely alluding to Jay's involvement in the ongoing race to be the Governor of New York. While Jay did not campaign at all, he was the most prominent and powerful Federalist from the state and thus the natural candidate.[63] Iredell interestingly noted that Jay might find the governorship "more agreeable" to him personally. Perhaps Jay had made his dissatisfaction clear to the Justices in their meetings, or perhaps Iredell was projecting his own

[62] Iredell to Jay, February 16, 1792. apt://columbia.edu/columbia.jay/data/jjbw/03976/03976001.tif

[63] Though certainly out of the scope of riding the circuit, the 1792 campaign for governor was an important point in Jay's tenure on SCOTUS, and it will thus be considered in the conclusion.

distaste for the job onto Jay. In either case, the comment signaled clear frustration on the part of some Justices.

Jay responded to Iredell about a month later, again deflecting the issue to Congress. He began: "The Difficulties attending that Subject can in my opinion be removed by Congress only." Yet he soon sympathized with Iredell, claiming that the objections against the system were "insuperable." He articulated that Congress had fallen short in his eyes, as he "had flattered myself that the System would have been revised during the present Session. The Expediency of a Revision appears to be generally acknowledged." At this point, all of the Justices agreed that reform was needed, but they seemed to disagree about the exact nature of the reform. In order to settle things fairly, Congress had to act. Thus far, they failed to do so. Nevertheless, Jay concluded, "Whatever may be the Circumstances which cause the Delays of Congress relative to it, I regret them." The tone of these letters, several months after their earlier and terser exchanges, demonstrated a growing amicability between Iredell and Jay. [64]

In March of 1792, Congress finally took action by passing the Judiciary Act of 1792. Above all else, the act put into practice the reform that Iredell had been trying to achieve for almost two years. Section Three established, "No judge, unless by his own consent, shall have assigned to him any circuit which he hath already attended, until the same hath been afterwards attended by every other of the said judge."[65] No longer could Jay establish the arrangements singularly. Instead, the duties of riding the circuit would be doled out equally—Iredell would not have to bear the burden

[64] "From John Jay to James Iredell, 3 March 1792," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0195. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 363–364.]

[65] *An act for altering the times of holding the Circuit Courts, in certain districts of the United States, and for other purposes*. 2nd Congress, Session One. Annals of Congress, Chapter 21, 1792. https://www.loc.gov/law/help/statutes-at-large/2nd-congress/session-1/c2s1ch21.pdf

of the Southern Circuit twice a year, and Jay would no longer be able to ride only the Eastern Circuit.[66]

Yet this reform seemed to placate only Iredell, and not even him for much longer. Only five months later, in August of 1792, the Justices gathered together to pen the letter they sent to Washington and Congress. They found the circuit court system to be problematic on both constitutional and logistical levels—constitutionally, it created conflicts of interest as the same me reviewed cases on the circuit court and the Supreme Court, and logistically, the travel burden placed on the Justices was excessive. After explaining their problems, they concluded with an "earnest request [to Congress] that it may meet with early attention, and that the System may be so modified as that they may be relieved [sic.] from their present painful and improper situation." To Washington, they likewise remarked, "We really, Sir, find the burthens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms." The Justices' frustration practically dripped off the page.

Further adjustments to the structure of the courts came the next year. The Judiciary Act of 1793 expanded the circuit's flexibility by reducing the number of Supreme Court Justices necessary for a quorum. "The attendance of only one of the Justices of the supreme court at the several circuit courts of the United States," Section 1 established, "shall be sufficient." Moreover, in certain circumstances, a Supreme Court Justice could hold the court without even the district judge. Reducing the quorum to two judges, however, meant that there needed to be a new rule for a split court. Congress decided that if that were to occur, there would be another trial that occurred, and if at the second trial, the same outcome occurred, "judgement shall be rendered in conformity to the opinion of the presiding" Supreme Court justice. Finally, the act gave Justices new powers

[66] Jay only ended up riding the Middle Circuit once before Washington sent him abroad to negotiate with Great Britain.

in holding special sessions for criminal cases.[67] The act included other smaller procedural adjustments, but these three parts were the most significant. It certainly granted the Justices much-needed flexibility in their routes. For example, if one of the Justices had gotten sick and could not travel, the other Justice riding the circuit alongside him could carry on and hold court anyway.[68]

After that act, the Justices no longer debated the issue through correspondence. It is unclear whether this piece of legislation satisfied the Justices or made them accept that no further change was coming or even worth entertaining. Jay continued to ride the circuit for the remainder of his time on the Court, and he rarely lamented about the duty afterwards. Historians and legal scholars have already noted the tangible impact of these trips on the Justices, especially James Iredell and William Cushing. Steven Calabresi, a constitutional law professor, characterized the trips as "onerous" and even "dangerous." Further, he argued that Iredell died in 1799 "at the youthful age of forty-eight, in part because of the rigors of circuit riding in the southern circuit, where roads and accommodations were still quite scarce."[69] Iredell served on the Supreme Court for nine years, and in riding the Southern Circuit so many times, he traveled over 15,000 miles to fulfill the Circuit court duties alone. Historian Herbert Alan Johnson painted a similarly grim picture of the end of Justice William Cushing's life. "As [Cushing] aged," Johnson observed, "The circuit duties began to take their toll on his health, and he considered retirement as a possibility. This was complicated by the fact that he had been on the Bench for so long that he had no private fortune and was

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[67] *An Act in addition to the Act entitled "An Act to establish the Judicial Courts of the United States."* Second Congress, Session Two. Annals of Congress, Chapter 21, 1793. https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/1/STATUTE-1-Pg333a.pdf

[68] Indeed, for Jay, that clause must have been welcome—in an earlier session of the circuit court, he rode alongside William Cushing. Cushing became ill in Rhode Island and could not carry on to New Hampshire. Although Jay tried to hold court himself, he lacked the jurisdiction to do so, and as Stahr observes, he was "no doubt annoyed." (282)

[69] Steven G. Calabresi and David C. Presser, "Reintroducing Circuit Riding,: A Timely Proposal," in *Minnesota Law Review* (2006, Vol. 90), 1391. https://scholarship.law.umn.edu/mlr/33

dependent upon his salary as a judge to maintain himself in the necessities of his." In 1810, Cushing faced "the impossible choice of an impecunious retirement or death from riding the circuit." He chose the latter, dying in the first stages of his journey in Scituate, Massachusetts.[70] These grim outcomes demonstrate that the Justices were not complaining just for the sake of doing so. Year after year, these journeys wore down their bodies, minds, and spirits.

Of course, the physical nature of circuit-riding and the brutality it imposed on the Justices cannot be overstated. Yet its legacy in the formation of the Supreme Court as an institution is more complex. As newspaper coverage indicated, the Justices were well-received everywhere they went. The Justices heard cases of all sorts—from stories of murder and treason to accounts of fraud and bankruptcy. These cases offered the Justices excellent opportunities to build on the Court's power, and they took advantage of that—especially in the instances of *Elliot v. Sage* and the Invalid Pensions Act. Perhaps most simply, the circuit court helped reinforce the idea that the United States were now united under a single tradition of law. While thirteen states each had their own codes of law, the circuit courts were a reminder that the federal government and a national common law connected these political bodies. Especially when manned by Supreme Court Justices, as in the era of Jay, these courts brought together the federal and the local to create new trust in the American project. Indeed, as one Rhode Island newspaper observed in 1790, the circuit courts brought about a new sense of "national justice." For the average American citizen, perhaps unsure of what a new United States meant, these opportunities to interact with the federal government, and more importantly, be heard by it through the courts "opened a dawn of hope for better times."[71]

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[70] Herbert Alan Johnson, "William Cushing," in *Justices*, ed. by Friedman and Israel, 57.

