Chapter 6

John Blair
“A Safe and Conscientious Judge”

Wythe Holt

“John Blair, . . . while not a man of the first order of ability, was a safe and conscientious judge. He acted an important part in the history of the country both before and after the American Revolution.”

“This court is truly willing to make any voluntary sacrifice for the attainment of so desirable an object as the establishment of courts, which by the expeditious administration of justice, will not only give that relief to suffering creditors, which has already been too long withheld from them, but contribute much to the increase of industry, and improvement of the morals of the people.”

It is an honor and a privilege for my work to be included in a volume contributed to by such distinguished and knowledgeable scholars of such diverse backgrounds and approaches. It is a warm pleasure to have as fellow contributors my graduate school roommate, Jim Haw, and my good friends and coworkers in the tiny field of early American federal court history, Steve Presser, Sandra VanBurkleo, and Bill Casto. I have benefited greatly from readings of the prior version of this piece, with astute comments ranging from “cutting edge” to “cutting block” made by Scott Gerber, Brent Tarter, Jim Haw, Bill Casto, my history colleague Forrest McDonald, and my law colleagues Norman Stein and Martha Morgan. This piece is dedicated to Bill Casto, for without his steadfast encouragement, his staunch friendship, and his helpful knowledge and insights it would not have been completed.

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I have kept spelling, punctuation usage, and grammar in the fashion of my 1790s sources when quoting from them, as best I am able, though our age has lost much of the habit of colorful and poignant phrasing to say nothing of punctuation diversity, so that I have not always been successful.
Prosperity during the 1750s and 1760s greatly increased the wealth both of the planters and merchants of tidewater Virginia and of the small but able group of lawyers who were their allies and helpmates. Generally in solid political control of the colony, they became ever more assertive, and eventually, using the language of republican political ideology, began to seek independence from the taxation, from the restrictions upon their trade, and from the paternalistic political control exercised by a remote and increasingly mercantilistic royal government in Great Britain. Precisely to this manor born was John Blair, in Williamsburg, the colonial capital, in November 1732.

Blair’s family was wealthy and well connected. His great-uncle James Blair had been for nearly five decades the political despot of the colony, personally causing the dismissal of two royal governors, acting as governor himself on one occasion, for fifty years both founding president of The College of William and Mary and member of the governor’s Council. John Blair’s father, for whom he was named, was for more than four decades the colony’s deputy auditor-general, was a member of the Council for a quarter century, and was four times acting governor. Moreover, John Blair pere obtained 100,000 acres of land in what is now West Virginia, owned plantations, sat on the Williamsburg city court, and was a partner in a prosperous mercantile firm.

Blair graduated with honors from William and Mary in 1754. Tall, with a generous forehead, blue eyes, red hair, and a gentle disposition, Blair used his family wealth to study law in the Middle Temple in London. In late December of 1756, in Edinburgh, he married his Scottish second cousin Jean Blair, a quiet, sickly, and perhaps mentally afflicted person to whom he became deeply devoted. After he was called to the bar in May 1757, he returned to Virginia.

Blair immediately began practice before the General Court, Virginia’s highest court, which sat only in Williamsburg. Virginia in 1748 had required its lawyers to choose either county court or General Court practice. Most opted for the sixty-odd county courts where the local gentry sat as justices of the peace; there old-style informality and
gentry dignity prevailed over mercantile efficiency and, at times, mercantile justice. Only a few were able to make the journeys or the sophisticated arguments, or afford the lengthy apprenticeship, required of the General Court bar. “Fewer than twelve Virginians actually attended the Inns, received a call to the bar, and returned to actual legal practice before 1776,” and all, like Blair, became leaders of the General Court bar. Others rose from the petty gentry, such as Edmund Pendleton, George Wythe, Patrick Henry, and Thomas Jefferson. Blair was no spellbinding orator like Henry, nor deeply persuasive like Pendleton, being “without that ease in speech, which sometimes gives currency to dross,” but he was clear-minded, thorough, learned, and well connected, and he soon gained a respectable share of the business.6

Blair also started to take his place in Virginia’s social and political order. He began a six-year stint as bursar of the College of William and Mary in 1760. He was selected as the college’s representative in the House of Burgesses in 1765, and, despite his very junior status, was chosen for important posts in 1766 and 1768. He was appointed Clerk of the Council in 1770 (resigning from Burgesses and leaving the active practice of law). And he received his father’s place as deputy auditor-general and stepped into that octogenarian’s shoes in the mercantile business upon his death the following year. Blair’s rise to social eminence was also signaled by his becoming the first grand master of Virginia Masons, serving from 1778 to 1784.7

Emergence of the Republic of Virginia

Blair, Pendleton, Wythe, and the rest of the tidewater elite had opposed as premature Henry’s shocking defiance of British authority embodied in his 1765 Stamp Act Resolutions, which passed the House of Burgesses by one vote. However, “[a]s events led to separation from Great Britain, Blair sided with those merchants and landowners who favored independence.” In May 1769 he presided over the House’s adoption of an address strongly condemning Parliament, and when the House was dissolved in 1769 and again in 1770, Blair joined with other merchant and planter leaders to draft the first nonimportation agreements. The dangers of an elite revolt, and the lie at the heart of American democracy, became momentarily apparent when, upon the sudden flight of the royal Governor Dunmore to his ships in May
1775, Blair on behalf of the Council was compelled to reassure the common people that “odious distinctions” between elites and others were now cast aside, and that the councillors were really the “watchful Guardians of the Rights of the People” rather than intent on preserving their own distinct interest. ⁸

Virginians now met frequently in Convention, at first as a temporary government. The Convention named Blair one of the three judges of a newly created admiralty court, in January 1776. The following May the Convention created a new Declaration of Rights and Constitution for a colony that now formally declared its independence from the crown, with Blair among the twenty-eight members of the committee that wrote the two documents. There is no record that Blair made any contribution, ideological or political, to these novel, momentous republican instruments that proved inspiring models to many other rebels around the world. He was, however, chosen to be one of the members of the new Council.⁹

Thomas Jefferson’s chief contribution to the new structure of government was its judiciary. The trial and appellate jurisdiction of the old General Court was split into three new courts, equity jurisdiction being placed in a Court of Chancery, admiralty in a reconstituted Admiralty Court, and common-law civil and criminal jurisdiction in a fresh General Court. A Court of Appeals, composed of the eleven judges who sat in the other three courts, was created to supervise all three, primarily on important issues of law. All judges had tenure during good behavior. Despite the new Constitution’s insistence upon separation of powers and the independence of the judges, prohibiting them from holding office in the other branches, John Blair, who on January 23, 1778, was elected one of the first judges of the new General Court by joint ballot of the two houses of the legislature, did not resign from the Council until February 28.¹⁰

Eminence as a Virginia Judge

Having become chief justice of the General Court in 1779, Blair was, in November 1780, elevated to the Court of Chancery. There he joined Edmund Pendleton and George Wythe, perhaps the two most celebrated and competent state court judges of their time. Moreover, both had been lawyers of renown before the Revolution; both had long been leaders in Virginia politics; both had served with great dis-
tinction in a Continental Congress full of capable men; both were well known for their political philosophies, Pendleton for his cautious conservatism, Wythe as an independent-minded if intensely learned proponent of Enlightenment republicanism; and both remained revered elders as Virginia achieved nationhood and then joined the new United States. Blair paled in comparison, as perhaps would other judicial contemporaries, and he never achieved any distinction we notice today during their nine years together on the bench.

Yet George Washington, Thomas Jefferson, and Joseph Jones (Blair’s predecessor as General Court chief justice) mentioned the three—and no others—when anticipating which Virginians might grace the United States’s first Supreme Court in 1789, or, in Jefferson’s case, ruminating about the ability of strong judges to enforce constitutional rights in the teeth of majoritarian clamor. Blair’s eminence is inexplicable in the apolitical modern language of judicial competence. He was, however, a sturdy, wealthy gentleman of the highest social standing, whose mildness excited no animosity, whose judicial opinions were clear and sound, and who had shown that he could be counted on to support the prevailing order. Blair lived in a time when law was not thought to be sharply separated from politics, and when judges considered themselves and were considered part of the government, so his connections and his loyalty to class and calling go a long way toward providing an understanding of his reputation.

Only four notable opinions that John Blair wrote or joined as a state court judge have come down to us: Commonwealth v. Caton (1782), Commonwealth v. Posey (1787), the Judges’ Remonstrance (1788), and the Judges’ Resignation (1789). All four, decided by the Court of Appeals, are of the first rank in importance, since they are among the earliest treatments by judges of their role in a republic.

