Seriatim

Gerber, Scott Douglas

Published by NYU Press

Gerber, Scott Douglas.
Project MUSE. muse.jhu.edu/book/10631.

For additional information about this book
https://muse.jhu.edu/book/10631

For content related to this chapter
https://muse.jhu.edu/related_content?type=book&id=279416
John Rutledge was a tall and imposing figure. His long, powdered hair ran back from a large forehead that set off his “dark piercing eyes, and firm mouth.” An aloof, dignified bearing revealed the pride of a South Carolina lowcountry (coastal plain) aristocrat. Normally polite and courteous, Rutledge had a temper and could lash out in anger. One French commentator characterized Rutledge in 1788, with some exaggeration, as “the most eloquent man in the United States, but also the proudest and most imperious.”

On the South Carolina bench, Chancellor Rutledge personified authority. “Though ordinarily patient and always impartial, his temper sometimes took fire, and broke out without much check. . . . ‘Court, jury, and audience quailed before him, when he assumed his gubernatorial air.’” Rutledge had a thorough knowledge of the law, but his greatest asset as a jurist was his ability quickly to grasp all the questions and implications raised by a complex case, put them in proper perspective, and penetrate to the heart of the issue.

This facile mind was joined to an ardent, uneasy temperament. Rutledge made up his mind rapidly and preferred quick, decisive action. He grew impatient with prolonged debate. Rutledge’s oratory reflected his personality. He was a speaker whose torrent of vehement rhetoric rushed his listeners along to the desired conclusion. Charles Cotesworth Pinckney described Rutledge’s speech as “strong and argumentative, and remarkable for close reasoning.”
If John Rutledge was a proud aristocrat, his gentility was of the freshly minted colonial variety. His English ancestors had settled in Ireland in the seventeenth century. An uncle, lawyer Andrew Rutledge, emigrated to South Carolina around 1730 or 1731. He quickly achieved professional success, married a wealthy widow, and won election to the Commons House of Assembly. He rose to leadership of the country party, which defended the interests of the colony in clashes with the royal governor, and attained the post of speaker. Andrew’s brother, Dr. John Rutledge, followed him to Charleston a few years later and also achieved prominence in the Commons House. In 1738 the doctor married his brother’s fourteen-year-old stepdaughter, Sarah Hext, who was heiress to a sizeable fortune. The first of their seven children, John Rutledge, was born in 1739.

Rutledge began his education at home and with tutors, then turned at an early age to the law. His legal education started in his Uncle Andrew’s office and continued under prominent attorney James Parsons after Andrew Rutledge died in 1755. He then attended the Middle Temple in London and gained admission to the South Carolina bar in January 1761.

Professional success came quickly. Rutledge handled more civil suits than any other lawyer in South Carolina’s Court of Common Pleas during the period 1761–1774. He was equally successful in the colony’s other courts. Estimates of Rutledge’s legal income during these years range from £1,000 to more than £2,000 sterling per annum, a level that few American colonists achieved in any occupation. The proceeds of his plantations added to his fortune, but land speculation and family responsibilities to his brothers drained his resources. In 1763 he married Elizabeth Grimké, with whom he had eight children who survived infancy.

Rutledge served in the Commons House of Assembly from 1761 to 1775. As early as 1762 he emerged as a leader of the country party. A firm defender of local rights and legislative prerogatives, Rutledge opposed the Stamp, Townshend, and Tea Acts in the legislature, the Stamp Act Congress, public meetings, and the courts, but was not involved in extralegal crowd activity. Like most Americans before 1774, he believed that Britain should regulate colonial trade and make broad policy for the empire but should not tax the colonies or interfere in their local affairs.
Rutledge considered the extension of vice-admiralty jurisdiction in the colonies “the most enormous of any [grievance] Whatever.” He spoke from personal experience, having been an attorney for Henry Laurens in several celebrated cases in 1767 and 1768 that resulted from “customs racketeering” by venal crown officers. Rutledge won the suits in which he was involved and successfully sued a customs officer for damages in one of them.10

Rutledge was among South Carolina’s representatives to the First Continental Congress in 1774. Though firm in defense of colonial rights, he wanted to avoid placing unnecessary obstacles in the way of reconciliation with Britain. Events caused Rutledge to support more radical measures at the Second Continental Congress in 1775, but he continued to hope for reconciliation. He apparently rejected Parliament’s power over the colonies completely by May 1775, acknowledging only the king’s authority. By October, the dissolution of the colonial government in South Carolina, and rising chaos there and elsewhere, caused him to advocate new, temporary governments based on the people. Having secured Congress’s consent, he left Philadelphia to lay the resolution before South Carolina’s Second Provincial Congress.11 When that body met in February 1776, Rutledge served on the drafting committee that wrote the new state constitution. The nineteenth-century historian George Van Santvoord credited him with primary responsibility for creating the document. There is, however, no contemporary evidence of his (or anyone else’s) contribution beyond the fact that he wrote the preamble. Rutledge ultimately accepted independence as a necessity but remained a reluctant rebel to the last.12