[71] Newport *Mercury*, June 25, 1791, 3.

CHAPTER THREE: DUELING FEDERALISMS: *CHISHOLM v. GEORGIA*, THE ELEVENTH AMENDMENT, AND THE DECLINE OF THE JAY COURT

Twelve years before John Jay was selected as Chief Justice of the Supreme Court, he found himself more responsible for establishing the law than interpreting it. Amidst the political turmoil of the American Revolution in the late 1770s, he served in a number of important roles at the state level. In 1777, he was selected as the Chief Justice of the Supreme Court of New York. As he adjudicated civil and criminal cases, he simultaneously battled over the new constitution of the state of New York, dueling with the likes of Gouvernor Morris, George Clinton, and Robert Livingston. He even sat on a special "Council of Safety" with the governor to manage the local war effort. Yet as Jay tried to win independence for the young nation, events were unfolding in Savannah, Georgia—nearly eight-hundred miles to the south, a world away from the courtrooms of Albany and New York City—that would contribute to the eventual failure of his national vision and the decline of his court's power.[1]

[1] Stahr, *John Jay*, 74-78.

On October 31, 1777, the state of Georgia purchased nearly $170,000 worth of goods from Robert Farquhar, a merchant from South Carolina. Desperate to sustain the Southern campaign, Georgia's government ordered a significant amount of "cloth, thread, silk, handkerchiefs, blankets, coats, and jackets" for revolutionary troops stationed nearby. Georgia officials Thomas Stone and Edward Davies promised Farquhar payment on December 1, provided that he delivered the supplies by then. Merchant records indicate that he did so on November 3. Doyle Mathis, a historian particularly concerned with reconstructing the often-contested details of this case, explains that Stone and Davies never followed through on their end of the deal. "On December 2 Farquhar requested payment, as he was to do several times thereafter, but he was refused," Mathis writes, "A committee of the Georgia house of representatives in 1789 reported that Georgia had paid Stone and Davies the necessary sum in continental loan office certificates for the specific purpose of satisfying Farquhar. However, from all evidence obtained, Farquhar received no part of the funds." Georgia had failed to fulfill its obligation to Farquhar, despite the legal obligation they had to him.[2]

The fight for Farquhar's money extended far beyond his lifetime. In 1784, he fell overboard a ship and drowned "when he was hit by the boom of a pilot boat coming into Savannah." A wealthy merchant, he left an extensive will that gave his ten-year-old daughter control of his estate. "The executors of Farquhar's estate named in his will," Mathis explains, "were his father, John Farquhar, Peter Dean, a merchant of Savannah, and Alexander Chisholm, a merchant of Charleston." These three men, all personally vested in recouping Farquhar's funds, fought tooth and nail to recover the money Georgia owed him. They first unsuccessfully petitioned the state

[2] Doyle Mathis, "*Chisholm v. Georgia*: Background and Settlement," *The Journal of American History* 54, no. 1 (1967): 21.

legislature to act. Passing the responsibility onto Stone and Davies, the legislature urged the executors to sue them directly.[3]

Taking primary responsibility as the executor, Alexander Chisholm instead brought his case before the United States Circuit Court in October 1791. As the court date approached, one Augusta newspaper wrote about the importance of the case:

> This case being without precedent and the Judiciary of the United States not pointing out any mode of serving a process upon any of the states—and also the Judiciary Act of this state, expressly requiring that a bill or petition be filed in the Superior Court of the County in which the seat of government may be, by any plaintiff against the state, render it necessary that a local opinion be had in the premises without delay.[4]

According to the author, neither federal nor local statutes explicitly allowed citizens to sue states that were not their own. Instead, he thought the case should be settled locally. Nevertheless, in making its way to the Circuit Court, the case now involved the federal government. As Mathis explains, Justice James Iredell and Judge Nathaniel Pendleton presided over the case, and they both ruled that Chisholm did not have the right to sue Georgia to recoup these funds. Unsatisfied with the response, Chisholm decided to appeal to the only higher power that remained: the Supreme Court.[5]

This chapter explores the Justices' opinions on *Chisholm v. Georgia*, the most significant case that Jay and the Associate Justices heard under his leadership. While the question at hand appeared to be a simple one—whether or not a citizen of one state can sue another state—the ruling mattered for several reasons. The first significant constitutional interpretations to come out of the Supreme Court, Jay and Iredell's opinions presented two competing understandings of federalism.

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[3] Mathis, "*Chisholm v. Georgia*," 21-22.

[4] Augusta *Chronicle*, July 21, 1791, quoted in Mathis, "*Chisholm v. Georgia*," 22-23.

[5] Mathis, "*Chisholm v. Georgia*," 22-24.

Ever concerned with national union, Jay's opinion outlined a vision of government that more so resembled nationalism than the federalism we typically associate with his era. Conversely, Iredell articulated an understanding of federalism grounded in states' rights, placing the federal government absolutely subservient to the states.[6] Though the other judges ruled with Jay and his nationalist opinion won out in this case, Iredell's understanding of federalism soon became the dominant school of thought throughout the nation. Congress soon moved to pass the Eleventh Amendment as a repudiation of Jay's ruling; its reaction demonstrated another failure of Jay to execute his robust nationalist vision, further contributing to his frustration and eventual departure from the Court.

The Attorney General and the Empty Chair: Edmund Randolph's Opening Arguments

The Chisholm case first appeared on the Supreme Court's minutes in the summer of 1792. Representing Alexander Chisholm, Attorney General Edmund Randolph had previously submitted a request stating, "Any person having authority to appear for the State of Georgia in the suit brought in this court by Alexander Chisholm citizen of South Carolina and Executor of Robert Farquhar of the same State, deceased, against the said State of Georgia, is required to come forth and appear accordingly." Since the Circuit Court had ruled a year prior that Chisholm had no right to sue Georgia, no one from Georgia responded to that request. On August 11, Randolph submitted another motion: "Unless the said State of Georgia shall after reasonable previous notice of this motion cause an appearance to be entered in behalf of the said State, on the fourth day of next term, or shall then shew cause to the contrary, judgment shall be enter'd against the said State and

[6] For more information on nationalism in the early Republic, see David Waldstreicher's *In the Midst of Perpetual Fetes*, and for a more extended discussion of federalism, see Elkins and McKittrick's *The Age of Federalism.*

a writ of enquiry of damages shall be awarded." Randolph demanded that Georgia attend those court proceedings, and if they did not, a "writ of enquiry of damages" would be issued by the federal government. In other words, Randolph viewed Georgia's absence as forfeiting the case and immediately ruling in favor of Chisholm. The court, sensitive to the serious demands of Randolph's motion, instead postponed their decision until the following February term.[7]

Seven months passed, and the Supreme Court again came into session. Yet again, Randolph sat patiently waiting for the defense to arrive. It never did, and so, as the minutes explain, "The Court proceeded to hear the Attorney General in support of his motion in this cause but considering that no appearance had been entered on the part of the State of Georgia." Randolph rose to begin his arguments.[8]

Randolph first identified the two central issues at the heart of the case: whether or not Chisholm had the right to sue Georgia, and if he had the right, how that right should be enforced if the state fails to comply. Concerning the first question, he turned to Article III, Section Two of the Constitution and the Judiciary Act of 1789. Outlining the scope of the Supreme Court's powers as defined by those documents, Randolph explained that two principles become clear. The first principle, he claimed, was that the Constitution "vests a jurisdiction in the Supreme Court over the State as a defendant at the suit of a private citizen of another State." The second, similarly, was that the Judicial Act of 1789 "recognizes that jurisdiction." He urged the Justices to "consult the letter of the Constitution, or rather the influential words of the clause in question." Because the

[7] "Minutes of the Supreme Court, [6–11 August 1792]," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0237. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 440–444.]

