

# The Effect (or Non-Effect) of Founders on the Supreme Court Bench

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## ABSTRACT

*Eleven of the first twelve Justices to serve on the Supreme Court participated in the creation and ratification of the Constitution. Their active participation in the constitutional process shaped their perspectives of both federal law and the Constitution. Through a series of examples, this Article shows that the initial group of Justices emerged from the Founding period with remarkably similar views of the purposes for which the Constitution was established, but that differences arose among them on specific points of constitutional interpretation. Reviewing early Supreme Court opinions and grand jury charges written by the Justices indicates how participating in the creation and ratification of the Constitution permitted the Court to speak with a unified voice on such things as the importance of the law of nations and the need for judicial review. The Justices' participation in Constitution-making activities also led to disagreement on certain topics, such as how states were to be treated and whether the requirement of circuit riding in the Judiciary Act of 1789 was constitutional.*

Professor Mary Bilder suggested the topic, “The Effect (or Non-Effect) of Founders on the Bench,” but she neglected to clarify what she meant. Who is a Founder? Someone who participated in the Federal Convention? Someone who attended a state ratifying convention? Someone who did neither, but who was actively involved in getting the Constitution ratified? My answer would be all of the above, so it is instructive to look at those who served on the Supreme Court in its first decade to see if differences exist among those Justices’ approaches to courts and judging traceable to their activities in the Founding period. Eleven of the twelve men appointed by Presidents Washington and Adams fit one of the categories stated above, and the twelfth soon started acting as if he did.<sup>1</sup> How, then, can scholars assess the influence of the Justices’ experience as Founders on the development of the federal judiciary and on their jurisprudence? No

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<sup>1</sup> Justice Samuel Chase, who opposed the ratification of the Constitution in Maryland, very quickly changed his mind and became an advocate of federalist ideology. See 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 108 (Maeva Marcus et al. eds., 1985) [hereinafter 1 DHSC].

control group is available against which to compare their performance.

The Justices left little written evidence that indicates that their personal involvement with the writing of the Constitution, or their efforts on behalf of ratification, affected their behavior on the Court or their decisions. Their opinions only occasionally mention the Federal Convention. Undoubtedly, though, the way they conducted themselves on the bench and their approach to the new science of federal law flowed directly from their experiences at the Constitutional Convention or during the ratification period. A series of examples will show that the initial group of Justices emerged from the Founding period with remarkably similar views of the purposes for which the Constitution was established, but differences arose among them on specific points of constitutional interpretation.

From the beginning, President Washington understood the importance of the third branch. In 1790, he wrote to the Justices:

I have always been persuaded that the stability and success of the National Government, and consequently the happiness of the People of the United States, would depend in a considerable degree on the Interpretation and Execution of its Laws.\_\_\_\_ In my opinion, therefore, it is important that the Judiciary System should not only be independent in its operations, but as perfect as possible in its formation.\_\_\_\_<sup>2</sup>

With that in mind, Washington chose only the “fittest Characters”<sup>3</sup> to serve on the Supreme Court. And what constituted “fittest?” The President considered training, experience, health, and public renown.<sup>4</sup> Next, Washington weighed the candidate’s activities during the war for independence and favored those whose sacrifices had been greatest.<sup>5</sup> But the one essential ingredient in the potential nominee’s résumé was his support for the Constitution.<sup>6</sup>

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<sup>2</sup> Letter from George Washington to the Chief Justice and Associate Judges of the Supreme Court of the United States (Apr. 3, 1790), in 2 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 21 (Maeva Marcus et al. eds., 1988) [hereinafter 2 DHSC].

<sup>3</sup> See Letter from George Washington to John Rutledge (Sept. 29, 1789), in 1 DHSC, *supra* note 1, at 20.

<sup>4</sup> See Natalie Wexler, *In the Beginning: The First Three Chief Justices*, 154 U. PA. L. REV. 1373, 1380 (2006).

<sup>5</sup> See *id.* at 1380–81.

<sup>6</sup> See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 66–68 (1995); Wexler, *supra* note 4, at 1380.

Judging from his first six appointments to the Supreme Court bench, Washington interpreted support for the Constitution in different ways. His choice for Chief Justice, John Jay, had not been a member of the Federal Convention, but he had been a delegate to the New York ratifying convention.<sup>7</sup> The events of the Revolution led Jay, a lawyer by training, into a life of public service and an active role in the ratification process.<sup>8</sup> He served in the First and Second Continental Congresses, was elected president of Congress, and then was appointed as minister plenipotentiary to Spain.<sup>9</sup> From there he made his way to Paris after his selection as one of the commissioners to negotiate a peace treaty with Great Britain.<sup>10</sup> When he returned home in 1784, the Confederation Congress chose him to be Secretary of Foreign Affairs, a position he held until Thomas Jefferson succeeded him as Secretary of State on March 22, 1790.<sup>11</sup> By that time, Jay had served for six months as Chief Justice.<sup>12</sup> (Yes, Jay held two positions at once in the federal government, as John Marshall did ten years later.)<sup>13</sup> During Jay's tenure as Secretary, the Constitution was drafted and ratified, with Jay participating in the process not only through his skillful performance at the ratifying convention,<sup>14</sup> but also by writing five essays for *The Federalist* dealing with his specialties: foreign affairs and the treaty-making power.<sup>15</sup> When he nominated Jay as Chief Justice, Washington 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.<sup>16</sup>

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<sup>7</sup> See 1 DHSC, *supra* note 1, at 5–6.

<sup>8</sup> See *id.* at 3–6.

<sup>9</sup> See *id.* at 5–6.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 6.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.* at 6, 154, 155 & n.1.

<sup>14</sup> Professor Pauline Maier believes that Jay was “more effective both off the convention floor and on it” than many of his fellow federalist delegates. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788*, at 360 (2010). Jay also wrote one of the best pamphlets supporting the Constitution during the campaign to elect delegates to the New York ratifying convention. See *id.* at 336.