In the meantime, the new General Assembly had elected Rutledge president of South Carolina. Highlights of his administration were successful defenses of Charleston against a British attack from the sea in June 1776, and of the frontier against the Cherokee.13 Rutledge resigned as president in March 1778, in protest against the legislature’s approval of a new state constitution. His principal objections were to the elimination of the president’s veto, and to direct popular election of state senators by parish and district, instead of having the lower house choose them at large. These changes, he feared, would alter a mixed government too much in the direction of democracy. Though Rutledge did not detail his objections to democracy, he probably shared a common contemporary view that turbulence, injustice, and
susceptibility to the wiles of demagogues had frequently resulted from that form of government in the past. In any case, he did not want to give the upcountry (piedmont) increased influence in state government at the expense of Charleston and the lowcountry.\(^{14}\)

Rutledge’s fall from power was brief. Britain shifted the brunt of its North American war effort to the South late in 1778, overrunning much of Georgia. The legislature returned Rutledge to the governorship in February 1779, hoping that his leadership could preserve the state from invasion as it had in 1776.\(^{15}\) This time, though, local and Continental military resources were insufficient to resist the increased British pressure. Charleston and the southern Continental Army surrendered after a siege in May 1780.\(^{16}\)

Governor Rutledge reluctantly had left the city in April, just before the British ring around Charleston tightened. The Continental commander, General Benjamin Lincoln, persuaded him to go in order to organize reinforcements for the relief of the city and to preserve the state government’s existence if Charleston fell. The legislature had earlier armed the executive with broad powers to do what was “necessary to secure the peace, safety, and happiness of this State” until the legislators could meet again.\(^{17}\) Hence Rutledge was able to act as a one-man government of South Carolina while the state was under British occupation.

Rutledge made two trips to Philadelphia in 1780 and 1781 to solicit aid from Congress for the southern theater.\(^{18}\) He spent the rest of that period with the restored southern Continental Army, reviving his state’s militia and trying to supply it and the Continentals. In the summer and fall of 1781, as American forces regained control of most of his state, Rutledge began to reestablish state government. The culmination of his efforts was the election of a new legislature that met at Jacksonborough in January 1782. There Rutledge, who was constitutionally ineligible for another term, relinquished his office.\(^{19}\)

The Jacksonborough assembly elected Rutledge to Congress, where he served until November 1783. The major issues that he dealt with in Congress were finance, support for the army, and peace terms. Rutledge was especially determined that the United States must have a western boundary on the Mississippi River. He distrusted France, believing correctly that the French favored a line farther east.\(^{20}\)

Rutledge remained in South Carolina for the next three and a half years. He declined congressional appointments to a special court to
decide a Massachusetts–New York boundary dispute, and as minister to the Netherlands. Gout and a serious illness during the war had permanently impaired his health. Moreover, he needed to turn his attention to his personal affairs, sadly neglected in a decade of full-time public service.

Rutledge’s plantations, like those of other South Carolinians, had suffered considerable damage during the war. Rebuilding required a substantial investment; Rutledge incurred increased debt. Crops were poor through 1785, and prices suffered from the disruption of old trading patterns. Rutledge’s income was further diminished by his not resuming the practice of law. Instead he became one of the judges of the new state Court of Chancery, which exercised equity jurisdiction, mainly involving wills and estates. Unable to rebuild his fortune but continuing to live in a gentleman’s style, Rutledge was in deep financial trouble by the late 1780s.

In the South Carolina House of Representatives, Rutledge and his allies were hard pressed to preserve the political dominance of low-country gentlemen. Artisans, mechanics, and some merchants in Charleston unsuccessfully challenged aristocratic domination of the state as contrary to republican principles. The growing upcountry populace demanded legislative reapportionment and removal of the state capital to the interior, achieving the latter but making only modest gains related to the former. Rutledge was critical of the paper-money and debt-relief schemes that the legislature adopted to assuage popular discontent and to save prominent planters and small farmers alike from bankruptcy.

Thus Rutledge had firsthand knowledge of the problems that his state and nation faced in the 1780s. As wartime governor, he experienced the difficulties that resulted from the inability of Congress to raise men and money for the war effort. As a result, he saw the need for a central government capable of providing for the national defense. He became convinced that Congress needed some power to tax. The economic difficulties of the 1780s, both in South Carolina and in the other states, made him and his state willing to give Congress the power to regulate trade in order to counter British commercial restrictions, but only if South Carolina’s interests were protected by requiring a two-thirds majority on trade issues and by prohibiting congressional interference with the slave trade. Upcountry discontent, challenges to deferential politics and to lowcountry dominance in
South Carolina, and paper-money and debt-relief schemes portended ill for the future of the republic. John Rutledge probably shared his brother Edward’s fear that Shays’s Rebellion threatened “a general distribution of property.” Gentlemen, Edward Rutledge warned, must rouse themselves “to support the central government.” John Rutledge accepted election to the Philadelphia convention of 1787 in the belief that the future of the new nation hung in the balance.