[8] "Minutes of the Supreme Court, [4–20 February 1793]," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0249. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 457–466.]

Constitution established that the Supreme Court had the power to hear cases "between a State and citizens of another state," Randolph argued that citizens thus had the right to sue states.[9]

Randolph anticipated that Georgia might make a legalistic argument framed around the phrasing of the Constitution. They might have argued that because the ordering of the Constitution's words, "between a State and citizens of another state," meant that only the state could serve as a plaintiff.[10] To that point, Randolph responded, "Human genius might be challenged to restrict these words to a plaintiff state alone." In other aspects of that same clause, like conflicts between foreign nations and individual citizens, the word "between" did not restrict the plaintiffs to solely foreign nations. Further, "In common language," Randolph explained, "it would not violate the substantial idea if a controversy, said to be between A.B. and C.D. should appear to be between C. D. and A.B." Randolph argued that as a preposition and a legal term, "between" held no connotations of directionality. Both precedent and common sense seemed to support his interpretation of the clause.[11]

Beyond these grammatical interpretations, Randolph argued that if a citizen could not sue a state, the state's power seriously threatened the rights of individual citizens. "States may injure individuals in their property, their liberty, and their lives; may oppress sister States; and may act in derogation of the general sovereignty," he explained, "Government itself would be useless if a

[9] Edmund Randolph, opening argument in *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

[10] A brief explanation of legal terms is helpful to understand Georgia's argument: in a case, the plaintiff is the one who initiates the case, and the defendant is the one being accused of wrongdoing. When we read court cases, the plaintiff always comes first. In this case, *Chisholm v. Georgia*, Chisholm, the citizen, was the plaintiff, and he sued the state of Georgia, the defendant, for wrongdoing. Georgia, in refusing to acknowledge that this trial was even valid, argued that because the Constitution reads, "controversies between a state and citizens of another state," that the Court could only hear cases between states and individuals where the state was the plaintiff, based on the order of words in the original phrase of the Constitution. Jay does not accept that line of argument.

[11] Randolph, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

pleasure to obey or transgress with impunity should be substituted in the place of a function to its law." Randolph saw law, and particularly the litigation process, as a central mechanism for preventing tyranny. If states became immune to litigation through a ruling in favor of Georgia, then their power might become almost unlimited. It would certainly, he believed, damage the balance of power between the states and the federal government. Randolph outlined some of the potential ramifications in a dramatic crescendo towards his conclusion:

> What is to be done, if in consequence of a bill of attainder, or an ex post facto law, the estate of a citizen shall be confiscated, and deposited in the treasury of a state? What if a state should adulterate or coin money below the Congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What if a state should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected without a suit against the State.[12]

Here, Randolph illustrated the point he explained abstractly towards the beginning of his speech. He particularly emphasized the potential for financial tyranny, using the image of the state seizing the estate of a citizen unfairly. Though he made no direct reference to the plight of Robert Farquhar here, nor anywhere throughout this speech, he alluded to it in this important passage. Further, Randolph demonstrated how unchecked state power could have a serious impact on the country's finances. A state might be able to print money excessively and pay off debt to individuals unjustly, without any regulation from the federal government or potential checks from affected citizens. Without any sort of restraint, a state might make contracts with citizens from other states—like Farquhar—and fail to fulfill them.[13]

Randolph proceeded to reflect on the concept of state sovereignty. He did not deny that the states were sovereign entities; in fact, he emphasized it several times throughout his oral argument. Instead, he insisted that states must recognize where their power comes from: the people. "The

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[12] Randolph, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

[13] Randolph, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

people individually are, under certain imitations, subject to the legislative, executive, and judicial authorities thereby established," he explained, "The States are in fact assemblages of these individuals who are liable to process." As assemblages, or bodies composed of their many parts, states, too, were subject to the processes of the three branches of the federal government. Randolph then articulated the importance of balancing competing spheres of government historically. Referencing ancient Greece, the Helvetic Union, and the Germanic Empire, he argued that states and their larger unions needed to remain accountable to each other in order to remain stable and functioning. Otherwise, the idea of a federal government as it now stood served no purpose. Yet this accountability, he made clear, was not a bad thing. "I hold it," he claimed, "to be no degradation of sovereignty in the States to submit to the Supreme Judiciary of the United States." Rather than a degradation of state power, it was a necessity for the function of ordinary governance, derived from both the nation's foundational legal documents and a proper understanding of sovereignty within nations.[14]

Randolph then tended to the final issue at hand: enforcement of court rulings. He first expressed what he thought of any state refusing to submit to the Supreme Court. "That any state that should refuse to conform to a solemn determination of the Supreme Court of the Union," he lamented, "is impossible, until she shall abandon her love of peace, fidelity to compact, and character." Yet if the court ruled in favor of Randolph and Chisholm and Georgia still refused to appear, Randolph contended that the federal government needed to intervene and display its power over the irascible state. Recognizing that such a strong understanding of the federal government may not have been palatable to everyone on the court, however, Randolph worked to assuage any fears of centralized tyranny. "The prostration of states-rights is no object with me," Randolph

[14] Randolph, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

concluded, "but I remain in perfect confidence, that with the power which the people and the legislatures of the States indirectly hold over almost every movement of the national government, the States need not fear an assault from bold ambition, or any approaches of covered stratagem." Randolph certainly did not want the states to be subservient to the federal government—they did not need to fear "an assault from bold ambition" or secretive, devious plots to usurp their individual power.[15]

After Randolph concluded his arguments, the Court reportedly came to a temporary impasse. No one from Georgia had come to make an argument on behalf of the state, but the Justices considered this a "highly important" suit. They made a special offer: "If any are disposed to offer their sentiments on the subject now under Consideration the Court are willing to hear them." Since no formal counsel had come forward on behalf of Georgia, the Justices offered any lawyer in attendance the chance to make an argument on behalf of the state.[16] As Stahr tersely notes, however, "Apparently none did."[17] Instead, court adjourned for the day, and the Justices returned to their chambers to begin thinking about how to respond to this peculiar case.

Two Ways Forward: Iredell and Jay's Conflicting Federalisms

On February 18, after two weeks of anticipation, the Justices delivered their opinions on the issue. While today, the Court rules as one body and releases only majority and dissenting opinions, Jay established that the Justices would all read their own opinions *seriatim*, or in order

[15] Randolph, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

[16] "Minutes of the Supreme Court, [4–20 February 1793]," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0249. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 457–466.]

[17] Stahr, *John Jay,* 294.

of rank.[18] The courtroom was brimming with anticipation as its members waited to hear the decision.