<sup>15</sup> See John Jay: Appointment as Chief Justice in 1789, in 1 DHSC, *supra* note 1, at 6–8. Jay wrote *The Federalist* numbers 2–5 and 64. See *id.* at 6.

<sup>16</sup> Letter from George Washington to John Jay (Oct. 5, 1789), in 1 DHSC, *supra* note 1, at 11.

The President chose as Chief Justice a statesman, not a legal scholar.<sup>17</sup>

The first five Associate Justices—John Rutledge, William Cushing, James Wilson, John Blair, and James Iredell<sup>18</sup>—actively participated in Constitution-making. Rutledge, Wilson, and Blair had been members of the Federal Convention, with Rutledge and Wilson taking significant roles there. All three also played a great part in ensuring ratification of the Constitution by their home state conventions. William Cushing ardently supported the Constitution as a delegate to the Massachusetts ratifying convention, and James Iredell fought hard for the adoption of the Constitution by North Carolina in its two ratifying conventions, publishing (under the pleasing pseudonym “Marcus”) a series of essays in favor of passage. When the President had to replace Justice Rutledge within a year, he chose Thomas Johnson of Maryland, who also had worked for ratification in his state’s convention, and when Johnson had to be replaced shortly thereafter, Washington picked William Paterson of New Jersey, a leader of the small states in the Constitutional Convention. Oliver Ellsworth, a member of the Federal Convention, became Chief Justice in 1796, after the recess appointment of John Rutledge was rejected. And Adams’s two appointees, Bushrod Washington and Alfred Moore, were delegates to ratifying conventions.<sup>19</sup>

The first thing to notice is the seriousness with which the early Justices undertook their duties in trying circumstances. These men set the course of the federal judiciary, and their commitment to the national government informed all that they did. Every Justice who served in the first decade firmly believed that the Constitution, with its scheme of separation of powers, had set up governmental institutions best designed to secure the safety and happiness of American citizens. To a man, however, they recognized that the Constitution was not perfect, that defects would be found, and that many things remained to be worked out, but that one of the Constitution’s great virtues was that it provided methods for correction.<sup>20</sup> Its terms were vague enough to allow for interpretation and adjustment,<sup>21</sup> it con-

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<sup>17</sup> See Wexler, *supra* note 4, at 1380.

<sup>18</sup> Iredell was not among the first six nominations. Washington had nominated Robert H. Harrison of Maryland, but Harrison became ill before he could assume his duties as a Justice and returned his commission. The President immediately nominated Iredell, but not in time for the first session of the Supreme Court. See 1 DHSC, *supra* note 1, at 33, 63.

<sup>19</sup> See *id.* at 17, 26, 47, 54, 63, 69, 71, 81, 85–86, 118, 124, 137–38.

<sup>20</sup> See, e.g., John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (1790), in 2 DHSC, *supra* note 2, at 26–27.

<sup>21</sup> For example, Nathaniel Gorham, one of the delegates to the Constitutional Convention,

tained an amendment procedure in Article V, and it created a novel institution, the Supreme Court, which would ensure that the new government functioned within constitutional limits.<sup>22</sup> As John Jay explained, “A judicial Controul, general & final, was indispensable. The Manner of establishing it, with Powers neither too extensive, nor too limited; rendering it properly independent, and yet properly amenable, involved Questions of no little Intricacy.”<sup>23</sup> He urged his fellow citizens to give the new arrangement a “fair” and “impartial” trial, as “the most discerning and enlightened Minds may be mistaken relative to Theories unconfirmed by Practice.”<sup>24</sup> Experience would be their guide, and improvements could be made.<sup>25</sup>

Because of the unusual nature of the judicial system set up by the Judiciary Act of 1789,<sup>26</sup> the Justices could communicate their beliefs to the American people.<sup>27</sup> The Constitution created the Supreme Court, but it was Congress that invented three tiers of federal courts and mandated how they would function.<sup>28</sup> Congress, in the Judiciary Act, designed two levels of lower courts below the Supreme Court.<sup>29</sup> The Act created a federal district court for each state, with its own presiding judge who would exercise jurisdiction over admiralty and maritime cases and minor federal crimes.<sup>30</sup> At a higher level would be circuit courts, which, unlike today’s circuit courts of appeals, were primarily courts of original jurisdiction—trial courts—for major federal crimes and civil cases of high monetary value.<sup>31</sup> Appeals from the district courts made up a minor portion of their dockets.<sup>32</sup> Each state would have one circuit court, and the states were grouped into three circuits: the eastern, middle, and southern.<sup>33</sup> The Judiciary Act did not provide for appointment of judges to the circuit courts. Instead, twice a year, two Supreme Court Justices would attend the circuit court in each

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stated, “The vagueness of the terms [of the Constitution] constitutes the propriety of them.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

<sup>22</sup> See U.S. CONST. art. III, § 1.

<sup>23</sup> John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (1790), in 2 DHSC, *supra* note 2, at 25, 27.

<sup>24</sup> *Id.* at 27.

<sup>25</sup> See *id.*

<sup>26</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73 (current version at 28 U.S.C. § 1 (2006)).

<sup>27</sup> See *infra* note 34 and surrounding text.

<sup>28</sup> §§ 1–4, 1 Stat. at 73–75.

<sup>29</sup> See *id.*

<sup>30</sup> See § 9, 1 Stat. at 76–77.

<sup>31</sup> See § 11, 1 Stat. at 78–79.

<sup>32</sup> See §§ 11, 21, 1 Stat. at 79, 83.