The Constitutional Convention

John Rutledge’s role at the Constitutional Convention reflected a political outlook grounded in traditional Anglo-American Whig thinking, adapted to the circumstances of the South Carolina lowcountry gentry. Rutledge’s extant writings contain no explanation in any detail of his political ideas. There are only a few brief, general comments reflecting his political theory before 1787. It is clear, though, that in the 1760s he shared the Whig view that the British constitution had reached a high degree of perfection, its excellence resting on a balance of power between King, Lords, and Commons. After independence he advocated a continuation of the principle of balance between branches of governments in a republican political order. In 1778 he wrote that the purpose of government was the people’s good, and that form of government was best which made the people most happy. His own preference at that time was for a “compounded or mixed” republic rather than “a simple democracy, or one verging towards it,” at the state level. Democracy was at first glance an attractive theory, he noted, but “its effects have been found arbitrary, severe and destructive.” To Rutledge, a mixed or balanced republic at the state level implied a strong, independent executive; a legislature of two houses, the upper house more independent of public opinion than the lower; an independent judiciary; and a deferential political order that enabled gentlemen to lead. Balance also included protection for the major interests in society; in a South Carolina context, protection especially for the minority interests of lowcountry planters and merchants. Rutledge adapted these basic concepts to the national level in his view of a proper central government for the United States.

The mix of qualities that Rutledge wanted in the national legislature was “Honesty” in the lower house, “Ability” and experience in
the upper.\textsuperscript{28} That formula, as applied in state governments, generally implied popular election of at least the lower house, but Rutledge unsuccessfully opposed popular election of either house of the national legislature. The South Carolina delegates at first wanted the state legislatures to elect the lower house, which would then choose the upper house from nominees submitted by the state legislatures. After the convention opted for popular election of the lower house, the delegates moved unsuccessfully that the states be allowed to determine the method of electing the House of Representatives, permitting indirect election in those states that so desired. Rutledge argued that the state legislatures would choose more “proper characters” than the people, and there was no difference in principle. “It was the same thing to act by oneself, and to act by another.” This position reflected Rutledge’s alarm at the poor performance of overly democratic state governments in the 1780s, and his desire that national legislators be gentlemen of property and ability removed from the pressures of public opinion. For the same reason, he also advocated property qualifications for office and opposed salaries.\textsuperscript{29}

However the legislators were chosen, Rutledge and his South Carolina colleagues supported proportional representation of the states in both houses of the national legislature. How to determine the proportion was important to them, since South Carolina was only the seventh largest state in total population, and the ninth in free population, according to the census of 1790.\textsuperscript{30} These figures were of course unknown to the delegates, but they had a general idea of the states’ relative standing. Very much aware that the Carolinas and Georgia had regional interests in slavery, the slave trade, and commerce to protect, Rutledge worked for a formula that would give the southernmost states as much representation as possible.

Rutledge at first endorsed representation in proportion to the states’ “comparative importance,” then fought repeatedly for a formula based on state quotas of the national government’s expenses or on national taxes paid. “Property was certainly the principal object of Society,” he remarked. The theory that wealth and property deserved consideration in representation was widespread in eighteenth-century America, but it had taken especially deep root in the South Carolina lowcountry. The state constitution of 1778 based representation on a combination of population and wealth. That formula gave the lowcountry a majority in the legislature despite the upcountry’s growing
majority in population. Not fully articulated as of 1787, this low-
country view of representation apparently assumed that property de-
served special protection; that the major property interests—planters,
merchants, lawyers—deserved a share of power that would protect
each interest in an equipoise that theoretically promoted harmony and
the good of the whole; and that those who supplied the bulk of the tax
money for the state’s defense and welfare deserved commensurate rep-
resentation. The deep South was a numerical minority in the United
States with special interests to protect, as was the lowcountry in South
Carolina. Rutledge and his colleagues at the convention therefore ad-
vocated a familiar representation formula for familiar purposes. In the
end, they settled for representation based on population, including
three-fifths of the slaves. Since slaves were a form of wealth, they
found that provision an acceptable compromise, though they were not
entirely pleased with it.

Proportional representation in both houses was unacceptable to
many delegates from the smaller states. Rutledge was elected to the
committee that devised the Great Compromise on representation. He
urged “the indispensable necessity of a representation from the states
according to their numbers and wealth,” and was unhappy with the
committee’s report: proportional representation in the lower house,
an equal vote for each state in the upper house, and a provision that
money bills must originate in the former and could not be amended in
the latter.

Rutledge continued to oppose the Great Compromise on the floor
of the convention. He argued again for representation based on
wealth, or wealth and population combined. He expressed fear that
new, poorer western states could gain a majority in a lower house
based solely on population. Again, this argument reflected attitudes
formed in lowcountry-upcountry conflicts in South Carolina. As for
the Great Compromise’s provision regarding money bills, Rutledge
believed that it was of no advantage, based “on a blind adherence to
the British model” and productive only of conflict in his experience in
South Carolina.

The South Carolina delegates voted against the Great Compromise
but accepted it once it was adopted. When Virginia’s Edmund Ran-
dolph and others expressed dissatisfaction and some spoke of ad-
journing, Rutledge urged that the convention must go on. “Altho’ we
could not do what we thought best, in itself, we ought to do some-
thing” rather than “abandon every thing to hazard.” Defects in the plan could be remedied later.34

Rutledge favored vesting the executive power in one person. “A single man would feel the greatest responsibility and administer the public affairs best.” He first suggested that the upper house of the national legislature alone should choose the executive, a doubly refined choice that would ensure ability, wisdom, and independence from direct pressures of public opinion. Probably, too, Rutledge concurred in his state’s initial preference that the executive have a relatively short term and be eligible for reelection. The convention, however, decided that the executive should be chosen by both houses of the national legislature for a seven-year term, and be ineligible to succeed himself. Rutledge supported this arrangement from then on, and opposed the electoral college. He also wanted the executive to have sole responsibility for vetoing bills. The proposal to join the Supreme Court justices with the president in a council of revision to exercise the veto was, he thought, improper. “The Judges ought never to give their opinion on a law till it comes before them.”35