The Justice who initially ruled against Chisholm more than a year before, James Iredell, rose.[19] As the most recent Justice to join the Supreme Court, he was considered the most junior, and he thus had to read his opinion first. Iredell began by restating the question at hand: “What controversy of a civil nature can be maintained against a State by an individual?” He proceeded to argue that the Framers had two ideas in mind regarding constitutional interpretation: either the Supreme Court should “refer to antecedent laws for the construction of the general words they use” in order to find the answer or Congress should pass all laws “necessary and proper to carry the purposes of this Constitution into full effect” and offer the Supreme Court a clarified position in law. But Attorney General Randolph, Iredell claimed, interpreted the Constitution differently, even dangerously. In Iredell’s estimation, Randolph argued, “The moment a Supreme Court is formed, it is to exercise all the judicial power vested in it by the Constitution, by its own authority, whether the Legislature has prescribed methods of doing so, or not.” For Iredell, Randolph had presented a dangerously powerful vision of the Court: a body that acts with its own authority and interprets the laws as its members see fit, not as Congress has legislated them. The Supreme Court itself could decide what civil controversies “can be maintained against a State by an individual.”[20]

[18] On this tradition, Stahr writes, “The court followed the English common law practice, in which each justice would consider and write up his own opinion, which were read out in order, from junior to most senior. This arguably reflected a failure of imagination of Jay’s part, a failure to consider whether a more collegial system would strengthen the court” (294). Indeed, it is interesting that a man so interested with national union failed to recognize a good opportunity for union within his own institution by changing the way in which the Court released decisions.

[19] It is interesting to note that this case exemplifies the sort of conflict discussed at the beginning of Chapter Two. Iredell ruled on this case in the Circuit Court, and now, he ruled on it again in the Supreme Court. His opinion did not change significantly at all—the substantial difference was his addressing of Randolph’s arguments, as seen throughout the opinion.

[20] James Iredell, dissent in *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

Iredell quickly distanced himself from that conception of the Constitution. "All the Courts of the United States," he explained, "must receive, not merely their organization as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only." In other words, he believed Congress should write the law and the Supreme Court should interpret it very narrowly. Rarely was there room for extrapolation from the Supreme Court. Congress, however, had broad powers to create laws, most clearly established in the "Necessary and Proper Clause." Yet Congress had not passed any laws specifically establishing that a citizen can sue a state. There were sections of Article III, Section 2 of the Constitution that Iredell believed were tangentially related, but based on the construction of their language, they were not applicable in this case. Likewise, the Judiciary Act of 1789 was relevant and necessary to consider, but none of the provisions were written with such clarity that the Supreme Court could take on *Chisholm v. Georgia* without overstepping its boundaries. With no federal legislation to draw from, Iredell suggested that states' laws and the common law were the only other sources of instruction the Court could draw from. After briefly surveying state laws, Iredell argued:

> I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed. Since that time an act of Assembly for such a purpose has been passed in Georgia. But that surely could have no influence in the construction of an act of the Legislature of the United States passed before.

When both the Constitution was ratified and the Judiciary Act was passed, neither Georgia nor South Carolina had any standing legislation that authorized the Supreme Court to hear a claim for "the recovery of money against a State." Georgia, afterwards, passed such a law regarding their state courts, but since that law was not in place as the Constitution and Judiciary Act were written,

Iredell believed it was unreasonable to assume that the authors of these documents intended to imbed that claim of compulsory suits within them.[21]

Iredell then turned to common law, which he quickly connected to the concept of state sovereignty. He first drew from the Tenth Amendment. "Every State in the Union in every instance where its sovereignty has not been delegated to the United States," he wrote, "I consider to be as completely sovereign, as the United States are in respect to the powers surrendered." The Constitution only allowed the branches of the federal government to act within the constraints explicitly established in the document. In cases where lines blurred and spheres of influence collided, Iredell believed that the states often had the power to claim sovereignty over the federal government. Likewise, he explained, "The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved." Turning back towards the Judiciary Act, which Iredell considered the "limit of our authority," he claimed that the Supreme Court "can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper State Court would have been at least competent to exercise at the time the act was passed." No such authority existed when any of the relevant pieces of federal legislation were passed, and so the Supreme Court had no standing and no authority to act on Chisholm's behalf.[22]

To summarize his argument, Iredell reiterated three points. First, he explained, "The Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding." The legislature held power over the courts, and by passing legislation, it clearly delineated where they could act.

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[21] Iredell, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

[22] Iredell, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

The court, in turn, had no power to act in circumstances not clearly established. Second, he claimed, “Congress has provided no new law in regard to this case, but expressly referred us to the old.” Since there were no more recent laws to help guide the Court in acting, the Justices needed to turn to precedent. In doing so, Iredell concluded, “There are no principles of the old law, to which, we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy.” His examination of state statues and English common law demonstrated no clear legal pathway for federal judicial intervention.[23]

Finally, Iredell concluded that the Supreme Court did not have the authority to hear the case at all. Taken to be true, the three above principles meant that “the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with.” Instead, “a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case.” If Chisholm wanted to be satisfied, Iredell believed he should turn to the legislature, rather than the courts, in order to force the state to comply with the contract. “My present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money, he explained, “Nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorise the deduction of so high a power.” Neither the language of the Constitution nor the spirit with which it was written supported Chisholm’s claim. With that remark, Iredell again took his seat.[24]

Justices Blair, Cushing, and Wilson next delivered their opinions. Each ruled in favor of Chisholm, declaring that a citizen had the right to sue another state in court. Finally, Jay stood to

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[23] Iredell, *Chisholm v. Georgia*. 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

[24] Iredell, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440.

read his opinion. Like the other Justices, he began by reiterating the question at hand: "Is a State suable by individual citizens of another State?" Acknowledging the strange situation that Georgia created in its courtroom absence, he explained, "Georgia refuses to appear and answer to the Plaintiff in this action, because she [contends she] is a *sovereign* state, and therefore not *liable* to such actions." He then began considering three issues at hand that would help determine if Chisholm had a right to sue Georgia.[25]

First, Jay considered "in what sense Georgia was a sovereign state." He turned back to colonial times, explaining that before the Constitution, all people in the colonies were subjects of King George. Power "flowed" from the King, and he had the authority to act as he pleased upon his subjects. But as the people of the American colonies came together in Revolution, Jay explained, "thirteen sovereignties" emerged under a "confederation of the states, the basis of a general government. Experience disappointed the expectations that had formed from it, and the people, in their collective and national capacity, established the present Constitution." In doing so, Jay believed, "the people exercised their own rights, and their own proper sovereignty." This act of establishing their own sovereignty over the whole country with a national constitution, he explained, was essential in establishing a precedent that "the state governments should be bound" to the Constitution. Jay then argued that the "sovereignty of the nation is in the people of the nation, and the residuary sovereignty of the state in the people of each state." Comparing this system of circumscribed sovereignties to the feudal systems of Europe, Jay explained that Americans "are sovereigns without subjects" and "have none to govern but themselves—the citizens of America are as equal as fellow citizens" and as "joint tenants in the sovereignty." Finally, he articulated a

[25] "John Jay's Opinion, *Chisolm v. Georgia*, [18 February 1793]," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0251. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 466–477.]

definition of sovereignty to utilize for the rest of the opinion: "Sovereignty is the right to govern; a nation or state-sovereign is the person or persons in whom that resides." To return to the initial question, Jay determined that Georgia was a sovereign state insofar as it was governed by the citizens who reside in it; nevertheless, it was legally obligated to uphold the laws and principles established by the Constitution. [26]

Second, Jay reflected on "whether suability is incompatible with such sovereignty." In other words, Jay wanted to know whether sovereign states could be sued by different political entities. He first articulated various legal relationships that were commonly agreed upon. "One free citizen may sue another," he wrote, and "one free citizen may sue forty thousand; for where a corporation is sued, all the members of it are *actually*, though not *personally*, sued." Citizens can sue corporations, like cities that have forty-thousand people, and thus it makes sense that a citizen can sue a state of fifty thousand. But, as Jay explained, that common-sensical reasoning alone is not sufficient to prove that a citizen can sue a state. He turned next to the relationship between states. "Any one state in the union may sue another state" in the Supreme Court, he explained, and using his definition of sovereignty, he argued that when one state sues another, it really means that "all the people of one state may sue all the people of another state." Sovereignty as a political body did not grant immunity from being sued, he believed, and he thus concluded that "suability and state sovereignty are not incompatible." Further, he explained:

> Why it should be more incompatible that all the people of a state should be sued by one citizen rather than by one hundred thousand, I cannot perceive—the process in both cases being alike—the judgements alike—and the consequences of the judgements alike. Nor can I observe any greater inconveniences in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light.