<sup>33</sup> See §§ 2, 3, 1 Stat. at 73–74.

state, with the district judge from that state serving as the third member of the bench.<sup>34</sup> The Act set the number of Supreme Court Justices at six, so that two could be assigned to each circuit in the spring and fall.<sup>35</sup> Each session would begin with the presiding judge giving a charge to the grand jury, and the Justices took advantage of the opportunity to sing the praises of the new federal government.<sup>36</sup>

A reading of the grand jury charges throughout the first decade reveals strikingly similar attitudes among the early Justices. Chief among those attitudes was their embrace of the law of nations as part of the constitutional fabric of the new United States. At the Federal Convention, James Wilson had declared that it would be “arrogan[t]” and “ridiculous” to define in the Constitution the law of nations, which “depended on the authority of all the civilized nations of the world.”<sup>37</sup> But when attending circuit courts, the Justices took pains to explain to the grand juries the obligation of the country to adhere to the law of nations: “We had become a Nation\_\_ as such we were responsible to others for the observance of the *Laws of Nations*,” wrote John Jay.<sup>38</sup> James Wilson advised that citizens accused of infractions against the law of nations should be punished lest the United States as a whole be held responsible for their actions.<sup>39</sup> And James Iredell reiterated these sentiments when he rode the southern circuit.<sup>40</sup> These Justices showed an awareness of the intent of the Framers of the Constitution to create a national judiciary capable of giving a uniform in-

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<sup>34</sup> § 4, 1 Stat. at 74–75.

<sup>35</sup> See §§ 1–4, 1 Stat. at 73–75. In 1793 Congress amended the statute to require only one Justice to attend a circuit court. Judiciary Act of 1793, ch. 22, § 1, 1 Stat. 333. For a discussion of the origins of the Judiciary Act of 1789, see Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?*, in ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789, at 13, 13–39 (Maeva Marcus ed., 1992).

<sup>36</sup> See Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 131, 156 (1967).

<sup>37</sup> 2 JAMES MADISON: DEBATES IN THE FEDERAL CONVENTION OF 1787, at 563 (Gaillard Hunt & James Brown Scott eds., 1987) (1920).

<sup>38</sup> John Jay’s Charge to the Grand Jury of the Circuit Court for the District of New York (1790), in 2 DHSC, *supra* note 2, at 25, 27.

<sup>39</sup> See James Wilson’s Charge to the Grand Jury of a Special Session of the Circuit Court for the District of Pennsylvania (1793), in 2 DHSC, *supra* note 2, at 417–21.

<sup>40</sup> See James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of Georgia (1791), reprinted in 2 DHSC, *supra* note 2, at 218; James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of South Carolina (1794), reprinted in 2 DHSC, *supra* note 2, at 454–60. Justice William Paterson also pointed out the importance of fulfilling obligations under the law of nations. See William Paterson’s Charge to the Grand Jury of the Circuit Court for the District of Delaware (1795), in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 58–60 (Maeva Marcus et al. eds., 1990) [hereinafter 3 DHSC].

terpretation to the laws and treaties of the nation, one which would understand the implications of their decisions for international relations.

The Justices not only said this in their grand jury charges but also made it plain in their jurisprudence. In cases like *Georgia v. Brailsford*,<sup>41</sup> *Glass v. The Sloop Betsey*,<sup>42</sup> *Ware v. Hylton*,<sup>43</sup> and the many prize cases that made up the major portion of the Supreme Court's docket in the 1790s, the Justices demonstrated the importance of adherence to the law of nations to the future of the United States.<sup>44</sup>

The Justices also enunciated their belief in judicial review when they spoke to grand juries and when they delivered their opinions—a concept they clearly found in the Constitution even though the express words were not there. To be sure, the Justices did not use the words “judicial review”; they just described it. John Jay discussed a final “judicial Controul.”<sup>45</sup> James Iredell, in a charge to the grand jury of the Circuit Court for the District of Georgia, observed that if violations of the Constitution occurred, “the courts of justice, in any such instance coming under their cognizance, are bound to resist them, they having no authority to carry into execution any acts but such as the constitution warrants.”<sup>46</sup> While preparing an opinion in a case that came before the Supreme Court in February 1792,<sup>47</sup> Justice Iredell went into more detail about the power of judicial review. In discussing acts of Congress, he noted:

All these must be justified under the authority granted by the Constitution. Within that authority all their acts are valid and obligatory. Beyond it none of them are so: and however

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41 *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 2 (1794).

42 *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 9 (1794).

43 *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796). John Jay's circuit court opinion in *Ware* is also informative on this point. John Jay's Circuit Court Opinion (1793), reprinted in 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 292–311 (Maeva Marcus et al. eds., 2003) [hereinafter 7 DHSC]. By the time the Supreme Court decided the case, Jay was no longer a Justice.

44 For more on the law of nations and the Constitution, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010); Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009).

45 John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York (1790), in 2 DHSC, *supra* note 2, at 25, 27; see *supra* text accompanying note 23.

46 James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Georgia (1791), reprinted in 2 DHSC, *supra* note 2, at 219.

47 See Minutes of the Supreme Court (1792), in 1 DHSC, *supra* note 1, at 198–200. The case, *Oswald v. New York*, was tried in the Supreme Court during the February 1795 term. See *id.* at 232–34.

painful such an occasion may be, if in any instance an act of Congress exceeding its authority comes before a Court it must be declared to be *void*: because upon the very same principle that one act of Congress can repeal a former act, *the authority of the Legislature being at all times equal, &* therefore the latter act shall supersede the former; so an act contrary to the Constitution must be *void*, that being contrary to fundamental Law, upon the basis of which the whole Government rests, and *unrepealable by any act of Congress acting under it*.<sup>48</sup>

William Paterson, in his charge to the petit jury at the end of the trial in *Vanhorne's Lessee v. Dorrance*,<sup>49</sup> waxed eloquent on the subject of the American Constitution, which he believed made it clear that "every act of the Legislature, repugnant to the Constitution, is absolutely void."<sup>50</sup> And Samuel Chase, never a shrinking violet, did not hesitate to let grand juries know that "[t]he Judicial power . . . are the only *proper* and *competent* authority to decide whether any Law made by Congress; or any of the State Legislatures is contrary to or in Violation of the *federal* Constitution."<sup>51</sup>

In the first decade after the Constitution was ratified, federal judges exercised their power of judicial review with regard to both state and national legislation on a number of occasions,<sup>52</sup> sometimes finding a conflict with the Constitution but more frequently upholding the actions of the legislatures. The political branches of government accepted the Court's role: when, for the first time, two Supreme Court Justices (Wilson and Blair) and District Judge Richard Peters, on circuit in Pennsylvania, found an act of Congress<sup>53</sup> unconstitutional in *Hayburn's Case*,<sup>54</sup> Congress enacted a new law to meet the judges'

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48 James Iredell's Observations on State Suability (Feb. 11–14, 1792), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 83 (Maeva Marcus et al. eds., 1994).