Rutledge wanted a more restricted federal judiciary than the convention ultimately created. He favored only a single Supreme Court, arguing that inferior federal courts were “an unnecessary encroachment on the jurisdiction of the States.” State courts should “decide in all cases in the first instance”; appeals to the Supreme Court would protect the national government’s authority. Given that power, though, the judges must be independent. Rutledge opposed a motion to allow the president to remove federal judges from office upon the application of both houses of the national legislature. That would be improper “if the Supreme Court is to judge between the U. S. and particular States.” It would influence the judges unduly to favor national power.36

Rutledge believed that the powers of the new government, though substantially broadened, should be enumerated. He did not like the sweeping general grant of authority originally contained in the Virginia Plan. Nor was he happy with the proposal that the national legislature be empowered to veto unconstitutional state laws. Rutledge eventually got satisfaction on both points. He successfully advocated replacing the latter provision with one that made the Constitution enforceable as the supreme law of the land. And, as chairman of the Committee of Detail, Rutledge had an important hand in substituting
enumerated powers, plus the necessary and proper clause, for the virtually unlimited authority given to Congress in the Virginia Plan.\textsuperscript{37}

In general, Rutledge’s conception of federalism thus envisioned a central government of enhanced but limited powers, reserving all other powers to the states or the people. His opposition to lower federal courts indicates that he did not want to extend the central government’s authority beyond what he believed experience had proven necessary. But there was some room for implied powers in his thinking. He considered a constitutional provision guaranteeing the states against foreign and domestic violence unnecessary. It was “involved in the nature of the thing,” he commented, that Congress “had the authority . . . to co-operate with any State in subduing a rebellion.”\textsuperscript{38}

Chairing the Committee of Detail also gave Rutledge an opportunity to protect his state’s particular interests in slaves and commerce against a northern majority in Congress. The committee’s report provided that Congress could not abolish or tax the slave trade. A two-thirds majority would be required for passage of navigation acts, and exports could not be taxed at all. These concessions to the lower South proved too much for the majority of the convention to accept. When some delegates spoke against slavery, Rutledge denied that the slave trade raised any issues of “Religion and humanity.” It was purely a matter of interest, he maintained. “If the Northern States consult their interest, they will not oppose the increase of Slaves, which will increase the commodities of which they will become the carriers.” The southernmost states, he predicted, would not ratify the new constitution “unless their right to import slaves be untouched.”\textsuperscript{39}

Like most South Carolinians, Rutledge was unaffected by the growing opposition to slavery in the northern states and the upper South. He saw slaves simply as productive assets and sources of wealth.

Ultimately, though, Rutledge supported a compromise on these issues. The convention agreed that Congress could prohibit slave importation after 1808, and could tax it up to ten dollars per slave in the meantime. It deleted the two-thirds majority for passage of navigation acts while retaining the prohibition of export taxes. Rutledge remarked that it was important to reopen the British West Indies to American trade, “and a navigation Act was necessary to obtain it. . . . As we are laying the foundation for a great empire, we ought to take a permanent view of the subject and not look at the present moment only.”\textsuperscript{40}
Rutledge also sought to advance his state’s interests by advocating appointment of a committee to consider assumption of state debts by the national government. That was both right and necessary, he argued, since state debts had been “contracted in the common defense,” and the states were yielding import duties—“the only sure source of revenue”—to the central government. South Carolina was struggling with a large war debt and stood to gain greatly from this proposal. But, though the convention adopted Rutledge’s motion, no constitutional provision resulted.41

The final Constitution did not entirely please Rutledge, but he considered it a vast improvement on the Articles of Confederation. His own contribution at the convention was substantial. Two authorities have concluded that only four or five delegates played a greater role at Philadelphia than Rutledge, though several others contributed as much.42 Rutledge spoke frequently in the debates and was chosen for five committees. His effective chairmanship of the Committee of Detail, his important role in securing the enumeration of congressional powers, the necessary and proper clause, the supremacy clause, and safeguards for the deep South on the slave trade and taxation of exports rank among his more conspicuous contributions to the Constitution. Not the least of his contributions was his frequent role as compromiser, both in word and by force of example. Often Rutledge did not get what he wanted, but he remained satisfied enough to make and urge concessions in the overriding interest of a more effective central government. The one partial exception was Rutledge’s strong opposition to the Great Compromise. Once it was adopted, though, Rutledge exerted his influence to calm discontents and ensure a successful conclusion.

When the South Carolina legislature considered the Constitution in January 1788, Rutledge spoke in defense of the provision including treaties in the supreme law of the land. He remarked that the Articles of Confederation were “demonstrably . . . not worth a farthing,” while the new system promised a bright future for South Carolina and the nation. As a delegate to the state ratifying convention, Rutledge defended the strength of the Constitution’s safeguards against abuses of power by officeholders and argued that rotation in office was unnecessary and undesirable. The convention ratified by a vote of 149 to 73.43
Later Life and Judicial Career

When the Constitution took effect, President George Washington offered his old and esteemed friend John Rutledge the senior associate justiceship of the United States Supreme Court in September 1789. Rutledge later said that only Washington’s complimentary personal letter, which appealed to his patriotic duty, induced him to resign as chancellor of South Carolina and accept the appointment. Privately, he was disgruntled that he had not been offered the chief justiceship. Rutledge believed that his own legal knowledge and experience gave him a better claim to head the high court than Washington’s choice, John Jay. His lack of enthusiasm for the job, combined with his poor health and the rigors of travel on circuit, as well as for sessions of the high court, explains why Rutledge remained on the Court for only a year and a half.