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[26] Jay, *Chisholm v. Georgia*.

If states, as sovereign political entities composed of citizens, can sue each other, then a citizen, a part of a sovereign state, should have the right to sue another state. The numerical size between the individual and the state, Jay believed, were just that: numerical. Appearances of inconvenience—such as the idea that a man, in suing a state, burdens the entire population of that state—should not interfere with justice, and based on this logic, Jay contended that a citizen could sue a state as a sovereign body.[27]

But logic alone could not suffice in establishing this as legal precedent. Turning to the law of the land, Jay lastly considered "whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another state." Before the Constitution had been established, Jay explained, there was no "national tribunal to which [the people] could resort for justice." The new Constitution provided that, and the federal judiciary was particularly responsible for delivering the six objects listed in the preamble to the Constitution: forming a "more perfect union," establishing justice, ensuring "domestic tranquility," providing for the "common defense," promoting the "general welfare," and securing "the blessing of liberty."[28] Of course, given the role of the courts in the new federal government, establishing justice was its most relevant duty. Jay asked, "What is the precise sense and latitude which the words, 'to establish justice,' as here used, are to be understood?" He found his answer in Article III, Section 2, where the Constitution described ten types of cases that the courts should consider. Most relevant was the eighth type of case: "controversies between a state and citizens of another state."[29] Jay

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[27] Jay, *Chisholm v. Georgia*.

[28] It is noteworthy that Jay drew from the preamble to the Constitution in writing this opinion. Rarely in the history of Constitutional law is it referenced at all or reflected on seriously by Justices.

[29] The other nine types of cases Jay listed were: "all cases arising under this Constitution," "all cases arising under the laws of the United States," "all cases arising under treaties made by their authority," "all cases affecting ambassadors, or other public ministers and consuls," "all cases of admiralty and maritime jurisdiction," "all controversies to which the United States shall be a party, "controversies between two or more states," "controversies

explained that Georgia contended, “this [phrase] ought to be constructed to reach none of these controversies excepting those in which a State may be plaintiff.” In other words, Georgia attempted to read the Constitution incredibly strictly: because the original phrase in the Constitution lists the state first in the type of controversy, Georgia argued that the Constitution can only apply to those cases in which the State is the plaintiff.

Jay did not accept that argument. Since “the extension of power is remedial, because it is to settle controversies,” he explained, “it is therefore to be construed liberally. It is politic, wise, and good that, not only the controversies in which a state is plaintiff, but also those in which a state is defendant, should be settled.” The argument that Georgia provided was semantical and against not only the “spirit, but the very words of the Constitution,” Jay believed, and he pointed to other examples throughout American government as evidence. A later clause in Article III, Section 2, established that the Supreme Court has jurisdiction “in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”[30] Nowhere, Jay wrote, did the word party singularly refer to the plaintiff, and it could have easily been written to mean so if that were true. Likewise, the Judiciary Act often referred to the State as a party, and the act did not “impliedly or explicitly apply that term to either of the litigants in particularly.” At this point, Jay’s opinion became abundantly clear: he believed that an individual did have the constitutional right to sue a state.[31]

between citizens of the same state,” and “controversies between a state or the citizens thereof and foreign states.” The distinction between case and controversy, though not explicitly mentioned in Jay’s address, is an important one in the fields of legal theory and jurisprudence. More information here: https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/the-two-classes-of-cases-and-controversies.

[30] Article III, Section 2.

[31] Jay, *Chisholm v. Georgia*.

Before stating that explicitly, however, Jay meditated on the stakes of the case and, more broadly, the value of the judiciary in ensuring that every citizen has an opportunity to pursue justice. "I have made no references to cases," he explained, "because I know of none that are not distinguishable from this case; nor does it appear to me necessary to shew that the sentiments of the best writers on government and on the rights of man harmonize with the principles that direct my judgement." He characterized his own interpretation of the essential phrase from Article III, Section 2 as both "honest" and "useful." The honesty in his interpretation, he believed, was quite clear; this interpretation "provides for doing justice without respect of persons, and by securing individual citizens and states in their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection." The utility of his opinion, however, was far more significant. Jay believed that the Constitution "leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring state." Likewise, the Constitution "rests on this great moral truth, that justice is the same whether due from one man to a million or from a million man to won." Finally, it reaffirmed that the people, not the states, "are the sovereign of this country."[32] This bold vision of federalism, which emphasized the relationship not between states, but rather between citizens and the federal government, flew in the face of Iredell's conception of federalism and the most popular notions of it throughout the nation at the time.

In the final paragraph of the opinion, Jay finally established that a "state is suable by citizens of another state." Yet he immediately qualified that statement by limiting the scope of the power. "Such suability may nevertheless not extend to all the demands, and to every kind of action, he explained. "There may be exceptions—for instance—I am far from being prepared to say that

[32] Jay, *Chisholm v. Georgia*.

an individual may sue a State on bills of credit issued before the constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplate." In other words, Jay did not declare that Georgia owed Chisholm the money immediately; instead, in this opinion, he established that it was legal for Chisholm to sue Georgia in the first place.

Though brief, the minutes of the Supreme Court explained what occurred next. First, the Court ordered "That certified Copies of the said declaration be served on the Governor and Attorney General of the State of Georgia on or before the first day of June next." Moreover, Jay and the Associate Justices declared, "Unless the said State shall either in due form appear or shew cause to the Contrary in this Court by the first day of the next term Judgment by default be entered against the said State." Chisholm had won the right to sue Georgia, and the Court soon doled out the proper papers to initiate the actual trial. Further, the Court finally made good on Randolph's motion from August 1792—if representatives from Georgia failed to comply and appear before the Supreme Court, the Justices would immediately rule in favor of Chisholm.[33]

The States Rule Supreme: Congress' Retaliation and the Failure of Jay's National Vision

In the weeks and months that followed the release of Jay's opinion, Federalists and Anti-Federalists alike rebuked his understanding of state sovereignty. Historians have debated the rapidity with which Congress acted in response to the opinion, primarily through the medium of what would become the Eleventh Amendment, but all accounts clearly emphasize the universal unpopularity of the ruling in *Chisholm*. Jay, a private man through and through, left little direct evidence to demonstrate his frustration with the legislative and public responses towards his ruling.

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[33] "Minutes of the Supreme Court, [4–20 February 1793]," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0249. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 457–466.]

Nevertheless, tracing his political decisions in the years that followed allows us to see that after *Chisholm*, Jay soon began to distance himself from the Supreme Court and the construction of a vigorous national government.