49 *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795).

50 *Id.* at 308.

51 Samuel Chase's Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (1800), in 3 DHSC, *supra* note 40, at 412.

52 See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 199–200 (1796) (reviewing state law); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (reviewing congressional act).

53 An Act to Provide for the Settlement of the Claims of Widows and Orphans Barred by the Limitations Heretofore Established, and to Regulate the Claims to Invalid Pensions, 1 Stat. 243, 243–45 (1792).

54 *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 411 n.–12 n. (1792). For a full discussion of the case, see 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 33–46 (Maeva Marcus et al. eds., 1998).



objections at its next session.<sup>55</sup> Although the Pennsylvania Circuit Court did not announce in so many words that it was striking down a congressional statute, the judges stated from the bench that they thought the duty imposed on them by the Invalid Pensions Act of 1792 was unconstitutional and therefore refused to consider a pension petition put before them by an invalid officer.<sup>56</sup> The three judges then wrote to President Washington explaining their opinion in detail.<sup>57</sup> The judges on the other two circuits, equally convinced that the plain reading of the statute made it invalid, also wrote letters to the President revealing their views even though no pension request had yet come before them.<sup>58</sup>

Unanimity did not last long, however. While they were united in their beliefs as to the purposes for which the Supreme Court was created, the Justices sometimes disagreed on the specific meaning of particular clauses of the Constitution. When the time came to decide *Chisholm v. Georgia*,<sup>59</sup> which came before the Supreme Court in 1793, one Justice did part company with his brethren. Before evaluating the merits of the case, the Court first had to determine whether it had jurisdiction over a suit against a state initiated by a citizen of another state. Four of the five Justices who heard the case<sup>60</sup>—Blair, Wilson, Cushing, and Jay—agreed that the Supreme Court could compel the State of Georgia to appear to answer the suit of a citizen of South Carolina.<sup>61</sup> While several questions had to be answered before reaching that conclusion, and the paths to the answers varied, the opinions of the Justices in the majority demonstrated their common understanding that one of the goals of the Constitution was to “establish justice.”<sup>62</sup> In the words of Chief Justice Jay:

If it is a *controversy* between them, then it clearly falls not only within the spirit, but the very words of the Constitution. What is it to the cause of justice, and how can it effect the definition of the word *controversy*, whether the demands

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<sup>55</sup> An Act to Regulate the Claims to Invalid Pensions, ch. 17, 1 Stat. 324, 324–35 (1793).

<sup>56</sup> See Proceedings of the United States House of Representatives (Apr. 13, 1792), in 6 DHSC, *supra* note 54, at 48.

<sup>57</sup> See *Hayburn's Case*, 2 U.S. at 411–12 n.

<sup>58</sup> See *id.* at 410 n. (federal circuit court for New York); 412–14 n. (North Carolina).

<sup>59</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

<sup>60</sup> The case began in August 1792, when there were six Justices on the bench, but its consideration was postponed until the following term, February 1793. By that time Justice Thomas Johnson had resigned, and the vacancy had not been filled. See 1 DHSC, *supra* note 1, at 80, 205, 214.

<sup>61</sup> See *Chisholm*, 2 U.S. at 451–52, 458, 467–68, 479.

<sup>62</sup> See U.S. CONST. pmb.

which cause the dispute, are made by a State against citizens of another State, or by the latter against the former? When power is thus extended to a *controversy*, it necessarily, as to all judicial purposes, is also extended to those, between whom it subsists.<sup>63</sup>

The four majority Justices—and Attorney General Edmund Randolph, who had been a delegate to the Federal Convention—believed that the new nation was founded on the understanding that the national government needed a mechanism to control states that took actions forbidden by the Constitution, and the judicial power of the Supreme Court was that mechanism.<sup>64</sup> They agreed that a state could be a defendant, as well as a plaintiff, before that Court.<sup>65</sup> James Iredell, the dissenting Justice, disagreed that Georgia could be required to answer *Chisholm*'s suit.<sup>66</sup>

A full analysis of the *Chisholm* decision is unnecessary for the purposes of this Article. It is sufficient to point out that one of five Justices, all of whom had participated in the making of the Constitution, differed from the others in his view of how the Constitution treated states.<sup>67</sup> If in 1793 there was disagreement over the interpretation of constitutional provisions, how can judges today authoritatively determine their meaning based on the “original” understanding of those provisions in 1787?

Several years later, however, the Court united once again on two major issues of constitutional interpretation. *Ware v. Hylton*<sup>68</sup> and *Hylton v. United States*,<sup>69</sup> both decided in 1796, exemplified the prevailing belief that the Constitution intended the Supreme Court to exercise the power of judicial review. *Ware* concerned the right of British creditors to recover pre-Revolutionary War debts owed to them by Americans under the Definitive Treaty of Peace of 1783,<sup>70</sup> and its resolution depended on establishing the supremacy of federal

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<sup>63</sup> *Chisholm*, 2 U.S. at 477.

<sup>64</sup> See *id.* at 419–20, 450–51, 463–64, 469, 473.

<sup>65</sup> See *id.* at 450–51, 466, 468–69, 473.

<sup>66</sup> See *id.* at 449–50.