Rutledge made no significant contributions to the Court’s work during his short tenure as associate justice. He did not attend its February term in either 1790 or 1791. Rutledge did make the trip to New York for the August 1790 term, but he suffered a painful attack of gout in the capital that prevented his presence at the brief two-day session. Since the Court heard no cases in any of its first three terms, Rutledge’s absence was not of vital importance.

Rutledge and Justice James Iredell were assigned to the Southern Circuit—the Carolinas and Georgia—in 1790. They held the first sessions of the Circuit Court in South Carolina and Georgia in the spring of 1790, but the North Carolina court had not yet been organized. Rutledge attended the fall session of the Circuit Court only in South Carolina. He arrived in Savannah for the Georgia session five days late, to find that the district judge had also been absent and Iredell had adjourned the court. Another severe attack of gout prevented him from going on to New Bern for the North Carolina session. The sessions that were held in 1790 were occupied with admitting attorneys and establishing rules of procedure. Like the other early justices, Rutledge, Iredell, and the district court judges who sat with them adopted the rules of the state courts where they met. They went beyond their colleagues in adopting the same principle for equity proceedings as well. No cases were decided on the Southern Circuit during Rutledge’s tenure.
Rutledge was involved in one incident of potential importance during his brief stint on the Court. In the fall of 1790, he was one of three justices who granted Robert Morris’s request for a writ of certiorari to transfer a suit to which Morris was a party from the North Carolina Superior Court to the U.S. Circuit Court. The case arose from a dispute between Morris and some of his former partners—citizens of a different state—over financial responsibility for a ship that the British had captured during the War for Independence. The justices’ action revived Antifederalist fears that the Constitution imperiled state sovereignty by extending federal jurisdiction. Certiorari was by common-law definition an order from a superior to an inferior court based on the latter’s presumably improper or biased activity. North Carolinians in general, and Antifederalists elsewhere, could not accept either the inferiority of the highest state court to the U.S. Circuit Court or the implication of impropriety. The North Carolina Superior Court refused to obey the order, denying that the federal courts had any authority in the matter, and the state legislature approved that stand. The federal judges, now unsure of their ground, did not press the issue, and a clash that might have damaged the national judiciary was avoided. Rutledge’s action in granting the writ seems inconsistent with his desire at the Constitutional Convention to limit federal jurisdiction. Perhaps he had changed his mind, or perhaps he believed that the Constitution and the Judiciary Act of 1789 authorized the writ and he therefore felt compelled to grant it.

Rutledge resigned from the Supreme Court in March 1791 to become chief justice of the South Carolina Court of Common Pleas and General Sessions. Most of the cases that that court heard were routine. Nevertheless, Rutledge’s recorded opinions as chief justice provide some insight into his judicial philosophy.

Rutledge’s jurisprudence was rooted in a deep respect for English legal tradition, instilled during his legal education. He wrote in 1769 that Coke’s Institutes were “almost the foundation of our law,” and found Blackstone “useful.” Rutledge’s judicial opinions generally followed statute law, common law, and precedent. He believed that the courts must follow established legal constructions. Changes in the law were the business of legislatures, and legislators should clearly stipulate any changes that they wanted to make. Rutledge expressed this philosophy in a case involving the order in which the debts of an insolvent estate should be paid. Specifically, were notes of hand in the
same category with bonds, or did they fall under the heading of other debts? Rutledge, delivering the unanimous decision of the court, ruled that a conversation among several representatives was inadmissible as evidence of the legislature’s intent. “If we once admit of suppositions,” Rutledge wrote, “we may suppose anything” about legislative intent; “and one judge may suppose one thing, and another judge another thing. We have no rule to govern us, but, construing the act according to the legal and technical meaning, we stand on firm ground.” “The legal and technical meaning” of an act depended on its clear wording and on precedent. “It is of great consequence to every free country, that the laws should be fixed and settled; and that when they are so, and generally known and understood, that they should not be changed by implication, or otherwise than by a clear, express and positive declaration of the will of the legislature.” The same philosophy underlay Rutledge’s ruling that South Carolina’s debt-installment law did not alter the principle of “the common law or statute of frauds” that a judgment for debt was for the whole amount, not just the installments due at the time of the judgment.51

State v. Washington, Rutledge’s first case as chief justice, occasioned perhaps the best extant display of his technical virtuosity in the law. He delivered the court’s opinion upholding a conviction for forgery of a state indent and receipt, which had been appealed on the grounds of technical deficiency in the wording of the indictment. The appellant also alleged that indents and receipts were not writings obligatory within the scope of the applicable law. Rutledge’s unusually lengthy opinion was notable for its close and detailed reasoning on the technical issues and its careful application of common law and precedent. He also emphasized that the jury was the judge of fact—including, in this case, the intent to defraud—and the court could not question the jury’s decision on matters of fact.52