In his landmark series on the history of the Supreme Court, historian Charles Warren argues that Congress took action to dismantle the Chisholm ruling the very next day. He claims that Representative Theodore Sedgwick introduced a resolution establishing that "no state shall be liable to be made a party defendant" in any federal court "at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate" in the United States.[34] In a reinterpretation of the history of the Eleventh Amendment, federal judge John Jacob Gibbins argues that Warren's sources were inaccurate. "The Annals of Congress for the week of February 18, 1793, however, disclose no such resolution and no discussion of Chisholm in the House of Representatives," he writes. "A search of the National Archives, moreover, has produced no evidence of such a resolution in official government records," and so "the existence of such a resolution thus appears dubious." Instead, a day later in the Senate, an unidentified Senator proposed a new constitutional amendment: "The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." Yet, as Gibbins observes, no one took serious action beyond this initial proposal. The Congressional term ended a month later with no serious progress on the matter.[35]

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[34] Charles Warren, *The Supreme Court in United States History* (1922), 101, quoted in John Gibbons' "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," 1926.

[35] John J. Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," *Columbia Law Review*¸ (Dec. 1983, Vol. 83, No. 8), 1926-1927.

As news of the opinion traveled from Philadelphia throughout the young nation, however, states were quick to take action themselves. Massachusetts and Virginia were particularly bold in their responses. Governor John Hancock of Massachusetts almost immediately pulled a resolution to attempt to securing states' immunity in court. In a message to the state government and the public at large, he proclaimed, "A consolidation of all the States into one government would at once endanger the Nation as a republic and eventually divide the states united, or eradicate the principles which we have contended for." Regarding the Supreme Court's recent decision, Hancock explained, "It is much less hazardous to prevent the establishment of a dangerous precedent, than to attempt an abolition of it, after it has obtained a place in a civil institution."[36] Seeking to mitigate the fallout from the Chisholm decision, Hancock and the state legislature sought to convene a national constitutional convention. Virginia simultaneously lobbied a similar message in the South, and Gibbons explains how eager states were to reaffirm their rights. "By the time the Third Congress convened in December [1793], the matter was before the legislatures of New Hampshire, Connecticut, Maryland, North Carolina, South Carolina, Pennsylvania, and Delaware," on top of Virginia and Massachusetts. Only a month later, the New York legislature took up the issue as well.[37]

The Third Congress began to consider the issue seriously in the earliest days of 1794. On January 2, an unknown Senator introduced the phrase that would eventually become the Eleventh Amendment. He declared, "The Judicial power of the United States shall not be construed to

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[36] Message of Governor John Hancock to the Senate and House of Representatives, *Resolves of Massachusetts* 31-32, September 18, 1793, in Gibbons, "The Eleventh Amendment," 1931.

[37] Gibbons, "The Eleventh Amendment," 1931. Gibbons makes an interesting argument that integrates foreign policy and the judiciary in his reinterpretation of the Eleventh Amendment. He claims, "States' rights had become political for Francophiles, an attractive slogan around which to rally, for only the national government had any real hope of enforcing the neutrality proclamation" and preventing the United States from getting heavily involved in the French Revolution (1932).

extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[38] As Gibbons notes, "This language differed from that introduced in the previous Congress" only slightly: by adding "be construed to." Senator Albert Gallatin and another unknown Senator attempted to change the phrasing of the words slightly, but their amendments failed. Instead, the amendment passed nearly unanimously in the Senate and, days later, passed in the House by an 81-9 vote. It was thus submitted to the states for ratification, and three-fourths would have to do so in order for this new amendment to become the law of the land.[39]

All the while, Jay continued to serve on the court. He still held sessions in Philadelphia twice a year, and he continued to travel the circuits faithfully. Yet after the vitriolic response to *Chisholm*, Jay never again delivered an opinion so strong in national vision or so aggressive in its ruling. The February 1794 term especially illustrated Jay's reluctance to act. The court had what Stahr sarcastically dubs "a full calendar" during that session: a measly "two pension appeals, a British debt case, and an international admiralty case." In the British debt case, Jay and the Associate Justices instead turned to a jury to decide the issues at hand. The jury ruled in favor of the defendants, and in doing so, "vindicated the right of a British creditor, regardless of a state statute, to recover a pre-war debt." Jay, in turn, avoided issuing another controversial opinion by ruling in favor of British creditors, and to that end, Stahr writes, an opinion "could well have received the same criticism as the Chisholm opinions."[40]

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[38] Annals of the Third Congress, January 2, 1794, 25. https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=004/llac004.db&recNum=10

[39] Gibbons, "The Eleventh Amendment,"1933-1934.

[40] That is not to say Jay totally abstained from the case. Indeed, he helped the jury resolve two important legal questions—whether or not Georgia's statutes placed the rights of the defendants in the hands of the state, not the federal government, and whether or not the Paris Peace Treaty detailed the rights of creditors. Jay answered in the negative to the first question and affirmative to the second. Stahr, *John Jay*, 308-309.

By the middle of 1794, Jay began to move away from the Supreme Court, as he became far more involved in the Washington Administration's handling of the crisis with Britain.[41] Jay returned from the treaty negotiations in winter 1795 to great news: he won the office of governor of the state of New York.[42] On July 29, 1795, Jay delivered his resignation to President Washington. "Having been elected Governor of the State of New York," Jay wrote, "It is proper that I should, and therefore I do hereby resign the office of chief Justice of the United States." He explained that his office as governor began in only a few days, and he needed to resign as soon as possible in order to avoid any conflicts of interest. Jay enclosed the resignation within another letter, personally addressed to Washington and filled with much warmer sentiments. To the President, Jay wrote, "I cannot quit it, without again expressing to You my acknowledgments for the Honor you conferred upon me by that appointment; and for the repeated marks of confidence & attention for which I am indebted to You." Washington had been instrumental in Jay's rise to prominence, plucking him from the talented crop of lawyers and statesmen and placing him atop the young nation's highest court. Jay led it for six years, and although that time undoubtedly tested him like no other, he wrote with deep gratitude towards the President. In a kind closing remark, Jay further expressed his fealty to Washington:

> It gives me pleasure to recollect and reflect on these circumstances—to endulge the most sincere wishes for your Health and Happiness—and to assure you of the perfect Respect Esteem and Attachment with which I am Dear Sir your obliged & affectionate Friend and Servant.

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[41] There are plenty of strong historical accounts of Jay's involvement in the infamous treaty that now bears his name, but an extended treatment of that issue is far outside the scope of this project. Nevertheless, there is something to be said for how foreign policy influenced the judiciary, particularly in regards to debt claims from British creditors before and during the war. For some interesting accounts of the Jay Treaty and the connection between the Supreme Court and Foreign Policy, see Gibbons, previously referenced, and Stahr, Chapter 14.

[42] While not especially relevant to the narrative and argument of this chapter, Jay's candidacies for governor, both in 1792 and 1795, are treated in closer detail in the conclusion of this project.

After years of partisan turmoil had rocked the Washington White House, Jay's reaffirmation of his friendship and faithfulness to Washington must have been comforting to the President. Their long political partnership—beginning nearly fifteen years earlier in the midst of the American Revolution—had finally come to an end. With that letter, Jay took his leave of the court, and John Rutledge was soon confirmed as the next Chief Justice.[43]

Jay's departure from the Supreme Court was certainly not sudden, nor was it a surprise to anyone close to him. Even in 1792, Justice Iredell—perhaps the Justice least close with Jay—had already commented on how he feared that Jay might resign from his post. Though his departure was a long time in the making, *Chisholm v. Georgia* served as a very clear inflection point for Jay's relationship with the court and the nation. Before the ruling, Jay had delivered vigorous grand jury charges that had a hopeful vision for a robust, powerful federal judiciary and national government.[44] His 1793 ruling in *Chisholm* was arguably the most aggressive step he took in trying to achieve that vision. He attempted to carve out serious power for the Supreme Court, giving it the right to oversee suits between citizens and states. Likewise, he tried to encode into law and precedent a new understanding of sovereignty that placed far more power in the hands of the federal government than many of his peers were comfortable with. After, in response to the almost universal rebuke of his opinion, he balked on his national vision and his sweeping conception of the Supreme Court as a powerful entity. Certainly frustrated with his duties riding the circuit and likely disappointed in the bipartisan response to his ruling, he became a far less active Chief

[43] "To George Washington from John Jay, 29 June 1795," Founders Online, National Archives, https://founders.archives.gov/documents/Washington/05-18-02-0208. [Original source: The Papers of George Washington, Presidential Series, vol. 18, 1 April–30 September 1795, ed. Carol S. Ebel. Charlottesville: University of Virginia Press, 2015, p. 272.]