In Posey, the whole court except Wythe and one other judge found a respected, pre-Revolutionary English judicial interpretation of an even more ancient English statute to be automatically binding upon them just as though it were part of the statute. Wythe dissented irately, because, as historian Robert Kirtland has shown, he believed such an ancient foreign judicial decision was not binding; an emerging positivist in outlook, Wythe wanted to look at the reason of the law, and to be able to change poor or outdated judge-made rules. Blair’s opinion epitomized the staid, natural-law position of the majority: “If it
were a new case, I should be at no loss to decide in favor of the prisoner. But the decision in *Poulter’s case*, has prevailed so long, that it must be submitted to; and the authority of it . . . cannot now be shaken.” Blair, and the majority, were unable to join Wythe in imagining that law could be judge-made. Rather, law arose from the imperceptible consent of the people, over the ages, to those opinions about the law that had been consistently expressed by and accepted by legislators, judges, learned treatise writers, and members of the bar: mortals did not have the power to alter it, after such a time, except by positive act of the people’s elected representatives.\(^\text{13}\)

The other three decisions are among the earliest judicial discussions of judicial review. *Caton* involved the alleged pardon of three loyalist Virginians who had been convicted of treason. The state constitution seemed to say that only the House of Delegates had the power of pardon, while a statute required the concurrence of both the House and the Senate in any pardon. The House had given pardon, but the Senate refused to concur. The Court of Appeals heard the prisoners’ claim that the statute violated the constitution. Only Wythe and James Mercer of the eight judges who sat claimed the power of judicial review. Mercer boldly declared the statute unconstitutional. Wythe in dictum resoundingly defended judicial review as flowing from the separation of powers, giving the people a recourse where the legislature had overstepped its bounds as laid down in the constitution. But he actually joined most of the rest of the court in a tortured construction of the constitution that eliminated any conflict with the act. They then found the act proper and denied the appeal. Blair did not speak at length, expressly “wa[ilv]ing] the question upon the power of the Court to declare an anti-constitutional Act of Assembly void, since the Treason law was not so.” Only one of the judges denied this power of judges to declare a statute void.\(^\text{14}\)

Blair’s caution disappeared, however, when the issue next arose. Essentially, ever since popular inability to repay debts owed to British merchants had closed Virginia’s courts for four years in 1774, trial court dockets had been almost hopelessly clogged, primarily with debt cases. Especially choked were the county courts, where delay was a debtor’s best friend; many of the genteel justices were in debt. Relief schemes revolved around having the professional (and more creditor-oriented) upper-court Virginia judges ride circuit through the hinter-
lands. This produced much opposition from the powerful county courts during the depressed 1780s, but finally in October 1787 the General Assembly added four judges to the General Court and required the fifteen Court of Appeals judges to travel around the state holding court in eighteen districts. In an opinion penned by Pendleton and entered on the record without benefit of litigants or argument, the Court of Appeals unanimously held the scheme unconstitutional, since it had more than doubled their duties without any increase in salary. Separation of powers demanded that the legislature not be “at liberty to compel a resignation by reducing salaries to a copper, or by making it a part of the official duty to become hewers of wood, and drawers of water.” Instead of calling the judges on the carpet, the legislature accepted judicial review and wrote another law, establishing a new stationary Court of Appeals (to which Blair and Pendleton were immediately elected) and confining judicial traveling to the enlarged General Court. Although judicial duties had again been increased without extra pay, this time the judges acquiesced because they wanted to “give that relief to suffering creditors, which has already been too long withheld from them.” However, in another advisory opinion by Pendleton they unanimously held the new act unconstitutional too, as “incompatible with their independence” because it terminated the old Court of Appeals although its judges should have been “secure in the enjoyment of their office.”

Without comment on their momentous import, Blair joined in these opinions tending to protect republican courts from any oversight by republican legislatures, while at the same time allowing the former, though unelected, to sit as unreviewable censors of the latter. Though Pendleton had raised the issue of whether judicial censorship might overstep the same separation-of-powers bounds the judges had laid down for the legislature, abstract issues of proper popular governance did not trouble the bench because the judges had been reared in a natural-law culture that understood their role as finding a law the people had already consented to (which the legislature had disobeyed), rather than exercising political will. Moreover, they were members of a ruling elite with little concern for democratic republicanism. Judicial review itself was not controversial in Virginia, and Blair, as usual, accepted the views of his social peers and eminent judicial colleagues.
A Federalist National Security Court

Blair as Constitution Maker

John Blair served but a short time on the new Court of Appeals, for nine months later one of his friends wrote to his niece, “I suppose you have heard of your Uncle Blairs appointment—he sets out for New york in Jan’y.” George Washington, now president of a reconstituted United States that Blair had helped to create, had named his old friend to the new United States Supreme Court.18

Blair had (with his fellow chancellor Wythe) been a delegate to the Constitutional Convention, where Madison recorded him as making no speeches. Though in caucus he had opposed Madison on the issues of a multiple executive and legislative election of the executive, he signed the finished document. He then sat in Virginia’s Ratification Convention. While Pendleton chaired the body and spoke in favor, and Wythe both served as chair of the Committee of the Whole (where all the debate was done) and moved for adoption, once again we find that, in the succinct words of James Monroe, “Blair said nothing, but was for it.” It is likely that many delegates in both august assemblies agreed with Georgia’s Constitutional Convention delegate William Pierce that “his good sense, sound judgment, and excellent principles overbalanced any oratorical deficiency,” for Blair’s work shaping and promoting the Constitution must have been done, in the tradition of gentry politics, in the halls, at church, and at the dining table.19 Blair had made a definite choice, however, for on the Supreme Court and even afterward he continued to prove himself a strong supporter of the new government.

The Embattled United States

A stronger federal government had been created because of the fears held largely by those citizens—by no means a majority—who supported it.20 The fears had both foreign and domestic sources. The United States was weak and surrounded by the colonial territories of powerful European nations desirous of further aggrandizing themselves, suspicious of both its republican experiment and any chances of success it might have, and, in the case of Great Britain, smarting under recent defeat, contemptuous, and hoping to give its former
colonies a comeuppance. Internally, some poor crop years, a decade-
long depression, plus the astonished unwillingness of established
seaboard elites to share power with the ordinary farmers and artisans
who had actually fought the Revolution had created internecine
squabbling, intermittent revenue collection, and frequent control of
legislatures by anticommercial soft-money forces that issued paper
money and enacted other debt-avoidance measures. Flare-ups of farm
folk, artisans, and wage workers culminated in Shays’s Rebellion in
New England—a serious revolt not finally subdued until after the
Constitutional Convention assembled.

A procommercial, prodevelopmental thread tied together those
members of the elites who wished to reestablish the nation upon a
stronger, more centralized basis. Both the ability to exercise armed
might either in self-defense or in internal policing, and any perma-
nent enlargement of the government meant that the national govern-
ment must be given power over its own revenue. The ability to re-
cruit naval aid by arming merchantmen as privateers, which in turn
meant the ability to protect a revenue-producing merchant marine,
implicated the protection of prizes captured in war. Above all, in an in-
creasingly trade-conscious and commodity-desirous world, to gain
stability meant borrowing from European sources to finance trade,
to stimulate manufactures, and to begin the development of the huge
trans-Allegheny territories, the mere acquisition of which had al-
ready stimulated a competitive froth of land speculation amongst
elites. Borrowing meant establishing credit. This in turn meant, as
with any Third World country today, elimination of soft-money and
other debtor-favoring practices, and neutralization of localistic and
anticommercial juries. It also meant a better debt-payback record
than existed with regard both to the huge and largely unpaid debts
incurred by both states and the federal government in winning inde-
pendence, and to the millions of dollars’ worth of debts owing from
planters and farmers to English and Scottish merchants left unpaid
at the onset of the Revolution and still mostly unpaid in 1787, be-
cause of lingering anti-British hostility plus the generally depressed
circumstances. Policing meant criminal law; revenue protection
meant the establishment of revenue jurisdiction; prize meant admir-
alty jurisdiction; and the neutralization of localism meant the es-
tablishment of independent federal courts with appropriate jurisdic-
tion.
The Constitutional Convention (as interpreted by William Casto) did precisely this, establishing a well-articulated system of federal courts with admiralty (including revenue) jurisdiction, jurisdiction over suits between citizens of different states (diversity) and suits brought by aliens (alienage), and jurisdiction over states as defendants. Federal judges were given independence through life tenure and a guarantee against diminution of their salaries. “Federal-question” jurisdiction was granted over cases arising both under treaties—most importantly the 1783 Peace Treaty, which guaranteed repayment of the prewar British debts in pounds sterling (a guarantee the states had widely ignored)—and under the Constitution, because most expected the federal courts to find state (and national) laws in conflict with the Constitution to be void. States were forbidden to impair contracts (debts) or to make anything but gold and silver a legal tender. The federal government, in addition, was allowed to have a military, to raise revenue (largely through import duties), and to control all commerce.

The Judiciary Act of 1789 completed the picture, setting up exclusive federal criminal jurisdiction and establishing a resident federal district judge in each state to hear revenue and prize cases. Circuit courts (comprised of two itinerant Supreme Court judges and the local district judge) would sit twice each year in each state to hear the most controversial cases—British debt cases, important federal criminal cases, and cases founded upon diversity of citizenship and alienage—except that jurisdiction over states as defendants was confined to the Supreme Court. Opposition by Anti-Federalists to the breadth of federal-court jurisdiction was diffused by leaving out all pending and most petty British debt cases, by stripping the Supreme Court of its constitutional power to overturn factual findings or damage awards made by juries, and by confining appeals from state courts to issues of federal law decided against federal interests.21

But the opposition was only temporarily diffused, as most of the officials of the new government well knew. In order to energize the new system, they had to walk a tightrope between action that exercised the government’s power to assert national interests but that might activate or heighten divisiveness, and inaction or nonthreatening action to promote harmony but that might permanently diminish some important national power. When it became necessary to emphasize the government’s power, none of the judges hesitated, for they were proponents of a system that they felt to be absolutely necessary for their
own and the nation’s welfare. Moreover, their support for the Constitution meant conscious support for the governmental policies of Washington and Hamilton. They firmly believed that the power of the government over revenue, civil order, prize, and trade had to be maintained; that aliens and out-of-state citizens, mostly creditors and entrepreneurs, were not to be discriminated against by localistic juries or anticommercial laws or rulings; and that the national dignity and integrity of the United States must be upheld, especially with regard to British creditors. In grand jury charges throughout the decade, the judges trumpeted the necessity, the power, and the goodness of the Federalist government. But in court, they often hesitated, and they acted firmly only when they thought it was called for, since they also understood how perilous the government’s position was. Everything might collapse if too much domestic opposition were excited.22