A few of Rutledge’s rulings departed from his usual judicial philosophy. He occasionally decided exceptional cases on the basis of equity or practical political considerations. There was, for example, the case of a slave woman who was allowed to find her own employment and keep her earnings after paying her owner a fixed sum. When the woman used her money to buy a slave girl in order to set her free, the woman’s master claimed ownership of the girl. Legally, he argued, a slave’s property belonged to her master. Rutledge instructed the jury that the master had received the stipulated income from his slave
woman. He was entitled to no more, and the jury should not “do such manifest violence to so singular and extraordinary an act of benevolence.” His instructions rested on principles of equity, which counsel for the defense had argued should override the letter of the law in this case.53 Though Rutledge never questioned the legitimacy of slavery—indeed, he fought hard to protect it during the Federal Convention of 1787—he could apparently be touched on occasion by manifest injustice to an individual slave.

Political considerations influenced Rutledge when a former Loyalist sought a new trial to regain ownership of a slave taken and sold by patriot militia under what the militia termed “Sumter’s law” during the war. Twice before, judges had given jury charges favoring the Loyalist, and twice juries had returned contrary verdicts in an apparent display of bias against Tories. The court granted the motion for a third trial, but Rutledge dissented. “As this was a dispute about property taken during the war, it was best that there should be an end of it,” he remarked.54 The War for Independence in South Carolina had included a bitter civil war between patriots and Loyalists, especially in 1780 and 1781, that left lasting enmities among many of the state’s citizens. Rutledge believed it prudent to let this case rest.

Rutledge’s life outside the courtroom in the early 1790s became emotionally troubled. He sank into a depression so deep as to produce erratic and sometimes deranged behavior. His emotional problems apparently became serious after two deaths in 1792. On April 22 Rutledge’s mother, Sarah Hext Rutledge, passed away at sixty-eight. Some six weeks later, on June 6, his wife, Elizabeth, died after a brief illness.55

Rutledge was a “remarkably domestic” man who found his greatest pleasure “at his own fireside.” The loss in quick succession of the two most important women in his life, especially his wife’s sudden passing, was a terrible blow to him. Rutledge withdrew into lengthy periods of silent, solitary mourning. According to Ralph Izard, “After the death of his Wife, his mind was frequently so much deranged, as to be in a great measure deprived of his senses.”56

Bereavement was not the only source of Rutledge’s depression. His physical health remained shaky, and his financial situation continued to deteriorate. He realized that his debts were unpayable and all of his property would likely be lost. His eldest son, John Rutledge, Jr., and his brothers, Edward and Hugh Rutledge, became deeply involved by
assumed obligations for his debts. Much of Rutledge’s property went
to John Jr. and Edward in the 1790s to compensate them for their as-
sistance, perhaps to the dismay of other creditors. But it was not
enough. In or before March 1795, Rutledge executed a deed of trust
that gave Hugh Rutledge and John Rutledge, Jr., the power to receive
his income and sell his remaining property, using the proceeds to pay
his debts and reimburse the son for payments he had made for his fa-
ther. Rutledge almost immediately regretted the deed, but the trust re-
mained in effect at least into 1797. To be so dependent on his fam-
ily was a serious blow to the personal morale of this proud aristocrat.

In his depression, Rutledge’s behavior became erratic. Charleston-
ian William Read referred in 1795 to Rutledge’s “mad frolics and
inconsistent conduct.” It also was reported at that time that “several
Grand Juries” had presented Rutledge “for what they thought Mis-
conduct or at least Negligence of his Duty.” The presentments of
which evidence survives, though, were for tardiness, not conduct on
the bench. As far as can be determined from the limited extant evi-
dence, Rutledge was a capable chief justice of South Carolina despite
his emotional problems outside court. Indeed, that post of honor and
responsibility was one of the few things that sustained a degree of per-
sonal morale for him.

By June 1795, Rutledge had learned that a position of greater
honor and responsibility would soon be vacant. John Jay had been
elected governor of New York, which would require him to resign as
chief justice of the United States. Rutledge wrote to George Washing-
ton to inform the president that he was available for the post he had
desired six years earlier. He still wanted it to cap his career, erase his
previous disappointment, and boost his morale. Rutledge was not un-
aware of the strain that the job would impose on his ailing physique,
but a 1793 revision of the Judiciary Act of 1789 that required each
justice to ride circuit only once a year instead of twice allowed him to
hope that he would be able to perform the requisite duties.

Washington received Rutledge’s letter and Jay’s resignation on the
same day: June 30, 1795. Apparently unaware of Rutledge’s emo-
tional problems, the president immediately appointed him chief jus-
tice. It was a recess appointment, the Senate having recently ad-
journed until December.

Before adjourning, on June 24, the Senate ratified the treaty that
Jay had brought back from Britain earlier in the year. The vote was 20
to 10, following strict party lines. When the treaty’s previously secret terms became public, there was a strong and widespread negative reaction to an agreement that many considered one-sided and damaging to the interests and honor of the United States. The Rutledge brothers, who had been strongly anti-British since the War for Independence, were among the leaders of public protest against the treaty in South Carolina.

After several days of crowd demonstrations in the streets of Charleston, Rutledge made an impassioned speech against the treaty at a public meeting on July 16. He probably had not yet learned of his appointment to the chief justiceship. Having denounced the treaty in the strongest terms, Rutledge angrily declaimed that “he had rather the President should die, dearly as he loves him, than he should sign that treaty.”