<sup>67</sup> See *id.*

<sup>68</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). For a full discussion of the case, see 7 DHSC, *supra* note 43, at 203–22.

<sup>69</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). For a full discussion of the case, see 7 DHSC, *supra* note 43, at 358–69.

<sup>70</sup> Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80; see also 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 151 (Hunter Miller ed., 1931).

treaties over state laws.<sup>71</sup> When the Court unanimously held in favor of the British creditors, this point of law was settled.

Having exercised judicial review to void a state statute, the Court in *Hylton* passed on the constitutionality of a federal statute, the Carriage Tax Act of 1794.<sup>72</sup> Before enacting the legislation, Congress had debated the constitutional validity of such a tax, discussing whether it was a “direct tax” (and therefore unconstitutional because not properly apportioned according to the population of each state) or a lawful “indirect tax.”<sup>73</sup> Persuaded by the argument of Alexander Hamilton, who was recruited to present the government’s case before the Court, the Justices upheld the carriage tax as an indirect tax.<sup>74</sup> All the Justices acknowledged that they were engaged in an exercise of judicial review.<sup>75</sup> They assumed they had the power to overturn the Act, but as they found the carriage tax valid under the Constitution, that would not be necessary.<sup>76</sup> While some criticized the substantive decision in *Hylton*,<sup>77</sup> the Court’s power of judicial review was not questioned.<sup>78</sup>

*Calder v. Bull*,<sup>79</sup> however, presents a case in which the Justices appear united in their understanding of one of the terms contained in the Constitution, but a closer look reveals a different story, one that shows how unsettled constitutional meaning actually was in 1787. The Justices ruled that a resolution passed by the legislature of the State of Connecticut was not an ex post facto law prohibited by the Constitution.<sup>80</sup> Even without discussing the rationales of the individual opinions or the disagreement between Justices Chase and Iredell on the role of natural law in constitutional decisions (a disagreement that sparked two centuries of scholarship but is irrelevant to the case),<sup>81</sup> it is easy to discern the precedent established by the case and followed by the Supreme Court to this day: the ex post facto prohibitions in the

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<sup>71</sup> *Ware*, 3 U.S. at 206.

<sup>72</sup> An Act Laying Duties upon Carriages for the Conveyance of Persons, 1 Stat. 373, 373–75 (1794); see *Hylton*, 3 U.S. at 171, 175–76.

<sup>73</sup> See *Hylton*, 3 U.S. at 174.

<sup>74</sup> See *id.* at 172, 181, 184.

<sup>75</sup> See *id.*

<sup>76</sup> See, e.g., *id.* at 172 (“By the case stated, only *one* question is submitted to the opinion of this court;—whether the law of Congress . . . is *unconstitutional and void?*”).

<sup>77</sup> See, e.g., 7 DHSC, *supra* note 43, at 369 (identifying people who believed the tax to be unconstitutional); 7 DHSC, *supra* note 43, at 501–02 (noting that Virginians opposed the tax).

<sup>78</sup> See William Michael Treanor, *Against Textualism*, 103 Nw. U. L. Rev. 983, 987 (2009).

<sup>79</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

<sup>80</sup> *Id.* at 386–87, 400–01.

<sup>81</sup> See, e.g., Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1173–74 (1987).

Constitution pertain only to criminal statutes.<sup>82</sup> Yet what is interesting for the purposes of this Article is that two of the Justices, Paterson and Iredell, held different views at the time of the ratification of the Constitution.

In his *Calder* opinion, Paterson declared that a resolution mandating a new trial in a Connecticut probate court was not an ex post facto law under the Constitution.<sup>83</sup> In his view, as in Justice Chase's, "[t]he words, *ex post facto*, when applied to a law, have a technical meaning, and . . . refer to crimes."<sup>84</sup> Paterson quoted from the constitutions of Massachusetts, Delaware, Maryland, and North Carolina to show that the states understood that ex post facto laws concerned criminal acts and nothing else.<sup>85</sup> He stated that ex post facto laws "are restricted in legal estimation to the creation, and, perhaps, enhancement of crimes . . . ."<sup>86</sup> Enhancement appeared to suffer from the same difficulty as making an innocent act a criminal one after the fact, and thus laws creating greater penalties for crimes committed earlier should be included in the constitutional prohibition, Paterson asserted.<sup>87</sup>

The Justice concluded the opinion with an unusual admission, however. He disclosed that he had believed that every type of retrospective law should be prohibited, because there was "neither policy nor safety in such laws."<sup>88</sup> Indeed, he had an "ardent desire" to extend the Ex Post Facto Clause to cover both civil and criminal statutes.<sup>89</sup> But, after hearing argument in *Calder* and probably consulting with his brethren, Paterson had changed his mind: "[The words ex post facto] must be taken," Paterson averred, "in their technical, which is also their common and general, acceptation, and are not to be understood in their literal sense."<sup>90</sup> He repeated Justice Chase's belief that, if the ex post facto prohibition applied to civil matters, there would have been no reason to include the prohibition of state laws "impairing the obligation of contracts" in the same clause of the Constitution.<sup>91</sup> Paterson specifically mentioned the Framers when he said,

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<sup>82</sup> See *Calder*, 3 U.S. at 386–87, 400–01; see, e.g., *Carmell v. Texas*, 529 U.S. 513, 513 (2000) (applying *Calder v. Bull* rationale to a modern criminal case).

<sup>83</sup> See *Calder*, 3 U.S. at 396.

<sup>84</sup> *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*46).

<sup>85</sup> See *id.* at 396–97.

<sup>86</sup> *Id.* at 397.

<sup>87</sup> See *id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; U.S. CONST. art. 1, § 10.