[44] That is not to say that Jay loved the Court before *Chisholm*. Indeed, as we will consider in the conclusion, Jay was a serious contender for the governor of New York in 1792, and if he had won, he likely would have left office then.

Justice, and he passed on rulings that might have been controversial. Likewise, as conflict between France and England began to boil, he informally returned to his previous role of advisor on foreign affairs and soon became the United States' lead diplomat on a pivotal negotiation journey. All the while, states began ratifying the Eleventh Amendment to enshrine the failure of Jay's vision into the Constitution. Indeed, though Jay had sought to bind the nation together under the federal government in order to promote unity and prosperity, Iredell's understanding of federalism as state sovereignty ruled the day and dominated the nation's political discourse throughout the next seventy years.

CONCLUSION: WHAT SHOULD WE MAKE OF THE JAY COURT? LESSONS FROM JAY AND HIS TENURE AS CHIEF JUSTICE

With weapons, cameras, and signage in hand, a violent mob stormed the United States Capitol on January 6, 2021 in an attempt to overturn the 2020 presidential election. Angry insurrectionists clashed with outnumbered Capitol police officers, thugs flew cheap mesh "Trump 2020" flags off the Capitol's beautiful granite banisters, and a bloodthirsty mob burst into the chamber of the House of Representatives as it tried to stop Congress from certifying the results of the Electoral College. Despite the mob's best efforts, the insurrection failed. Unsuccessful in their attempts to kidnap and harm legislators, the rioters left the building in disgrace. At four in the morning the next day, Congress certified that Joseph Biden won the election and would be the 46th President of the United States.

Two weeks later, on a sunny day with a clear blue sky—a stark contrast to the dreary gray overcast that came with the insurrection—President Biden gave his inaugural address to the American people. His speech explored the numerous crises that the country faced, from COVID-19 and widespread unemployment to systemic racism and environmental justice. At its core, however, Biden's inaugural address was a reflection on the value of American unity in troubling

times. “I know speaking of unity can sound to some like a foolish fantasy,” he said, “I know the forces that divide us are deep and they are real. But I also know they are not new. Our history has been a constant struggle between the American ideal that we are all created equal and the harsh, ugly reality that racism, nativism, fear, and demonization have long torn us apart.” In an age of hyper-partisanship exacerbated by novel technologies and ever-compounding crises, Biden promoted a message of moderation, compromise, and patience. He explained, “History, faith, and reason show the way, the way of unity. We can see each other not as adversaries but as neighbors. We can treat each other with dignity and respect. We can join forces, stop the shouting, and lower the temperature.” Whereas his predecessor and other partisans sought to stoke the flames of hate and fury, Biden tried to reorient the discourse towards civility and progress.[45]

The stakes of the moment demanded nothing less. “For without unity,” Biden explained, “there is no peace, only bitterness and fury. No progress, only exhausting outrage. No nation, only a state of chaos. This is our historic moment of crisis and challenge, and unity is the path forward.” As Biden gave his speech, he looked out towards a small crowd of supporters, masked and physically distanced to mitigate the spread of COVID-19. Behind those supporters, not so far in the distance, the president could clearly see a symbol of history that represented a similarly partisan age: the Washington monument.[46]

The story of John Jay and his tenure as Chief Justice illustrates that deep partisanship and conflicts over the federal government’s power and purpose are not new problems in the United States. In fact, these problems are as old as the nation itself. While Biden’s pleas for unity seem

[45] Joseph Biden, “Inaugural Address,” (Speech, Washington D.C., January 20, 2021), *The White House*. https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/

[46] Biden, “Inaugural Address.”

uniquely situated to our present moment, they invoke a long and storied tradition of American Union—a tradition popularly centered around Abraham Lincoln, but one that began in earnest eighty years earlier, as the states debated whether or not they would ratify the new Constitution. Jay argued in the *Federalist* essays that maintaining union would be central to the success of the American project. "Not only the first, but every succeeding Congress," he remarked, "as well as the late convention, have invariably joined with the people in thinking that the prosperity of America depended on its Union." If America failed to come together around the Constitution, investing its power in a new centralized government, it might become an easy target for European adversaries. Even worse, it could tear itself apart over sectional conflicts if no larger regulatory power existed. No matter how union might fracture, the results would be the same. "Whenever the dissolution of the Union arrives," Jay lamented, "America will have reason to exclaim, in the words of the poet: 'FAREWELL! A LONG FAREWELL TO ALL MY GREATNESS.'"[47] Jay worked hard to make that Union a reality in the 1780s, not only as a writer, but also as a political actor. He famously brokered a deal between Anti-Federalists and Federalists at the New York Ratifying Convention in Poughkeepsie that led the state to support the Constitution. Assuaging the Anti-Federalists' fears, he promised them a Bill of Rights in exchange for ratification. While other Federalists balked at their opponents' concerns, Jay saw reason in them; in promising to fight for a Bill of Rights, he simultaneously brought the Anti-Federalists into the fold and delivered the Federalists one of the most important states in the Union.

Jay's involvement in the creation of an American Union increased significantly once he became Chief Justice of the Supreme Court. As his tenure began, he expounded the same optimism

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[47] John Jay, *Federalist II*, New York *Independent Journal*, October 31, 1787, 2.

for the project of union that he held throughout the 1780s. In his first jury charge, for example, he remarked:

> Providence has been pleased to bless the people of this country with more perfect opportunities of choosing, and more effectual means of establishing their own government, than any other nation has hitherto enjoyed…our deliberations and proceedings being unawed and uninfluenced by power or corruption, domestic or foreign, are perfectly free; our citizens are generally and greatly enlightened, and our country is so extensive that the personal influence of popular individuals can rarely embrace large portions of it.[48]

Yet as time went on, Jay became weary of the judiciary's power and its ability to promote national political stability. He never expressed these sentiments publicly, but his private correspondence and political maneuvering suggest frustration and even disappointment with the national project. Indeed, only two years after being named Chief Justice, it appeared that he was considering alternative career paths. In 1792, Jay was almost elected Governor of the State of New York. Though he never formally campaigned, his popularity in the state secured him the Federalist nomination, and he lost the election by only five hundred votes. All circumstantial evidence suggests that he would have taken the position had he won. His letters to his family illustrated clear frustration with riding the circuit on top of holding the Supreme Court twice a year. Even Justice Iredell, considered the odd man out in the early years of the Jay Court, suspected that the New York Governor's race would pull Jay away from the federal judiciary, and he said as much in a letter to Jay as they debated the merits of rotating circuit duties.