Blair the Cautious Virginia Federalist

John Blair had no debt problem, and his own social, economic, and political interests as a wealthy planter and merchant were congruent with those of the Federalist regime. Several Virginians who were in a socioeconomic position similar to Blair’s, but who were in debt or were suspicious of the potential dominance of the national government over their large and relatively powerful commonwealth, opposed it from the beginning (though many of these, such as Patrick Henry, changed to a position of support during the 1790s). Many other Virginians in Blair’s class, such as Edmund Pendleton, sooner or later moved from support into opposition as the national government exercised its great powers.23 Several factors not only kept but strengthened Blair’s allegiance to the government of Washington and Hamilton. Its economic policies remained congruent with his interests; for example, Hamilton’s federal redemption of state-issued Revolutionary War securities at par would greatly enhance the value of his Virginia loan office certificates.24 Blair spent much of the year away from Virginia and in association with other Federalists (particularly those on the Court, such as his friend James Wilson), and he was always by training and personality inclined to listen and defer to the strong members of his class. As judge he had continuous contacts with the federal government, and his travel throughout the United States was as the living symbol of its presence and power.
These traits and experiences kept his fires of devotion to the Federalist government and its policies burning strong. Like that of his fellow Virginians George Washington and John Marshall, Blair’s support for the government grew as he witnessed what he thought to be the disintegration of popular allegiance and an increasing foreign danger to the fledgling republic during the mid-1790s. But, like the other judges, Blair came to feel the dangers of moving too precipitously in exerting national power, and they all began to exercise great caution in being bold about Federalism.

Initially, Blair and the other judges may not have fully realized the depths of the potential opposition to federal power, but an instance in the first year of the Court brought starkly home to them the perils that might be aroused by forthrightness, and the need to flex the federal muscle only in crucial situations. Robert Morris of Pennsylvania, merchant and financier, one of the wealthiest of Americans, and land speculator upon a spectacular scale—who as financial wizard of the United States during the Revolution had disfavored the interests of the southern states—had in North Carolina in 1783 suffered an adverse jury verdict for more than three times the face value of the debt he owed. Morris, furious at what he considered local prejudice, in 1787 begged the North Carolina Superior Court for an injunction to stay another judgment against him that he thought equally biased. The injunction had not been acted upon when the Constitution went into effect in North Carolina in June 1790. Without notice to the other side, he immediately asked the judges of the new federal Supreme Court to issue a writ of certiorari to the North Carolina court, commanding it to transfer the suit to the Circuit Court for North Carolina.

Blair joined Justices James Wilson and John Rutledge in approving the writ. The North Carolina judges, however, refused to accept a peremptory writ that would label them both biased and inferior to the federal court. The federal demand seemed to “justify all the fears of the Anti-Federalists about the creation of a consolidated national government” and about the elimination of the state courts. Moreover, these very North Carolina judges were Anti-Federalists who had just spearheaded an almost successful effort to have their state reject the Constitution. Their refusal plus the action of the North Carolina legislature in praising them created an uproar in Philadelphia. An anguished Blair wrote Wilson about “ideas which never before occurred” to him, and indeed it seems to have been the first time he had
thought deeply about the extent to which the states were now subordinate to the federal government. He supposed issuance of the writ “hasty” and that “it would be more convenient to acknowledge our faults than to plunge deeper into it,” since “[t]here appears to be no certain boundary, clearly & distinctly marked, between federal & State jurisdiction.” The judges should not provoke unnecessary dissension, he concluded; the case was not very important. However, the fright and caution of the Court was emphasized when, in 1791, similar requests for certiorari to transfer important pending British debt cases from the state to the federal courts in Virginia and Georgia were quickly denied by his colleagues while on their circuits.25

The Supreme Court’s first announced decision, in August 1791, appears to be a similar exercise of caution. *West v. Barnes* involved a constitutional challenge to the validity of Rhode Island’s notorious 1786 law making its depreciated paper money legal tender at face value. Federal jurisdiction had been erected precisely to stanch such anticreditor practices. But Blair’s opinion, like those of his colleagues delivered seriatim, refused to ignore the Judiciary Act’s plain if ill-conceived requirement that writs of error (the only mode of appeal) be returned to the clerk of the Supreme Court within ten days of the rendering of the judgment complained of at circuit. That had not been done in *Barnes* and, as Barnes’s counsel aptly noted, because distances were so great, strict adherence would effectively deny to most folks their right to appeal; the requirement was an apparent legislative oversight concerning what was a matter solely of form. The Court was probably worried about open disagreement between two branches of the new government at its beginning. Moreover, as was shown when the case was retried at circuit the next June, it had been hastily brought, so that it was a poor vehicle in which to make such a potentially upsetting ruling in a state that, like North Carolina, had been dubious of entering the union.26

The Circuit-Riding Controversy

The judges also, at first, were cautious about making public their complaints to the president and to Congress about riding circuit, which was expensive, arduous, and dangerous, and took them for long periods away from their homes and their families. Complicated and brought to a boil by the permanent assignment of a feisty James
Iredell to the sprawling Southern Circuit—he thought the assignment arbitrary and discriminatory, and relentlessly pressed his colleagues for relief—discussion of circuit riding consumed much of their August 1790 meeting. Chief Justice John Jay argued that the practice was unconstitutional, looking solely to the structure of the judiciary as outlined in Articles I and III: the Constitution contemplated that lower courts would have their own judges; that the Supreme was to be a court of last resort only “& it is perhaps rather nice to distinguish between a court & the judges of that court”; and, tendentiously, that only the president and not the Congress (through creation of courts not staffed by their own judges) could nominate federal judges. Blair added the separation-of-powers argument, which, in his prior Virginia experience, had been decisive: the judges were not given greater salaries for their extra circuit court duties.27

Probably both because of the dangers of allegations of unconstitutional congressional action so early in the new government’s history, and because they learned that Attorney General Edmund Randolph argued strongly against circuit riding in a report on the state of the judiciary he was soon to present to the House of Representatives upon its request, the judges did not communicate their sentiments to the other departments of government.

However, Congress did not act upon Randolph’s suggestions that winter, to the chagrin of the judges. At a contentious February 1791 Supreme Court session, Blair demonstrated that at times he could be independent of the dominant leadership by siding with Iredell’s demand for rotation of the judges among the circuits. When Jay, William Cushing, and Wilson adamantly refused to leave their circuits, Blair amiably helped Iredell out by swapping his Middle Circuit for the brutal Southern Circuit in the spring of 1791. The judges continued to make no official protest while reform of the judiciary was still before Congress; as if to underscore this decision, evidence of continuing Anti-Federalist opposition to the judiciary began to appear during 1791.28

By January 1792, however, it had become clear that “no radical reform of the Judiciary law will be made,” and caution gave way to action. Iredell’s brother-in-law Senator Samuel Johnston, on Iredell’s behalf, engineered a law requiring rotation of the judges among the circuits. The judges openly ruled an act of Congress unconstitutional, in Hayburn’s Case. And in August 1792 they openly petitioned Congress
for an end to circuit riding, in language emphasizing practical difficulties, not constitutional ones. The draft this time was written by Iredell, not Jay. Congress responded only by reducing to one the number of justices required at circuit, and thus to one the number of circuits each had to ride per year. The justices petitioned Congress again in February 1794 to end circuit riding but to no avail. No termination of these duties came to the judges in the 1790s. Thomas Johnson certainly, and John Jay and John Rutledge probably, left the Court in large part over the difficulties of circuit riding; Iredell’s death at age forty-nine in 1799 was likely hastened by them; and it is not unlikely that an ill and aging John Blair, who with uncharacteristic anger protested his consecutive assignments to circuit duties in the fall of 1794, the spring of 1795, and the fall of 1795, finally resigned in no small part due to them.29

Blair Opposes Virginia Debtors on British Debts

Caution also initially accompanied the judges in their dealings with the potentially explosive British debt cases in Virginia. About 45 percent of the total debt was owed from the Old Dominion—about $6.5 million in 1790 terms—and its courts had been completely shut to British creditors since spring 1774. Many Virginians were adamant about not paying blood money to their erstwhile enemies. Virginia was by far the largest and most populous state, and it had barely voted for the Constitution to begin with.30 Its continued membership in the imperiled Union was absolutely essential in the 1790s.