"They understood and used the words [ex post facto] in their known and appropriate signification, as referring to crimes, pains, and penalties, and no further."<sup>92</sup>

But in 1795, the year in which he had had an "ardent desire" to extend the reach of the Ex Post Facto Clause, Paterson apparently had not believed that the clause was limited to criminal matters.<sup>93</sup> In that year, he presided over a trial in the Pennsylvania Federal Circuit Court and wrote an opinion, in the form of a charge to a petit jury, in the important case of *Vanhorne's Lessee v. Dorrance*.<sup>94</sup> In it, Paterson discussed the constitutionality of a Pennsylvania law repealing a previous statute that had validated titles to land.<sup>95</sup> He queried whether the new legislation might be invalid under the Ex Post Facto Clause and concluded that it was not, because it did not contain the necessary factors that would make it so.<sup>96</sup> In coming to this conclusion, Paterson revealed that he was not relying on a belief that the Ex Post Facto Clause applied to criminal matters only. He clearly thought the clause was relevant to civil concerns like property.<sup>97</sup>

Why, then, did Paterson take the opposite view in *Calder* three years later? Did he consult with Chief Justice Ellsworth about any further consideration of the Ex Post Facto Clause at the Constitutional Convention, when Paterson was absent? No proof exists of such a consultation, but there are circumstantial clues that lead to such a conclusion. One line in a circuit court opinion by Justice James Iredell during the June 1798 term of the North Carolina Federal Circuit Court is revelatory. *Calder v. Bull* had been argued before the Supreme Court the previous February, and Iredell noted that much material had been produced to prove that the words "ex post facto" should be understood in their technical sense as affecting legislation dealing with criminal matters only.<sup>98</sup> According to Iredell, "A majority of the judges appeared to be convinced of it, but upon the doubt of one the case was not decided."<sup>99</sup> Why, though, "did the doubt of one" delay a decision in the case? The minority Justice could have dissented. Perhaps the Justices who had heard the argument wished to

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<sup>92</sup> *Calder*, 3 U.S. at 397.

<sup>93</sup> *Id.*

<sup>94</sup> *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 304 (1795).

<sup>95</sup> See *id.* at 317-19; 8 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 98 (Maeva Marcus et al. eds., 2007).

<sup>96</sup> See *Vanhorne*, 2 U.S. at 319-20.

<sup>97</sup> See *id.*

<sup>98</sup> See *Minge v. Gilmour*, 17 F. Cas. 440, 443 (C.C.D.N.C. 1798) (No. 9,631).

<sup>99</sup> *Id.*

consult Chief Justice Oliver Ellsworth—a native of Connecticut who had attended the Constitutional Convention—on the drafters’ understanding of the Ex Post Facto Clause.<sup>100</sup> The Justices may have wanted to discuss the finer points of law and legal custom in Connecticut as well. These matters were central to the unanimous decision announced by the Court on August 8, 1798.<sup>101</sup>

What would Chief Justice Ellsworth have told the Justices about the discussions concerning the Ex Post Facto Clauses at the Constitutional Convention? According to James Madison’s Convention notes, on September 14 George Mason moved to strike the prohibition against ex post facto laws from Article I, Section 9, because it was not clear that “this phrase was limited to cases of a criminal nature,” while Elbridge Gerry seconded the motion “with a view to extend the prohibition to ‘civil cases’”—a wholly different motivation.<sup>102</sup> All the states voted against the motion,<sup>103</sup> but no evidence exists on why each one voted that way. Were the Convention delegates convinced that the meaning of the Ex Post Facto Clause was clear or were they content to leave the meaning uncertain?

James Iredell’s views of the meaning of the Ex Post Facto Clause also appear to have changed between the period in which the Constitution was ratified and 1798. Comments made in the various states during the ratification debates indicated that some people thought the

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<sup>100</sup> Of the four Justices who heard argument in *Calder*, only William Paterson had been a member of the Constitutional Convention, and he was the Justice who had doubts about the meaning of the Ex Post Facto Clause. See LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 65–66 (2000). James Wilson had also participated in the Convention, but the Justices probably did not expect to see him when the Supreme Court convened in February because he was hiding from his creditors. See 1 DHSC, *supra* note 1, at 48, 298 n.288. Chief Justice Ellsworth missed the Court’s February term because of illness. 1 DHSC, *supra* note 1, at 298 n.288.

<sup>101</sup> See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395, 398 (1798).

<sup>102</sup> 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 197–98 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter 13 DHRC].

<sup>103</sup> See *id.* Professor William Winslow Crosskey questioned the accuracy of Madison’s notes with regard to the Ex Post Facto Clauses. William Winslow Crosskey, *The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. CHI. L. REV. 248, 248–54 (1968). Professor Julius Goebel, Jr., in his discussion of *Calder*, suggests that Paterson wished to expand the definition of ex post facto on September 14, 1787, in the Constitutional Convention itself, when the clause was once more discussed. See JULIUS GOEBEL, JR., 1 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 783 & n.71 (1971). But Paterson had left the Convention toward the end of July and seems to have returned only to sign the Constitution. 3 FARRAND’S RECORDS, *supra* note 21, at 589. His reference in the *Calder* opinion was to his own language in *Vanhorne*. Compare *Calder*, 3 U.S. at 397, with *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 319–20 (1795).

phrase “ex post facto” applied only to criminal matters, while others believed the prohibition also extended to civil issues.<sup>104</sup> Iredell, in his essay, *Marcus I*, clearly favored the more inclusive definition: “The people are expressly secured . . . against *ex post facto* laws, so that the tenure of any property at any time held under the principles of the common law, cannot be altered by any act of the future general legislature.”<sup>105</sup> Yet after *Calder v. Bull* was argued, although not decided, in February 1798, Iredell, sitting on circuit in North Carolina in June, firmly declared a contrary view: “There are strong reasons why the expression [“ex post facto”] should be confined to criminal and not to civil cases.”<sup>106</sup> Iredell then enumerated several situations in which a legislature would be justified in taking property from an individual for a public purpose and averred that it would “have been very unwise if the constitution had restricted the legislature in any such instance.”<sup>107</sup> “[T]he words ‘ex post facto’ should be confined to criminal cases only,” the Justice stated.<sup>108</sup> Later in August, in his Supreme Court opinion in *Calder*, Iredell repeated these sentiments even more strongly.<sup>109</sup> The arguments presented to the Court in February seem to have changed Iredell’s mind.<sup>110</sup> The case could have been decided on the alternate ground that the resolve of the Connecticut legislature was a judicial rather than a legislative act, and discussion of the ex