Three years later, upon his return from negotiating the treaty with England that now bears his name, Jay learned that he had again been the Federalist nominee for the governor of New York. This time, he won the election, and he quickly resigned from the Supreme Court to take the top

[48] John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

spot in New York's government. He never again entered the national political scene. Five years later, he remarked to John Adams that he "left the Bench perfectly convinced that under a System so defective, it would not obtain the Energy weight and Dignity which are essential to its affording due support to the national government." The system's defects were clear: the double duty of riding the circuit and holding the Supreme Court. Though Congress legislated on the issue twice, they failed to satisfy the needs of Jay and his Associate Justices. Moreover, Jay believed that the Supreme Court would never "acquire the public Confidence and Respect, which, as the last Resort of the Justice of the Nation, it should possess." While the circuit courts clearly helped establish the federal judiciary's power and prominence, the universal rebuke of Jay and his Court regarding *Chisholm v. Georgia* disillusioned Jay significantly. From that point on, he deferred to juries in making decisions and spent more time aiding Washington in foreign policy than adjudicating cases with his fellow Justices. Congress Quickly passed the Eleventh Amendment and sent it to the states, potentially enshrining a rejection of Jay's thought right into the document that he fought for so vigorously.[49]

Jay's tenure on the Supreme Court illustrates three ideas important to understanding the early Republic. First, and perhaps most obviously, statecraft and governance were not easy tasks. No matter how well Jay, Hamilton, and Madison had laid out their political systems in newspapers, pamphlets, and letters, putting these systems into practice presented the Founders serious logistical and philosophical challenges. As Jay remarked in that first optimistic grand jury charge, "The most perfect constitutions, the best governments, and the wisest laws are vain, unless well-administered

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[49] From John Adams to John Jay, December 19, 1800. https://founders.archives.gov/documents/Adams/99-02-02-4718

and well-obeyed."[50] Simply put, the proper administration of Article III of the Constitution and the Judiciary Act of 1789 was burdensome and onerous. Jay quickly learned that the reality of governance on the unprecedented scale the federal governance brought to the United States would be a massive endeavor, one unlike anything he or the other Founders had seen before.

The problems that came with bringing "Justice to every man's door" reveal the second lesson from the Jay Court: being a Supreme Court Justice in the 1790s was not a desirable position. All of the Justices, but especially Jay, came to see their job as a burden rather than an opportunity to establish and secure justice for all citizens. As explained in Chapter Two, riding the circuit was the source of many of their problems. It caused constant infighting among the Justices, it separated them from their families for months at a time, it forced them to trek through a nation lacking national infrastructure, and it took a serious toll on their physical health. Though the Justices became popular on the circuits, they traveled hundreds of miles in short durations of time, lodged in less-than-ideal conditions, almost always at the mercy of the weather and the environment. Scholars have gone so far to attribute Justice Iredell's untimely demise to the burdens of constant travel, and Justice Cushing embarked on his final circuit journey in 1810 confident it would be a death sentence. Indeed, as the Justices sought to carry out the mission of the Constitution, their own constitutions suffered for it. They often left the court disillusioned and frustrated, if they were able to leave at all.

Finally, the fight for Robert Farquahr's inheritance reveals the third lesson: that the true nature of federalism has always been contested both in the judiciary and in the public discourse.

[50] John Jay, "Charge to the Grand Juries of the Eastern Circuit, 12 April–20 May 1790," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-05-02-0133. [Original source: The Selected Papers of John Jay, vol. 5, 1788–1794, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2017, pp. 234–240.]

Justice Iredell's understanding of federalism as state sovereignty carried the day, but its long-term implications for the nation were disastrous. Southerners took up the mantle of states' rights as a way to defend the pernicious institution of slavery, eventually leading to the Civil War. The sudden rise of the Republican Party and the emergency of Abraham Lincoln, however, revived the understanding of federalism as nationalism, as they reinvigorated the federal government to secure the union. Ever since, there has been an ongoing battle between the dueling federalisms over the power and scope of the federal government. Few recognize Jay or Iredell as foundational thinkers in this debate, but both the ideological and political implications of their opinions in *Chisholm v. Georgia* demonstrate that any narratives involving federalism should include that pivotal case.

Jay's story also offers us valuable lessons as we struggle in a partisan age not dissimilar to his own. From the Washington administration to the Biden administration, from the Jay Court to the Roberts Court, the United States has always grappled with what being "united" really means. When some speak of unity, they mean it in a cultural sense: they want everyone to agree on cultures, religions, or other value systems and worldviews. In that case, however, unity often becomes exclusive rather than inclusive: those who conform benefit, while those who do not or cannot suffer. Moreover, modern liberal democracy, with its foundational principles of freedom of thought and expression, almost by definition ensures that cultural unity is impossible to achieve in the United States. There will always be contrarians, dissenters, and rebels in a society as culturally and ideologically pluralistic as our own, and frankly, that is for the best.

The unity that Jay, Lincoln, Biden, and so many others value must be something else. Rather than unity of culture, perhaps the ideal of American unity rests on the simple principles of mutual toleration and respect, not only for fellow citizens, but also for the structures and systems that bind all of our lives together. A unified understanding of respect—for the rule of law, for the

right to disagree peaceably, and above all else, for the proposition that every person is created equal—could go a long way in fixing our political discourse. The political problems that we struggle with today are not new. Nor are the solutions we propose to fix them. We know what the issues are, and on paper, we know what the solutions should be. Yet Jay's story reminds us that there is an enormous distance between the ideal world, composed neatly in sentences and paragraphs on a piece of paper, and the real world, with its bumpy roads, its unexpected twists and turns, its searing tragedies, and its broken people.

Recognizing that distance should not invoke feelings of resignation and despair, but instead feelings of hope and duty. Indeed, it should inspire us to turn back towards history and take cues from public servants who have faced these problems before like Jay: principled, patriotic, and firmly dedicated to bringing justice to every person's door. Today, we need leaders that emulate Jay's finest qualities at every level of our society, from the federal government to the local Student Congress. His triumphs remind us that we can create a system that leads to just outcomes through fair constitutions, firm principles, coalition-building, and compromise. More than most Founders, Jay avoided the partisan rancor of the time and tried to accomplish his goals acting in good faith. His failures remind us that our achievements are ephemeral if we are not vigilant. Creating lasting true change requires constant attention, deep resolve, and a strong commitment to and involvement in our community.

In 1785, as Jay saw the new nation flounder under the Articles of Confederation, he wrote to his friend Richard Price. "The cause of liberty like most other good causes," Jay explained, "will have its difficulties and sometimes its persecutions to struggle with." Those difficulties and persecutions, however, did not invalidate the principles that Jay and his countrymen fought for in the American Revolution. Instead, they reminded him that the values he sometimes took for

granted, especially freedom and democracy, are fragile. Jay then offered his friend some advice that remains poignantly relevant today:

> The wise and the good never form the majority of any large Society and it seldom happens that their measures are uniformly adopted or that they can always prevent being overborne themselves by the strong and almost never ceasing union of the wicked and the weak. These circumstances tell us to be patient and moderate those sanguine expectations, which warm and good hearts often mislead even wise heads to entertain on these subjects. All that the best men can do is to persevere in doing their duty to their country and leave the consequences to Him who made it their duty; being neither elated by success however great nor discouraged by disappointments however frequent or mortifying.[51]

[51] "From John Jay to Richard Price, 27 September 1785," Founders Online, National Archives, https://founders.archives.gov/documents/Jay/01-04-02-0083. [Original source: The Selected Papers of John Jay, vol. 4, 1785–1788, ed. Elizabeth M. Nuxoll. Charlottesville: University of Virginia Press, 2015, pp. 190–191.]

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