British creditors filed dozens of claims once the federal circuit court in Virginia was established, and they expected at last to obtain justice quickly. But Patrick Henry, John Marshall, and the other able lawyers for the debtors, who were determined to avoid payment if possible, raised complicated defenses and “employed every device at their disposal to drag out the proceedings.” Probably in part to ensure both legitimacy and proper handling of Virginia law, the Court assigned John Blair to the Virginia circuit for three of its first four terms of court. This included the term when argument finally began on November 24, 1791, in Jones v. Walker, a case chosen by the attorneys because it raised all of the important issues. The courtroom was packed for the weeklong arguments. An attending creditor bitterly recounted that “all the declamatory talents of Patrick Henry were displayed to in-
flame Mens minds, prevent their Judgments & drive them to acts of Outrage.” It was Henry’s last great case, and his three-day peroration not only closed down the General Assembly for want of attendance but was remembered decades later by awed auditors. The court’s records show that Blair was not present to enjoy Henry; he left the bench on November 23 and did not return until December 3 because he was financially interested in one of the issues in dispute. Justice Thomas Johnson of Maryland and District Judge Cyrus Griffin of Virginia, the other two men on the bench, found “two [of the] points of Law perfectly novel” and refused to decide, calling for a new argument at the next term. The creditors were outraged, both by the procrastination and because debtors theretofore resigned to paying up were now defiant; “[T]he courts of Justice in Virginia are still shut for the recovery of British debts,” one of them fumed.31

After another postponement, the cautious approach of the circuit court bench ended, and all of the legal defenses Virginia debtors raised in Walker save one (the question Blair was interested in) were unanimously denied by Judges Jay, Iredell, and Griffin in December 1793. The single issue was appealed, but, to the grudging satisfaction of the British creditors, scores of debts in cases not involving that issue were finally brought to judgment in the two long terms the Virginia Circuit held in 1794. Blair patiently sat in both of them, since the issue in which he was interested could not be before him. Juries still frustrated creditors by deducting at least eight years’ interest in every case as punishment for British wartime depredations. This was illegal under the treaty; Blair, in an equity case where there was no jury ordered full wartime interest on a British debt, but was helpless to overturn jury verdicts in the other cases. He had also joined a unanimous Supreme Court the previous February, in Georgia v. Brailsford, in holding that a Georgia wartime law sequestering British debts was ineffective to divest British creditors of title.32

Thus, after caution was replaced by action, Blair’s legal position on the states’ “British debts” impediments proved to be procreditor, courageously contrary to that of most Virginians and the same as those of all his Federalist Court colleagues except the North Carolinian Iredell. Given Johnson’s equivocation on the Virginia Circuit in 1791, John Blair was the only southern justice who gave full support to the British creditors’ position.
Blair as Able Judicial Technician

*Georgia v. Brailsford* presented not only an important substantive question involving British debts but also two technical and difficult issues of equity law on which the Court issued opinions in August 1792 and February 1793. In these rulings Blair demonstrated that his nine years on Virginia’s highest equity court had made him an able judicial technician in that sometimes arcane field.

Brailsford, a British subject, had sued Spalding, a Georgian, on a 1774 debt in the Georgia federal circuit court. Spalding’s chief defense had been Georgia’s wartime act sequestering to the state all debts Georgians owed to British subjects, and barring recovery on them by any but the state. The state of Georgia, afraid of collusion between Brailsford and Spalding, had asked to be impleaded in order to protect its rights, but Iredell, riding circuit, had denied the request on grounds that the Judiciary Act gave the Supreme Court exclusive federal jurisdiction over suits involving states. He had then found that the bar on recovery was repealed by the Peace Treaty, and had given judgment for Brailsford on the merits.33

Georgia filed a bill in equity in the Supreme Court, asking for an injunction to restrain in his hands any moneys collected by the marshal upon execution of the lower court judgment, and demanding payment of the debt to it. In August 1792, Blair, understanding that one purpose of equity was to correct defects in the common-law process, among which was the inability of Georgia to have been heard in the lower court, forcefully argued for issuance of the requested injunction in order to protect whatever rights Georgia might have pending a hearing on the merits. Since Johnson and Cushing found such protection unnecessary, the chief justice’s vote with them would have produced a tie denying the injunction, but Jay said that his mind had been changed during the argument, likely by the clarity of Blair’s exposition, and completed the 4–2 vote to issue the injunction.34

The tougher equitable question was its availability: litigants who had an adequate remedy at law could not obtain equitable relief. Three members of the now five-member Court (with Johnson’s resignation), upon argument the next February, thought that Georgia had an adequate remedy at law. Blair alone argued that the Court, sitting
in equity, had to expand the equitable action in the nature of interpleader to take care of the situation because Brailsford, an alien, might decamp with the proceeds of his judgment before any proper legal process from Georgia’s common-law action reached him. It seems that Blair again was persuasive in part, since the majority, speaking through Jay, continued its injunction in force. Of all the justices, Blair alone seemed comfortable with the expansive powers of an equity court, and fully knowledgeable about equitable jurisprudence.

Blair Upholds the Power of the Confederation

Blair made two important circuit court rulings. One of these was Penhallow v. Doane, in which he ingeniously and resoundingly upheld the power and authority of the national government. Hastening from Massachusetts the week before Congress was to ban commerce with Great Britain in 1775, Elisha Doane’s ship The Lusanna had taken on British registry and, with possible Loyalist Shearjashub Bourne in charge, had traded at London and Gibraltar before sailing for Halifax, Nova Scotia, with a cargo of British war materiel. When captured by John Penhallow’s privateer McClary out of Portsmouth, New Hampshire, Bourne claimed that he was a Patriot but had been caught abroad and had had to register falsely and to take on war materiel to get home again. Two New Hampshire state prize court juries were dubious and, taking British registry and war materiel at face value, awarded prize to Penhallow in 1778 (despite an able defense by John Adams in his last case).

New Hampshire law did not allow American citizens an appeal to Congress in prize cases. The Articles of Confederation gave Congress plenary appellate power in prize, and a 1775 act provided for appeals in such cases; the Articles were not ratified, however, till 1781. Doane, “one of the richest men in New England,” appealed, claiming local prejudice. Congress thereafter established a prize court, which in 1783 accepted jurisdiction over the case, reversed the decree, and awarded the ship to Doane’s estate. This was typical of the Confederation court: “In practically every such case decided on appeal [in which American merchants trying to do business had had to resort “to ruses” and “to give complicated and implausible explanations . . . to protect their property,” and were disbelieved by state prize juries], the
[federal] judges restored the captured property.” Now New Hampshire appealed to Congress, and a committee report by Thomas Jefferson agreed with New Hampshire, and Penhallow, that before 1781 Congress had had no power to require appeals from a state’s prize court unless the state agreed. However, Congress took no action, either to reverse its court or to enforce the decree.\(^{37}\)

After 1789 the case was brought by Doane’s estate into federal court, seeking enforcement. Blair heard it on circuit in New Hampshire in the fall of 1793 and upheld the 1783 Confederation court award. He deftly obviated the retroactivity issue raised by Jefferson by finding prize jurisdiction to be an inherent aspect of the power to wage war that the colonies had given Congress from the beginning, deducing that this made competent both appellate power and Confederation court. He then refused to contemplate an attack on that court’s finding that it had jurisdiction. This ringing affirmation of national power won both admiration from Federalists, and, when the case finally reached the Supreme Court in 1795, a chorus of echoes from the other judges endorsing Blair’s rationale. Moreover, Blair’s calm and straightforward but narrow legal ground for national supremacy produced no Anti-Federalist outcry, while the additional angry, tendentious argument that Justice William Paterson advanced in *Penhallow*—that the states had never been sovereign and thus New Hampshire had to yield to a sovereign Congress—not only provoked the opposition but also forced his Federalist colleagues to upset and disavowal.\(^{38}\) It was one of John Blair’s finest hours as a supporter both of the Federalist government and of the commercial ethos of “ruses” and profit.

**Blair, Judicial Review, and Natural Law Jurisprudence**

The other important circuit ruling occurred in Pennsylvania in April 1792. Not only had Congress failed to terminate circuit riding in the winter of 1792, it had saddled the justices, as circuit court judges, with the wearisome duty of hearing and assessing the viability of pension claims by Revolutionary War veterans. Anger and frustration led them to cast off their caution about revealing disagreements with Congress over the meaning of the Constitution, and they probably agreed upon this bold path during the February 1792 Supreme Court session. On April 12 Blair, Wilson, and District
Judge Richard Peters refused to hear the pension claim of veteran William Hayburn, holding unconstitutional the 1792 Invalid Pension Act. This first such judicial declaration about a national statute sent shock waves through Philadelphia, provoking precisely the kind of divisive commentary from Anti-Federalists that Federalists had feared. Word soon arrived that Jay and Cushing had taken a similar stand on the New York Circuit. Later Iredell, on circuit in North Carolina, and Johnson, on circuit in South Carolina, added their voices to make the decision a unanimous one among all six sitting Supreme Court justices.39

Blair’s opinion was entirely consistent with the opinions he had joined as a Virginia judge in 1788 and 1789, demonstrating concern with preservation of the independence of the judicial branch, and refusing to accept burdensome uncompensated duties. The Invalid Pension Act required the circuit judges to certify to the secretary of war their findings and opinion, which might then be revised by that official before submission to Congress for possible further revision. Jay and Cushing had not waited for a claimant, but, when court opened on April 5, announced their wholly advisory opinion that the doctrine of separation of powers forbade judges’ opinions from being subject to revision by members of the other branches of government. Wilson and Blair waited until Hayburn and other claimants appeared, then announced their opinion based upon the same principles but stating plainly that “[s]uch revision and control” by the other branches is “radically inconsistent with the independence of that judicial power . . . so strictly observed by the constitution of the United States.” Consistent with their opinion that the act was void, Wilson and Blair refused to hear the claimants. Jay, Cushing, and Iredell chose to hear pension claims as “commissioners.”40

Federalist anger focused on the presumed “infallibility” of the judges and on their refusal to do what Congress ordered them to do rather than on their belief that judicial review was unconstitutional; that is, upon judicial supremacy, not judicial review. Federalist congressional leader Fisher Ames thought the decision “indiscreet and erroneous,” likely to “embolden the states and their courts to make many claims of power.” No one seemed to think that it was improper for the judges to exercise judicial review. The repute of Marbury v. Madison as the first act of judicial review by the Supreme Court has been engendered by several factors. Some originated in the
1790s: the lack of directness and lack of cohesion of the justices (who issued differing opinions in different circuits), Federalist phobia against promoting dangerous division by continuing to talk about the matter, and much sentiment that judicial review was uncontroversial: many were well aware that several state statutes had already been ruled unconstitutional by the justices on circuit. But modern positivist biases have been the chief obstacle: positivists as authoritarians accept judicial lawmaking only when entombed in formal opinions in litigated cases; and positivists focus legalistically and hierarchically upon the titles of courts, not (as did the natural-law sentiment of the 1790s) upon the moral authority of the justices who sat in them.