The speech, made in the context of disorderly public protests, shocked Federalists and contributed greatly to a rising opposition to Rutledge’s confirmation as chief justice. Hitherto seen as a reliable Federalist, Rutledge was suddenly tied in Federalist minds to a chain of threats running from the Genet affair, the Democratic-Republican Societies, and the Whiskey Rebellion to the current Democratic-Republican challenge over the Jay Treaty. “C[hief] Justices,” wrote John Adams, “must not go to illegal Meetings and become popular orators in favour of Sedition, nor inflame the popular discontents which are ill founded, nor propagate Disunion, Division, Contention, and delusion among the People.”

This politically motivated opposition strengthened objections to Rutledge that already had arisen from questions about his character and competence. It was reported widely, and apparently with considerable truth, that Rutledge was “deranged in his mind,” frequently drunk, indecorous in public, and unethical in his financial dealings. If true, these reports alone disqualified him for high office in the opinion of men like Alexander Hamilton. Federalists believed that an experimental new government needed gentlemen of influence, character, and ability in positions of leadership to help it survive challenges from a disorderly populace infected with French revolutionary ideas. Rutledge shared the Federalist belief in elite leadership, but Federalists saw his conduct as a betrayal of them and of his own principles. Political opposition to the nomination and doubts about Rutledge’s personal fitness to serve were inseparably intertwined. Rutledge’s de-
rangement, some Federalists thought, explained his Jay Treaty speech, and “the crazy speech” proved his mental incapacity.65

Despite the controversy swirling around him, Rutledge behaved with dignity when he went to Philadelphia to preside as interim chief justice over the August term of the Supreme Court. He participated in two decisions, both involving the legality of ship seizures by French privateers. In *Talbot v. Jansen*, Rutledge concurred with a unanimous Court in invalidating the capture of a Dutch ship by what was ruled to be an American vessel fraudulently operating as a French privateer. The ship, he ruled, was illegally fitted out in the United States, and its prize was taken in violation of international law and of United States treaty obligations to Holland. The decision supported Washington administration neutrality policy that French privateers could not be fitted out and manned in U.S. ports. In *United States v. Peters*, he delivered the majority decision that a French privateer could not be detained in a United States port by order of a federal court to answer for the legality of a seizure made on the high seas and taken to a French port. The trial of prizes and application of international law in such a case lay exclusively with French courts.66 These cases contributed to the definition of United States maritime and neutrality law.

Rutledge continued to behave circumspectly through the fall of 1795 as the controversy over his nomination mounted. He would not recant his opposition to the Jay Treaty, but he kept quiet and lived “very much retired” until he embarked on his fall tour of the Southern Circuit. He participated in fifteen decisions, mostly involving ship seizures, at the Charleston session of the Court from October 26 to November 5. Despite poor health, he journeyed on to Augusta, Georgia, but could do no business there because the district judge was absent, the clerk had died, and the records were not available. Rutledge then set out for Raleigh, North Carolina, the last stop on the circuit. On November 21, a few hours after he left Evans Tavern on Lynch’s Creek, he became too ill to go on. After recuperating for a while at Evans’s, he headed for home.67

This experience forced Rutledge to face the fact that he was not physically equal to the demands of Supreme Court service. That realization gave a final, crushing blow to his already depressed spirits. He had lost his wife, his mother, much of his property, and control over what property remained. Already dependent on his brothers and eldest son, he faced the prospective loss of all of his property and with
it the remnants of the personal independence that eighteenth-century gentlemen so highly valued. The public attacks on his character had badly damaged his reputation, and his confirmation as chief justice was very much in doubt. Now he knew that he could not do the job in any case. The proud aristocrat concluded that he had no reason to live. He attempted suicide by drowning at Camden on the way home. Rutledge’s family watched him closely to prevent another suicide attempt, but they were not vigilant enough. On December 26 or 27, he left home before dawn and again tried to drown himself in the Ashley River. Blacks working nearby rescued him despite his protests.68

After this second failure to take his own life, Rutledge became calm and rational. On December 28, 1795, he resigned as chief justice, stating that he had found his health “totally unequal to the discharge of the duties of the Office.” He apparently had not yet learned that the Senate had rejected his nomination by a vote of 14 to 10 on December 15. It was a straight party-line vote that reproduced the alignment on the Jay Treaty, except for the Federalist senator Jacob Read of South Carolina, who voted to confirm Rutledge in the belief that his rejection would badly damage the Federalist Party in his state.69 Doubts about Rutledge’s personal fitness to serve and political considerations were both important to the outcome—and inextricably linked—but the vote suggests that the political factor was the stronger one.