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<sup>104</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 643, 724 (Merrill Jensen et al. eds., 1976); 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 352, 489, 491 n.2 (Merrill Jensen ed., 1978); 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 330 (John P. Kaminski et al. eds., 1997); 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 494 (John P. Kaminski et al. eds., 1998); 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1365 (John P. Kaminski et al. eds., 2000); 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 45, 371 (John P. Kaminski et al. eds., 1988); 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 730–31, 773 (John P. Kaminski et al. eds., 1990); 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1349, 1355, 1359, 1361, 1363, 1370 n.15, 1408, 1422 (John P. Kaminski et al. eds., 1993); 13 DHRC, *supra* note 102, at 197–98; 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 126, 164, 217–19, 221 n.2 (John P. Kaminski et al. eds., 1986) [hereinafter 16 DHRC]; 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 63 (John P. Kaminski et al. eds., 1995); 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 129, 162, 300 (John P. Kaminski et al. eds., 1995).

<sup>105</sup> James Iredell, *Marcus I*, NORFOLK & PORTSMOUTH J., Feb. 20, 1788, *reprinted in* 16 DHRC, *supra* note 104, at 164.

<sup>106</sup> *Minge v. Gilmour*, 17 F. Cas. 440, 443 (C.C.D.N.C. 1798) (No. 9,631).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 400 (1798).

<sup>110</sup> *See id.*

post facto prohibition could have been avoided altogether.<sup>111</sup> Did the Justices decide in 1798 that a definitive interpretation of a clause in the Constitution was needed because it was unclear what the Framers intended?

Another issue that brought out differences among the Justices on what the Constitution would allow was circuit riding. At the beginning of the decade, the Justices set out on their circuits with great faith that, despite the hardships, they were employed in encouraging their fellow citizens' loyalty to the federal government.<sup>112</sup> Not only would the Justices tell them about the advantages of the new institutions, but they would also demonstrate the merits of the federal court system set up by the Judiciary Act of 1789.<sup>113</sup> In the words of William Paterson, a senator from New Jersey in the First Federal Congress and a member of the committee that wrote the Judiciary Act, circuit courts were "Courts of original Jurisd[iction]\_ you carry Law to their Homes, Courts to their Doors\_ meet every Citizen in his own State."<sup>114</sup>

The Justices soon soured on the circuit-riding system, however. Traveling to the Supreme Court in the two worst months of the year, February and August (and remember that the Court met first in New York and then in Philadelphia throughout the decade), and having to ride a circuit in the spring and the fall took its toll.<sup>115</sup> Modes of travel were primitive and dangerous (one Justice fell through the ice crossing a frozen river), lodgings along the way uncomfortable, and the Justices were separated from their families for more than half the year.<sup>116</sup> Worse yet, they had to pay the costs of this travel out of their own pockets.<sup>117</sup> Congress had made them the highest paid federal officials next to the President and Vice President,<sup>118</sup> but had neglected to pro-

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<sup>111</sup> See *id.*

<sup>112</sup> See Lerner, *supra* note 36, at 131–32.

<sup>113</sup> See *id.*

<sup>114</sup> William Paterson's Notes for Remarks on Judiciary Bill (June 23, 1789), in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 416 (Maeva Marcus et al. eds., 1992) [hereinafter 4 DHSC].

<sup>115</sup> See 2 DHSC, *supra* note 2, at 2–3.

<sup>116</sup> See *id.* at 3; PHILA. GAZETTE, Feb. 3, 1800, reprinted in 1 DHSC, *supra* note 1, at 887–88; see also AURORA, June 3, 1800, reprinted in 3 DHSC, *supra* note 40, at 439 & n.1.

<sup>117</sup> See 2 DHSC, *supra* note 2, at 3.

<sup>118</sup> The Chief Justice received \$4,000 and the Associate Justices \$3,500. An Act for Allowing Certain Compensation to the Judges of the Supreme and Other Courts, and to the Attorney General of the United States, § 1, 1 Stat. 72, 72 (1789). Only the Secretaries of State and Treasury earned \$3,500. See An Act for Establishing the Salaries of the Executive Officers of Government, with Their Assistants and Clerks, § 1, 1 Stat. 67, 67–68 (1789). For a full discussion of how the salaries were determined, see 4 DHSC, *supra* note 114, at 19–21.



vide for any expenses involved in circuit riding.<sup>119</sup> At the end of a year, the Justices often found themselves short of money.<sup>120</sup>

At the August 1790 term of the Supreme Court, which came soon after the Justices had completed their first circuits, the Justices held a private meeting to discuss their unhappiness with the circuit-riding system.<sup>121</sup> As a result, Chief Justice Jay drafted a letter to the President in which he discussed at length what the judges considered the primary flaw in the Judiciary Act passed by Congress: designating Supreme Court Justices as judges in an inferior court was unconstitutional.<sup>122</sup>

Justice John Blair, who had attended the Constitutional Convention, suggested to Chief Justice Jay that the unconstitutional nature of Justices serving in this dual capacity had occurred to him after their meeting early in August: “[T]he circuit system may not be perfectly consistent with the spirit of the Constitution, which intended the supreme court as a dernier resort only,” Blair wrote.<sup>123</sup> “[T]he *constitution* seems also to have intended, that the judges of such inferior courts as Congress might see fit to establish should be a sett [sic] of judges *distinct* from *those* of the *supreme* court,” he continued.<sup>124</sup> He also noted the impropriety if “men who have decided a cause in one court, should determine it again in an appellate capacity.”<sup>125</sup> Congress had addressed this problem with regard to district judges sitting on circuit court appeals but ignored it in the case of Supreme Court Justices sitting on appeals of causes they would adjudicate at the circuit court level.<sup>126</sup> Jay elaborated on Blair’s reasoning by stating that the Constitution declares that “the judicial Power of the United States shall be vested in one *Supreme* Court,” and that the judicial power is

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<sup>119</sup> See 2 DHSC, *supra* note 2, at 3.