Iredell had promised to change his view “if we can be convinced this opinion is a wrong one.” The attorney general, Edmund Randolph, moved the Supreme Court in August 1792 to issue a writ of mandamus, commanding the Pennsylvania circuit court to hear Hayburn’s claim. Randolph appeared on behalf of no client, but as the legal representative of the United States, claiming that the Judiciary Act’s authorization that the attorney general “prosecute all suits in the Supreme Court in which the United States shall be concerned” had granted him the same power as the English attorney general, who regularly made such appearances. Chief Justice Jay challenged him as to whether he could thus act without authorization from the president. Other questions were asked, but apparently no justice challenged his ex parte appearance. “The question the Supreme Court took upon itself was apparently narrow: could the Attorney General speak on his own, or must the President be the one speaking through his authorized cabinet representative?” Blair joined Iredell and Johnson in voting to allow Randolph to appear ex parte, but the motion failed upon an even division, Jay, Cushing, and Wilson voting to require presidential authorization.

Given the similar action Blair had joined in Virginia a few years earlier—issuing an opinion ex parte, as it were, and having it spread on the record—he did not share modern positivist notions that require lawyers to have clients when they appear before courts, and courts to issue opinions only in such litigated instances. Further, neither Blair nor the other judges thought it odd when, in 1782, Chief Justice Pendleton asked members of the bar to give their opinions on judicial review in the Caton case, or when, in 1793, Chief Justice Jay invited
any member of the bar to speak on behalf of the absent state in *Chisholm v. Georgia*. Blair and the other southern judges shared the traditional notion that the attorney general of a government was its general legal representative and could appear ex parte before the bar in the public interest; the other justices demanded only presidential authorization and did not disapprove such ex parte appearances. These actions and ideas appear strange to positivists today but excited no comment then.

Positivists believe that law is commands, that these commands are positively made by authoritative sources (either by legislative bodies in statutes and regulations, or by judicial bodies in opinions), and that the law wholly consists in these commands. Natural lawyers, on the other hand, believed that the law was only what “the community” accepted as the law and that it accreted over a course of years by acceptance of legal opinions of legislatures and of those trained in the law: judges, treatise writers, and members of the bar. *Any* legal opinion was only *evidence* of the law, not “the law.” Members of the bar had a professional responsibility, as well as a civic one, to give their best opinion as to what the law was. Authority was moral and consensual, not legalistic and peremptory. Thus, the opinion of a judge was *more* authoritative, but all professional opinions deserved respect and were to be judged primarily by their wisdom, not by the status of their holders—which is why the old reports are replete with the arguments the lawyers made; why opinions of the judges were often delivered seriatim; why so many of the old cases have little or no judicial opinion; why the opinions of that time give treatise writers respect equal to that of prior judicial decisions; why reporting *in haec verba* was unusual and not demanded in the 1790s; and why we call what judges say “opinions” rather than “rulings.” It is also why Blair’s actions summarized in the previous paragraph were not strange to the natural-law-trained lawyers and judges of the 1790s.

Ultimately, the action of Wilson and Blair in refusing to sit as “commissioners” was completely vindicated. In February 1794 William Bradford, the new attorney general, filed in the Supreme Court a debt claim on behalf of the United States against Yale Todd, a Connecticut pensioner whose claim had been approved by Iredell as “commissioner” in 1792. The Court held for the United States, invalidating all the actions of the judges as “commissioners.”
Chisholm and National Power

The controversy over *Hayburn* died down, and indeed *Hayburn* lessened fears among Anti-Federalists about the power of both the Court and the national government. But the Court’s decision one year later, in *Chisholm*, brought all those fears back to the fore and tended to consolidate the emerging Jeffersonian opposition to the centralizing, commercially-oriented Federalist policies. That decision generated the largest uproar yet, alienating constituencies theretofore doubtful or even Federalist.

*Chisholm*’s decedent, a South Carolinian, had sold supplies to the state of Georgia during the Revolution worth nine thousand pounds, and had never been paid.47 Chisholm sued Georgia in the Supreme Court, and the state refused to appear, claiming immunity from suit as a sovereign. The Constitution contained express language giving to federal courts jurisdiction over suits “between a State and citizens of another State,” which had provoked many Anti-Federalist objections during the ratification debates, but most Federalists, including Alexander Hamilton and John Marshall, had taken the position that Anti-Federalist fears were groundless. The Judiciary Act of 1789 contained a provision vesting such jurisdiction exclusively in the Supreme Court, but the Anti-Federalist fears seemed calmed.

In February 1793, after several postponements, the Court held, 4–1, with Iredell dissenting and Johnson just resigned, that the clauses meant what they said, and found that Chisholm’s suit against Georgia was properly brought before it, even though Georgia refused to consent. Justice Wilson and Chief Justice Jay gave long and elaborate opinions—the one lyric, the other angry—from which one could conclude that they believed that states were or could be made entirely subordinate to the federal government, the greatest fear of the Anti-Federalists.48

Blair’s opinion, in contrast, was simple, straightforward, and confined to the situation at hand. Carefully and clearly resting himself upon the plain words of the Constitution, “the only fountain from which I shall draw,” he found meaningless its word order (from which others had implied that the only jurisdiction given was when a state was a plaintiff): “[a] dispute between A. and B. is surely a dispute between B. and A.” The Constitution’s other grants of jurisdiction over
“Controversies between two or more States” and between “a State and foreign States” were conclusive that it contemplated states’ being made defendants in federal court without their consent. When a state adopted the Constitution, he concluded, “she has, in that respect [being ‘amenable to the judicial power of the United States’], given up her right of sovereignty.” The most important interest Blair had was to preserve the government and to keep its powers intact, and that “requir[ed] the submission of individual states to the judicial authority of the United States.” Obedience to the new government, even in delicate situations like the one before him, was paramount. It seemed necessary to him, as Europe was becoming embroiled in general war, as foreign states cast covetous eyes toward United States territory, as rural dissidents maintained opposition to the government, and as Jefferson emerged as a viable leader of the opposition, to speak “clearly and decidedly” in favor of its dignity and capability. As was true in the British debt instance, Blair was the only southerner on the Court to take the Federalist position.49

The uproar was so strong and widespread that Congress devised, and the states passed, the Eleventh Amendment, withdrawing jurisdiction from the federal judiciary in diversity and alienage suits in which a state was an unconsented-to defendant.50 This has remained, in the country’s history, the only instance in which the constitutional grant of judicial power was directly diminished through amendment. However, during Washington’s second term the nation’s foreign and domestic troubles grew, so despite increased attacks on Federalist judges, they continued to exercise their authority to support and uphold the federal government where it was prudent to do so.

The Neutrality Crisis and Domestic Insurrection

As 1793 progressed, the war in Europe heated up. The numerous French partisans within the United States demanded that aid be provided to the new republican government of the only country that had given the colonies significant help during the Revolution, and the Francophile secretary of state Jefferson and the domestic opposition gained strength. British partisans, mostly merchants and their allies (among whom was the Anglophile treasury secretary Hamilton), pointed to our cultural ties with and economic dependency upon Great Britain, and warned of the dangers of democratic excess. Jef-
ferson and Hamilton agreed, however, that the weakness and vulnerability of the United States made involvement on either side unadvisable. The president declared the United States neutral, “friendly and impartial.”

The activist new French ambassador, Citizen Edmond Genet, by claim of right under the 1778 treaty, outfitted French privateers in American ports (crewing them with enthusiastic American volunteers), and had their prizes condemned by members of his staff sitting, on American territory, as French prize courts. The British minister was convulsed with protest at this disregard of neutrality. “All members of the cabinet . . . agreed that the fitting out of privateers, the recruitment of American crews, and the operation of the consular [prize] courts were improper.” Washington asked the Supreme Court for assurance by way of an advisory opinion.

At their August 1793 term the justices unanimously rejected the president’s request to answer the questions, citing separation-of-powers concerns and their reluctance to address questions extrajudicially, “our being Judges of a Court in the last Resort.” The judges’ response is surprising. Like the ex parte appearance of Randolph, the giving of advisory opinions was usual in the natural-law atmosphere of English tradition, and we have seen that, in *Hayburn*, none of the justices thought the practice unconstitutional. Blair had given them, and Jay gave so much advice to the president and Hamilton that he could almost have been considered a member of the cabinet; he was soon to become special ambassador to England to negotiate a new treaty.

It was thus not advisory opinions in general that were rejected but this particular advisory opinion. It would have been characteristic of Blair to join his colleagues in following the lead of Jay, who (with Hamilton) believed that only a strong president acting alone, not in conjunction with any other branch, could provide adequate leadership in the crisis of foreign affairs then threatening the nation. They also wished a public rebuke for Jefferson, who desired that the Court and Congress join the president in leadership in foreign affairs, and who was becoming the focal point of domestic opposition. Wilson and Jay had already given well-publicized grand jury charges opposing Genet’s activities, and legal challenges to the French prize awards were in the federal district courts and could find their way up to the Supreme Court, so there were judicial avenues for the judges to render their opinions.
To the utter dismay of the Washington administration, four of the five federal district courts that considered challenges to the French prize courts declared that, according to the law of nations, questions of prize were exclusively for the courts of the captor nation and that neutral nations had no jurisdiction in such matters. The Supreme Court in February 1794 finally got to hear an appeal in one of them, and in Glass v. Sloop Betsy, the judges unanimously asserted, without giving any legal rationale, that the federal district courts did have jurisdiction, and that prize courts of another nation could not be erected in the United States. Thus, United States courts now had jurisdiction to hear these cases and a legal way to refuse to give preclusive effect to any award of a French prize court on American soil. The learned district judges surely knew the law of nations. Just as surely Blair and his colleagues, when they got the chance to act judicially, made an overtly political decision: to support the president’s policy of neutrality and to oppose Genet no matter what the law of nations said. The politically cagey caution of summer 1793 was followed by direct political action in winter 1794.