The Senate’s vote was significant as a reflection of party conflict and ideology in the 1790s. Its importance for the subsequent history of the Supreme Court is debatable. One scholar has argued that had Rutledge been confirmed, and had he remained in office until his death in 1800, Oliver Ellsworth would not have been chief justice in the late 1790s, and the timing of Rutledge’s death would have made John Marshall’s appointment as his successor unlikely.70 That conclusion is questionable. If in fact Rutledge resigned before learning of the Senate’s vote on his confirmation, the outcome of that vote was irrelevant to the subsequent personnel of the Court. Washington would have had to appoint a new chief justice early in 1796 even if Rutledge’s nomination had been confirmed. Presumably, the result would have been the same, and subsequent judicial history would have been unaffected. Whether or not Rutledge would have resigned for health reasons if there had been no opposition to his confirmation is, of course, another question.
Rutledge remained rational after his 1795 suicide attempts. He lived in seclusion for more than two years, preoccupied with his debts for at least part of that period. At some time after August 1797, he resumed control of his own financial affairs. In May 1798 he suddenly returned to society in a burst of high spirits. Rutledge’s improved mood did not reflect a change in his fortunes. Between 1798 and 1800, forty-one judgments for debt were entered against him in the Charleston District Court of Common Pleas. But locally, at least, his name continued to command respect. He was elected to the state House of Representatives in a December 1798 special election to fill a vacancy from Charleston. He died on July 18, 1800.71

Conclusion

John Rutledge’s major contribution to the constitutional history of the United States was his significant role at the Philadelphia convention of 1787. As chairman of the Committee of Detail, he had much to do with the enumeration of Congress’s powers and insertion of the necessary and proper clause. He fought, with partial success, to secure the interests of the southernmost states on slavery, the slave trade, and commercial matters. He had an important hand in securing the Constitution’s supremacy clause. His willingness to compromise his desires helped to ensure the success of the convention.

Rutledge decided no cases during his service as associate justice of the United States Supreme Court in 1790 and 1791. His contribution during that period was to help open and organize the Circuit Court in South Carolina and Georgia. As interim chief justice in 1795, Rutledge participated in two cases, both involving ship seizures. Although his role was not pivotal, his opinions helped define United States law on neutrality and maritime issues, and supported the Washington administration’s neutrality policy.

The best expositions of Rutledge’s judicial philosophy were contained in his opinions on the South Carolina bench. There his jurisprudence reflected adherence to common law, statute law, and precedent. Established legal constructions, he believed, should be upheld; the courts should leave legal innovation to legislators, in the belief that fixed and known laws were important to liberty. Together with his role at the Federal Convention of 1787, Rutledge’s greatest
services came in the Continental and Confederation Congresses, and in all three branches of colonial and state government. His two terms as wartime chief executive of South Carolina stand out among his contributions at the state level. History has generally given him due credit for his achievements.

NOTES


15. *South Carolina & American General Gazette* (Charleston), Feb. 11, 1779.


bly and House of Representatives, 1776–1780 (Columbia: University of South Carolina Press for the South Carolina Department of Archives and History, 1970), 252, 268.


19. The sources on Rutledge’s activities in 1780 and 1781 are too numerous and scattered to detail here. They are fully documented in my book John and Edward Rutledge of South Carolina (Athens: University of Georgia Press, 1997).


25. The best source on the 1780s is Nadelhaft, Disorders of War. For Rutledge’s role, see the published journals of the House of Representatives and the Charleston newspapers for the period.

26. Lark Emerson Adams and Rosa Stoney Lumpkin, eds., Journals of the House of Representatives, 1785–1786 (Columbia: University of South Carolina Press for the South Carolina Department of Archives and History, 1979), 349, 370, 382–83, 396, 398; Nadelhaft, Disorders of War, 174; Charleston Evening


32. Ibid., 509, 516, 522–23.

33. Ibid., 534, 571, 582, 2:279–80.


38. Ibid., 2:48.

39. Ibid., 2:183, 364, 373.

40. Ibid., 366, 374, 396, 408, 446–49, 452.

41. Ibid., 322, 324, 327.


45. Rutledge to Washington, Oct. 27, 1789, June 12, 1795, DHSC, 1:22, 94–95. For his resignation as chancellor, J. Rutledge to Gov. Charles Pinckney, Dec. 17, 1789, General Assembly Papers, ser. 6, no. 512, SCAr.


52. State v. Washington (1791), 1 Bay 120.

53. The Guardian of Sally, a Negro, v. Beatty (1792), 1 Bay 260.

54. Administrators of Moore v. Cherry (1792), 1 Bay 269.


57. J. Rutledge, Jr., memorandum, May 1797, and E. Rutledge to J. Rutledge, Jr., Apr. 24, 1794, John Rutledge Jr. Papers, Duke University; Charleston County Court of Equity Bills, 1803, no. 29, SCAr.


59. William Read to J. Read, July 27, 1795, Read Family Correspondence, SCHS; J. Adams to Abigail Adams, Dec. 21, 1795, DHSC, 1:816; for references


It is not entirely clear when Rutledge learned of his appointment. Leon Friedman, “John Rutledge,” in Leon Friedman and Fred L. Israel, eds., The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions, vol. 1 (New York: R. R. Bowker, 1969), 45, calculates that Rutledge should have heard of the appointment before the speech. Edmund Randolph to Washington, July 29, 1795, DHSC, 1:773, agreed. Warren, Supreme Court, 1:129, states that Rutledge received his commission on July 24, after the speech. W. Read to J. Read, July 21 and 27, 1795, Read Family Correspondence, SCHS, supports Warren. Read commented on the speech in both letters but reacted to the appointment only in the second one.

63. J. Adams to A. Adams, Dec. 17, 1795, DHSC, 1:813.


67. W. Read to J. Read, Sep. 10, Nov. 25, 1795, Read Family Correspon-


70. Warren, *Supreme Court*, 1:139.