<sup>120</sup> See, e.g., Letter from James Iredell to Hannah Iredell (Apr. 11, 1791), in 2 DHSC, *supra* note 2, at 157–58 (addressing personal shortage of money).

<sup>121</sup> See Letter from John Blair to John Jay (Aug. [5], 1790), in 2 DHSC, *supra* note 2, at 83–84.

<sup>122</sup> Letter from Justices of the Supreme Court to George Washington (ca. Sept. 13, 1790), in 2 DHSC, *supra* note 2, at 89–91. It is unknown whether this draft was actually sent to the President.

<sup>123</sup> Letter from John Blair to John Jay (Aug. [5], 1790), in 2 DHSC, *supra* note 2, at 84.

<sup>124</sup> *Id.*

<sup>125</sup> See *id.*

<sup>126</sup> Section 4 of the Judiciary Act of 1789 provided that “no district judge shall give a vote in any case of appeal or error from his own decision: but may assign the reasons of such his decision.” Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 75. The Supreme Court Justices decided informally to adhere to this rule and did not vote in cases on which they had ruled below, but they gave their reasons for the way they had voted in the circuit court when Supreme Court opinions were announced.

extended to the Supreme Court's original jurisdiction in two cases only, but in all other cases the Court is vested with appellate jurisdiction.<sup>127</sup> The need for a national court to examine the acts of "ordinary Tribunals" in order to confine them to the "Limits of their respective Jurisdictions" and to ensure that "they should uniformly interpret and apply the Law" had long been "deemed essential," Jay wrote.<sup>128</sup> "These control[li]ng Powers were unavoidably great and extensive, and of such a Nature as to render their being combined with other Judicial Powers, in the same Persons unadvisable," he continued.<sup>129</sup> "To the natural as well as legal Incompatibility of *ultimate* appellate Jurisdiction, with original Jurisdiction, we ascribe the Exclusion of the Supreme Court from the latter, except in two Cases," Jay concluded.<sup>130</sup> Confidence in impartial justice would be eroded by continuing the circuit-riding system.<sup>131</sup>

Once William Paterson joined the Court in 1793, however, arguments about the unconstitutionality of circuit riding tended to disappear, and the Justices instead concentrated on improving the mechanics of the system. Because Paterson was one of the authors of the Judiciary Act of 1789 that set up the circuit-riding system,<sup>132</sup> he may have urged his brethren to test the system for a few more years. But, by the end of the decade, the Justices finally got what they wanted when Congress passed the Judiciary Act of 1801.<sup>133</sup> The Act eliminated circuit riding and created a tier of circuit courts to which the President would appoint judges distinct from the Supreme Court Justices.<sup>134</sup> Though the Act was a reasonable effort to address the

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<sup>127</sup> See Letter from Justices of the Supreme Court to George Washington (ca. Sept. 13, 1790), in 2 DHSC, *supra* note 2, at 89 (internal quotation marks omitted).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *id.* at 90–91. Jay included in his letter another constitutional defect in assigning Justices as circuit court judges. The Constitution provides for only one way to appoint officers of the United States: the President, with the advice and consent of the Senate, makes the appointment. See *id.* at 91. In the case of the circuit judges, Congress made the appointment and therefore exercised a power that belonged exclusively to the Executive. See *id.*

Throughout the 1790s, the Justices, as a court or individually, bombarded Congress with requests to eliminate or at least fix the circuit-riding system. The only relief they received from Congress came in the form of changes to the dates of particular circuit court sessions, see 3 DHSC, *supra* note 40, at 469, 476, 478, 481, 485–88 (discussing acts making changes to the circuit sessions), and changing the requirement that two Justices attend each circuit court to only one. See *supra* note 35.

<sup>132</sup> See 4 DHSC, *supra* note 114, at 22–23.

<sup>133</sup> An Act to Provide for the more Convenient Organization of the Courts of the United States, ch. 4, § 1, 2 Stat. 89, 89 (1801).

<sup>134</sup> See *id.* §§ 1, 4, 7.

problems brought to the attention of Congress in the previous decade, it unfortunately got caught up in the politics of the day and was repealed one year later.<sup>135</sup>

As a result of the Act's repeal, the Justices were forced to return to riding circuit and to put the imprimatur of the Supreme Court on the system in the case of *Stuart v. Laird*.<sup>136</sup> Justice Paterson announced the decision.<sup>137</sup> Practice under the Act, he stated,

for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.<sup>138</sup>

The other Justices, who had all participated in the Constitution-making activities from 1787 to 1789, joined him in this opinion.<sup>139</sup> All had stated objections to the constitutionality of the circuit-riding system at one time or another during the previous decade.<sup>140</sup> What is the lesson for originalism here?

Clearly, the examples discussed above show that the early Supreme Court Justices, who were active members of the Founding generation, understood their role in establishing a strong federal judiciary, one that would interpret federal law uniformly for the new nation. But they also knew that various provisions in the Constitution needed to be explained and that time and experience would lead to the best explanation.

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<sup>135</sup> See An Act to Repeal Certain Acts Respecting the Organization of the Courts of the United States; and for other Purposes, ch. 8, § 1, 2 Stat. 132 (1802); see also Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1285 (2003) (characterizing the Act as a political attack on the independence of the judges).

<sup>136</sup> *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

<sup>137</sup> See *id.* at 308.

<sup>138</sup> *Id.* at 309.

<sup>139</sup> *Id.*

<sup>140</sup> See *supra* notes 122–31 and accompanying text.