For Blair and the other judges, troubles only mounted. Many poor and middling farmers and wage workers found Federalist national policy to favor merchants and the seaboard elites and to be inconsistent with their more democratic view of the goals and meaning of the Revolution. Resistance coalesced along the western frontier around Hamilton’s excise tax on whiskey, which discriminated against underrepresented small farmers and small distillers, and, on the specie-less frontier, ate directly into workers’ wages and the local medium of exchange. It erupted into open armed protest in western Pennsylvania (the only frontier locale where officials actually tried to enforce the tax) in the summer and fall of 1794, with ensuing disturbances in central Pennsylvania, western Maryland and Virginia, and Kentucky. President Washington personally led a thirteen-thousand-strong army westward to crush the protest. Part of this show of force included the arrest, often for treason, of twenty or so mostly bedraggled protesters. Some were of middling wealth, such as John Hamilton, sheriff of Washington County; Thomas Sedgewick, a magistrate; and the Reverend John Corbley. Over local protest they were herded eastward in November to jail in Philadelphia, where they remained, accused of treason and awaiting indictment by a grand jury, when the Court met in February 1795.\(^54\)
Blair was clearly alarmed by this event, and his two surviving grand jury charges, from the fall 1794 circuit in Delaware and the spring 1795 circuit in Georgia, demonstrate that he saw it as the gravest of threats among many then pressing on the government. Both directly contradicted the grievances raised by the westerners, asserting the responsiveness and representativeness of the government, the mildness of the tax, and the necessity that the burdens of majority rule be accepted by all. Both saw the government as weak militarily and as threatened with extinction by the revolt because of its occurrence during the delicate international situation. Despite the arrests and the apparent crushing of the revolt, the tone of the later charge is more desperate and alarming than that of the earlier, indicating that Blair, like other Federalists, saw the real threat as coming from the Jeffersonian opposition: “[H]ow dangerous it is to indulge too freely discontent with respect to the measures of government.” He was worried about designing individuals who “fret the minds of the ignorant,” turning them into “the deluded multitude.”

Blair’s actions in the Supreme Court in February 1795 reflected these fears and prejudices. Corbley and others moved for the erection of a special circuit court, to be held in western Pennsylvania close to their witnesses. Hamilton, brought from prison on a habeas corpus writ, moved the Court for discharge because he had been jailed for treason without a hearing or, alternatively, for release on reasonable bail pending indictment. After holding these motions for several days, the Court unanimously denied the motion for a special circuit court in the West, on insubstantial if not specious grounds, and granted Hamilton bail in the enormous sum of $4,000 personally and $2,000 each for two sureties. The grand jury failed to indict Corbley, Hamilton, and Sedgewick for treason, and prosecution of Corbley on a “true bill” for misdemeanor was dropped. Only two persons were convicted of treason for the revolt, both of whom were poor, one of whom at least was simpleminded; both were pardoned.

A Federalist to the End

Retirement

Having suffered from illness frequently while on the Court, John Blair was forced to leave the bench on circuit in South Carolina and
to cancel the ensuing North Carolina circuit court in the spring of 1795. He described the malady as “a rattling, distracting noise” in his head, “nothing but an overbearing noise in [his] head which distracts [his] attention.” The problem persisted, causing him to miss the Court’s August 1795 session and the fall circuits, and on October 25 he tendered his resignation to the president.57

He lived for five more years, and, though he was ill at times, no further mention of any rattling in his head has come to light. Though distraught by the deaths of his only son in October 1791 and his wife a year later, Blair engaged in many pursuits happily and remained a sturdy supporter of the Federalist regime to the end. In the fall of 1796 the Jeffersonians were sure that he would become the Federalist candidate for the United States Senate, and in the spring of 1797 he appeared as foreman of the federal circuit court grand jury in Richmond that presented Jeffersonian Congressman Samuel Cabell for the “evil” contained in a circular letter to his constituents; Cabell had therein castigated Federalist policies and the election of John Adams. The presentment raised a great furor, not least of which was popular astonishment at Blair’s participation. In the summer of 1799 he suffered a stroke, and he died on August 31, 1800.58

A “Safe and Conscientious” Judge

As a judge, John Blair was, in historian Earl Gregg Swem’s apt phrasing, “safe and conscientious.” Neither innovative, complicated, nor deep, nor an erudite legal scholar, Blair dealt with the immediate problem, went only as far as he had to, ruffled few feathers, and may not have thought through the finer legal or political points, as he showed in his confusion over the Robert Morris certiorari instance. But Blair was “safe and conscientious” in that he was knowledgeable in the law, as he demonstrated in Brailsford, and in that he held firm to his duty, hewed to his Federalist principles, and spoke clearly and directly, if quietly, to the points at hand, as in Chisolm. A New Hampshire Federalist, who had probably attended and admired his handling of Penhallow, remembered him as “far superior to Cushing—a man of firmness, strict integrity, and of great candour.” And he was “safe and conscientious” in that he was sufficiently independent not to be thought pliable. The Jeffersonian attorney general of Massachusetts was “much pleased with Judge Blair,” praising Blair’s “in-
dependence” when, on circuit, he openly if respectfully differed on a point of law from the Federalist-dominated Massachusetts high court, stating “that he could give no opinion but his own.”

More important, Blair was “safe and conscientious” in a way modern scholars of the judicial role do not customarily note. Both the New Hampshire and Massachusetts observers just quoted liked the political as well as the legal thrust of Blair’s judicial opinions. The political dimension was then as now an inherent part of judging, but then it was recognized and expected. The most important value in Blair’s great opinions, in Penhallow and Chisholm, was that they were clear and forthright legal affirmations of the power and federal superiority of the national government, a government greatly suspect to many Americans, a weak government under siege from foreign powers, a new and experimental government liable to momentary dissolution. John Blair proved time and again that he could be counted upon to support the Federalist position, which he saw as the national, the constitutional position.

Blair’s other quality of greatness is also evident in his opinions in Penhallow and Chisholm, when contrasted with the strident tones and tendentious Federalism exhibited in the same cases by Justice Paterson, in the one, and Chief Justice Jay, in the other. The expansive and hard-edged nationalist metier adopted by his northern peers evoked much antipathy from both Antifederalists and southerners, but Blair, whose opinions were the opposite of those of most of his geographic compatriots, provoked only calm disagreement about the legalties of the problem, not hot political opposition. Blair was “safe and conscientious” because he wrote calmly and maturely, clearly emphasizing national power through deliberate and bounded legal argument without being politically threatening or provocative.

He exhibited this quality in all his dealings. A British creditor who traveled the southern federal circuit in the 1790s, monitoring his many suits, was critical to the point of contempt of many of the justices for their delay and lack of courage, but he gave Blair respect.61 And astonishment, not harsh words, formed the height of critique from Virginians of his 1797 federal grand jury foremanship. In an age of increasingly vituperative, politically charged personal attacks, Blair’s Federalist partisanship stands out as calm, persuasive, and productive of ongoing dialogue and continuing relations rather than as disruptive and divisive. The proper criterion against which to judge
the Supreme Court’s opinions in the perilous 1790s is their political
effectiveness in persuasively upholding the power, authority, and re-
spect of the shaky new national government while exciting no dis-
membering dissent; and the proper gauges of its members are their
courage and consistency in supporting the new Constitution and its
constituted government. On both of these measures, the amiable, safe,
conscientious Virginian John Blair ranks at the top.

Indeed, Blair was a “safe and conscientious” supporter of his class.
The Revolutionary alliance between the merchants of the North and
the planters of the South, embodied in the developmental and planter
interests of the first president, was still fluid and viable in the 1790s,
though it was breaking down and would not remain so for long.
(Most supporters of the mercantile interest were still natural lawyers,
like Blair, but the tendency would be for them to adopt the emerging
positivist theory of law.) Blair, who also personified both sorts of in-
terest, apparently (like most contemporaries) without seeing their in-
compatibility, emphasized solidarity with the developmental and mer-
cantile interests of the Jay/Hamilton Federalists in his opinions, con-
sistently upholding the might and, with regard to punishment of the
whiskey rebels, the economic schemes of their new national govern-
ment. Thanks to the qualities and circumstances just mentioned, his
divergence from the planting interest also did not bring him criticism.

Eulogizers recalled Blair’s mildness, gravity, and piety, his own ab-
sence of fanaticism, and the lack of any assault upon him by an enemy.
St. George Tucker, one of the leading Virginia lawyers of the next gen-
eration, remembered him as quiet, dull, and gentlemanly.62 Though
not a strong thinker as a jurist, John Blair did have an ability to get to
the heart of the matter, was an able and competent judge, and was,
first and foremost, sturdily devoted to his own interests and to the
cause of mercantile and planter republican independence, as later em-
bodied in the Federalist Party.

NOTES

1. [Earl Gregg Swem], Book Review, William and Mary Quarterly (1st Ser.),
22:142 (1913).

hereafter as Pendleton Papers), 2:554 (opinion of the Virginia Court of Appeals,
written by Edmund Pendleton, joined by John Blair), dealt with at more length in text accompanying note 16.


7. William & Mary college records, John Blair, Jr., Folder, Faculty/Alumni Collection, Earl Gregg Swem Library, ViW; DAB, s.v. John Blair (1732–1800), p. 338; Israel, “Blair,” 109–10; Earl Gregg Swem, “Williamsburg—The Old Colo-


the Judges,” Va. Ct. App., March 11, 1789, ibid., 2:553. Call’s fourth volume of Virginia reports, which covers the 1780s, was not published until 1827 and for most of the cases reported (for that period) gives only the facts, the arguments of counsel, and the decree or judgment entered, but no opinions of the judges, which were, by that time, probably lost. It contains notorious errors, also, which is why I have chosen to use David Mays’s treatment of Caton and his version of the last two opinions, both written by Edmund Pendleton.

13. Kirtland, George Wythe, 252–62; Commonwealth v. Posey, 8 Va. (4 Call) 109, 122 (Va. Ct. App. 1787); William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth (1995), p. 3 (“When the Court was created, virtually all American attorneys were natural lawyers who believed that judges did not and should not resort to considerations of policy in adjudicating cases. They believed that law was a comprehensive and systematic body of principles based upon divine wisdom and the perfection of human reason.”). To Blair, as to many of his Virginia contemporaries, “the people” were those white males of sufficient property and standing to represent the community as a whole.


The Court of Appeals established in 1789 was the first functioning modern appellate court—composed entirely of lawyers, having members not serving in any other branch of government, without trial jurisdiction, and not sharing its judges with any other court. See Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence (1990), pp. 27–46, esp. 43–44.

18. Charlotte Balfour to [Eliza Whiting], November 10, 1789, in Blair, Banister, Braxton, Horner & Whiting Papers, ViWC; George Washington to John Blair, September 30, 1789, Blair to Washington, October 13, 1789, both in Documentary History 1:58. The phrase “National Security Court” in the subtitle is from Casto, Supreme Court, 71 et passim.


Pierce also described Blair as “one of the most respectable Men in Virginia, both on account of his Family as well as fortune.” Only seven other Constitutional Convention delegates were noted by Pierce for their wealth, and only Charles Cotesworth Pinckney of South Carolina was also given the high accolade of being great in both family and fortune.


21. Also important in diffusing opposition was the Bill of Rights, which was developed in Congress concomitantly with the Judiciary Act. See Ritz, Judiciary Act, 19–21; Holt, “‘To Establish Justice,’” pp. 1513–15.

22. The best history of the Court in this period is Stewart Jay, “Most Humble Servants: The Advisory Role of Early Federal Judges” (unpublished manuscript, May 1995, in my possession), which emphasizes the intensely political role of the judges and gives in detail the fluid and confusing constellation of political tensions

23. Pendleton’s move can be precisely dated to the announcement that states could be sued in federal court, in Chisholm v. Georgia, in 1793. See Edmund Pendleton to Nathaniel Pendleton, August 10, 1793, Documentary History 5:232 (the opinions of Jay and Wilson are “very reprehensible as tending to prove the Federal to be a consolidated Government for all America, & to Anihilate those of the States—a Principle, which, if established, would make that Constitution as great a curse as I have hitherto thought it a blessing”).

24. For Blair’s investment, see the story in note 31 below. This connection is part of my own debt to Forrest McDonald. See McDonald, We the People: The Economic Origins of the Constitution (1958), pp. 38–92, esp. 74, 90.

25. Holt & Perry, “Writs and Rights” (first quote is from p. 103; explanation of the contemporary meaning of certiorari on pp. 102–3); John Blair to James Wilson, February 2, 1791, Documentary History 2:126–29 (quotes are from pp. 128 and 129); John Sitgreaves to James Iredell, August 2, 1791, ibid. 2:196; Jones v. Syme, Waterman v. Syme (C.C.D.Va. 1791) (Wilson, J.), Order Book [for the Circuit Court for the District of Virginia], 1790–95, Federal Court Records, Vi; Richard Hanson to William Jones, May 14 & 30, 1791, Box 6, Treasury 79, PRO; Stead v. Powell (C.C.D.Ga. 1791) (Iredell, J.), Minute Book [for the Circuit Court for the District of Georgia], 1790–93, RG 21, National Archives Records Administration, East Point, Georgia.

The regular process under the Judiciary Act of 1789 for taking a case from a state court into federal court was “removal” under section 12, but, in another shrewd concession to Anti-Federalists, the right of removal had been limited to defendants. British creditors would have been plaintiffs in the state court debt cases lying on the books for so many years, so this provision in effect made non-retroactive the jurisdiction the Constitution and the peace treaty gave to federal courts over British debts. Holt & Perry, “Writs and Rights,” p. 100; Holt, “To Establish Justice,” pp. 1487–88. The extraordinary writ of certiorari, then, should also have been unavailable to transfer pre-1789 cases.

26. West v. Barnes, Federal Gazette and Philadelphia Advertiser, August 11 & 12, 1791 (U.S., August 3, 1791); Barnes v. West (C.C.D.R.I. 1791), Final Record Book, 1790–94, RG 21, NARA, Waltham, Massachusetts; ibid. (C.C.D.R.I. 1792)(retrial of same case); Providence Gazette and Country Journal, June 16, 1792 (giving disposition upon retrial); James Iredell to George Wash-
ington, February 23, 1792, Documentary History 2:239–41 (describing West and the troubles it did not solve; requesting legislative relief). There does not seem to have been a decision on the constitutionality of the tender law, which expired in October 1789; but, at the same June 1792 term, in Champion & Dickason v. Casey (C.C.D.R.I. 1792), Final Record Book, John Jay, Justice William Cushing, and the district judge unanimously held unconstitutional a three-year stay on repayment of a debt granted specifically by the legislature to Casey, on ground that it “impair[ed] the Obligation of the Contract in Question,” seemingly as volatile an issue as that of the tender law. [Boston] Columbian Centinel, June 20, 1792. Congress corrected the problem underlying West v. Barnes in the Process and Compensation Act of May 8, 1792, by permitting circuit court clerks to “issue writs of error . . . returnable to the Supreme Court.” See Documentary History 4:180, 185 (section 9), 195 (section 1).

27. A much more detailed history of the circuit-riding controversy discussed in this and the next three paragraphs, plus citations to all the statutes mentioned, may be found in Holt, “‘The Federal Courts Have Enemies.’” See John Blair to John Jay, August [5], 1790, Documentary History 2:83 (source of the quote; contains Blair’s summary of the Court’s August 1790 discussion, and Blair’s additional suggestion); Justices of the Supreme Court to George Washington, ca. September 13, 1790, ibid., 2:89–91 (draft written by Jay and containing Jay’s arguments, circulated to the other justices, but never sent).

Of course, it was also dangerous to travel to Philadelphia for the semiannual sessions of the Supreme Court. On his way in the summer of 1794 Blair’s carriage “got overset six miles the other side of Dumfries” and he “rec’d a slight cut on the forehead & bruised his head just above the temple. Y.e headach followed for a short time, & a small degree of stupor lasted somewhat longer.” Mary [Blair Braxton Burwell] Prescott to [Eliza Whiting,] August 24, 1794, in Blair, Banister, Braxton, Horner, & Whiting Papers, ViWC. The whale-proportioned Samuel Chase nearly drowned, and had to be hauled out of the freezing waters of the Susquehanna by three men, when he broke through “Ice that had been tried and would bear a Waggon and horses” before sunrise on his way to Court in the winter of 1800. Samuel Chase to Hannah Chase, February 4, 1800, Documentary History 1:888–89.


29. Roger Sherman to Simeon Baldwin, January 2, 1792, Documentary History 4:574 (source of quote); William Richardson Davie to James Iredell, May 25, 1792, ibid., 2:278–79 (“I congratulate you on the interposition of Congress in your behalf against the tyranny and injustice of your brothers of the bench,”); Justices of the Supreme Court to the Congress of the United States, August 9, 1792, ibid., 2:289–90; Justices of the Supreme Court to the Congress of the United States, February 18, 1794, ibid., 2:443–44; John Blair to James Iredell, September 14, 1795, ibid., 3:68 (“I am utterly at a loss to conceive why that course of duty [fall 1795 circuits] should have been assigned to either of us, when both of us had taken a tour in the spring, . . . besides [my] having had the Middle Circuit in the fall [of 1794].”).


31. Marshall Papers 5:259–94 (first quote is from p. 262); William Wirt, Sketches of the Life and Character of Patrick Henry (9th ed., 1845), pp. 329–86; Alexander McCaul to James Ritchie, February 1, 1792, vol. 14, Foreign Office 4, PRO (source of next two quotes); Richard Hanson to William Jones, January 29, 1792, Class 30, T79, PRO (“Mr. Blair . . . thought himself interested in the payments into the Loan Office and refused to sit as Judge”); John Blair to William Cushing, June 12, 1795, Documentary History 1:757 (if Ware v. Hylton “should be brought on in August, I ought to remind you, that I have all along declined sitting in that cause”); Henry Glassford to William Molleson, February 1, 1792, James Ritchie to William Molleson, February 1, 1792 (source of last quote), both in vol. 14, F04, PRO.

Blair was interested in the suit. One of the “impediments” charged by the plaintiff was the 1779 Virginia law that allowed debtors to British creditors to discharge their debts by payment, in depreciated Virginia currency, into the state’s Loan Office. In 1779–1781 Blair had made seventeen payments into the Loan Office, totaling nearly seven thousand pounds Virginia paper currency, to cancel debts of about 850 pounds sterling. RG48 (Register of Loan Certificates, 1777–1801), Vi. (I am indebted to Brent Tarter for this information.) Virginians
excused Blair’s nonattendance on grounds of his son’s death, see, e.g., [Secretary
of State] Thomas Jefferson to [British Minister] George Hammond, May 29,
1792, Jefferson Papers 23:584, but the very sickly Jimmy Blair died on October
25, 1791, see Gentry & Tarter, “Blair Family,” p. 109, while Blair did not leave
court until a month later.

In vivid contrast to Blair, James Wilson apparently gave no thought to recus-
ing himself in Chisholm v. Georgia even though he was a named plaintiff in
Hollingsworth v. Virginia. Since the latter suit was also brought under the
Supreme Court’s original jurisdiction over state-defendant litigation, the decision
in Chisholm “was determinative of the Court’s jurisdiction” in Hollingsworth.
Casto, Supreme Court 195.

1790–95, Federal Court Records, Vi; Richard Hanson to John Tyndall Warre,
June 23, 1794, Class 30, T79, PRO (“had but two Judgments, one . . . without
allowing any interest, the other . . . with Interest from 7.th July 1782”); John
Hamilton to Lord Grenville, November 29, 1794 (“several Judgements obtained
for British debts, but with the Deduction of Eight years Interest, this proceeds
from the Verdict given by the Jury to which the Judges do not give their assent”)
and Andrew Ronald to John Hamilton, December 17, 1793 (“the Juries, notwith-
standing the decision of the Court [William Paterson and Cyrus Griffin] that the
Plaintiffs were intitled to full and unceasing interest, made it a uniform rule, to
deduct 8 years interest”), both in vol. 6, F05, PRO; Guls v. Murchie (C.C.D.Va.
1794), Order Book, 1790–95, Federal Court Records, Vi (Blair orders interest
from May 7, 1776); Georgia v. Brailsford, 3 U.S. (3 Dallas) 1, 4–5 (1794) (unan-
imous jury instructions given by Jay, C.J.); Ware v. Hylton, 3 U.S. (3 Dallas) 199
(1796). It was commonly held that the war had lasted from April 1775 to April
1783.

Blair, sitting upon what was to be his last circuit court in Georgia in the spring
of 1795, had once again to recuse himself from all British debt cases because
Georgia had a law like the one in Virginia still on appeal. John Hamilton to Lord
Grenville, June 20, 1795, Class 11, F05, PRO.

33. James Iredell to George Washington, February 23, 1792, Documentary
History 2:241 (explains his actions on circuit); Julius Goebel, History of the
Supreme Court of the United States: Antecedents and Beginnings to 1801 (1971),
pp. 742–47.

34. 2 U.S. (2 Dallas) 402–9, esp. 406–7 (opinion of Blair), 408–9 (opinion of
Jay)(1793). Commenting upon the decision, Edmund Randolph (the losing coun-
sel) was quite critical of three members of the majority, and of the Court’s lack
of familiarity with equity. He complained that Justice James Wilson “knows not an
iota of equity,” that Chief Justice Jay, whose approach to the law “had no
method, no legal principle, no system of reasoning,” was “aim[ing] at the culti-
vation of Southern popularity,” and that the members of the Court in general
would “take a score of years to settle . . . a regular course of Chancery.” Randolph also criticized Iredell, who had denied Georgia access below but voted with Blair in the Supreme Court, but leveled no charges at Blair. Edmund Randolph to James Madison, August 12, 1792, Madison Papers 14:348–49.

35. 2 U.S. (2 Dallas) 417–18 (opinion of Blair), 418–19 (opinion of Jay). The writ *ne exeat* forbade a person from leaving the jurisdiction, and, as Attorney General Edmund Randolph had explained to Congress in his report on the state of the federal judiciary in December 1790, judicial power to issue such was necessary if a “proper plan” was to “be devised” to fill out the details of federal equity jurisdiction. Section 14 of the Judiciary Act of 1789 had authorized the federal courts to issue “all other Writs not specially provided for by Statute,” but *ne exeat* had nowhere been mentioned. Thus it was doubtful in February 1793 whether such a writ could be issued. Spurred perhaps by Blair’s concerns in *Brailsford*, Congress in section 5 of the Judiciary Act of March 2, 1793, authorized single justices of the Supreme Court to issue writs *ne exeat*. See Documentary History 4:162 n.7 (Randolph’s Report of December 31, 1790), 71 (section 14 of the Judiciary Act of 1789), 205 (section 5 of the Judiciary Act of 1793), 202 n.8 & accompanying text (explanation of *ne exeat*).


37. Adams Papers 2:355 (source of first quote); Bourguignon, First Court, 242 (source of second quote).

38. Penhallow v. Doane, 3 U.S. (3 Dallas) 109–13 (1795) (Blair’s opinion on circuit, embedded in his Supreme Court opinion); ibid., 108–9, 113–16 (Blair’s Supreme Court opinion); ibid., 80–91 (opinion of Paterson, J., agreeing with Blair and arguing in addition that the states were never individually sovereign); ibid., 91–108, 116–20 (opinions of Iredell, J., and Cushing, J., agreeing with Blair but disagreeing vehemently with Paterson’s additional argument).

Interestingly, Blair, whose vote was needed to make a majority of the six-person Court (reduced to four in this instance with Jay in England, negotiating a fresh treaty, and Wilson recused because he had represented Doane before the Confederation court: Documentary History 1:231 n.160 & 1:236 n.175), did not mention the difficulty of his having already heard and decided the case once, even though, when the judges were contemplating a strong protest about their circuit-riding duties in 1790, he had written that it was “liable to objection, that men who have decided a cause in one court, should determine it again in an appellative capacity.” John Blair to John Jay, August [5], 1790, ibid., 2:84.

39. Hayburn’s Case, 2 U.S. (2 Dallas) 409, 410–14n (1792) (note containing the opinions of Jay, Cushing, and the district judge of New York; Wilson, Blair,
and Peters; and Iredell and the district judge of North Carolina, issued as letters dated respectively April 5, April 18, and June 8, 1792); Opinion of Justice John-
son and District Judge Bee, October 26, 1792, Minute Book [for the Circuit Court for the District of South Carolina], RG 21, NARA, East Point, Georgia (Johnson did not ride circuit in the spring of 1792); Maeva Marcus & Robert Teir, “Hay-
ington, April 5, 1792, George Washington Papers, Library of Congress (Wilson in chance meeting with Randolph declared that he and Blair both doubted the law’s constitutionality); James Madison to Henry Lee, April 15, 1792, Madison Papers 14:288 (the Pennsylvania federal judges had pronounced the law “uncon-
stitutional and void”). The district judge of Vermont later joined Jay and Cushing to repeat (verbatim) the declaration they had previously made in New York. See Opinion of John Jay, William Cushing, and Nathaniel Chipman, June 18, 1792, filed with 1803 case files of Vermont Circuit Court, RG 21, NARA, Waltham, Massachusetts.

40. 2 U.S. (2 Dallas) at 411n; James Iredell to Hannah Iredell, September 30, 1792, Documentary History 2:301 (“I have reconciled myself to the propriety of doing the Invalid-business out of Court. Judge Wilson altogether declines it.”). The records of the claims of the invalids indicate that very few were heard from the Middle Circuit courts attended by Blair in the spring of 1792, and all of those are without date and so are consistent with their having been handled by Cushing when he rode the Middle Circuit in fall 1792. See American State Papers: Claims (38 vols., 1854), 1:56–68, 107–22 (complete record of claims filed before the circuit judges acting as commissioners in 1792; none are certi-
fied by Blair or Wilson; claims from Virginia and Maryland circuits are without date).

41. Warren, Supreme Court 73–76; Fisher Ames to Thomas Dwight, April 25, 1792, in Seth Ames et al., eds., Works of Fisher Ames (2 vols., 1983), 2:942; War-

42. Of course, in Marbury only one side argued the cause.

43. 2 U.S. (2 Dallas) 414 n; Edmund Randolph to James Madison, August 12, 1792, Madison Papers 12:258; [Philadelphia] Federal Gazette, August 18, 1792; Marcus & Tier, “Hayburn’s Case,” 534–40 (quote is from p. 538). After the tie vote, Randolph argued for mandamus on behalf of Hayburn, who was present. The judges, not wanting to embarrass their Federalist administration further with another holding of unconstitutionality, took the case under advisement until Feb-
uary, giving Congress another chance to act. Congress repealed the 1792 act and gave the abusive duties to the district judges.
44. Mays, *Pendleton* 2:193–94; George Morgan to Alexander McKee, February [20], 1793, *Documentary History* 5:222 (“No counsel appearing on behalf of the State, the Bench expressed a desire to the Gentlemen of the Bar, that of any of them held the negative of the question, they would speak; and that the Bench would be glad to hear them upon it. None offering, the Chief Justice, after a proper pause, expressed a wish and offer of whatever time should be required by any gentleman to prepare himself, but this was also declined.”). Interestingly, Edmund Randolph appeared in all three cases, in *Caton* as attorney general of Virginia, and in *Chisholm* as private counsel for Chisholm.


Natural lawyers of the 1790s had been reared in an openly classed society, and most viewed “the community” which accorded authority to legal opinion from a class standpoint. Positivists today usually deny class but hedge against lower-class participation in government through their authoritarianism.


51. The neutrality crisis is covered ably in Casto, *Supreme Court*, 72–80; the quote near the end of the next paragraph is from p. 77. My understanding of the Court’s rejection of the president’s request has been greatly informed by Jay, “Most Humble Servants,” especially pp. 170–93.

see Jay, “Most Humble Servants,” pp. 69–92, 114; Casto, *Supreme Court*, 72–75. Casto also details advisory opinions by many of the other justices.

53. For the preference of Jay and Hamilton for executive power, especially in foreign affairs, see Jay, “Most Humble Servants,” pp. 60–61, 72, 175–76; for the preferences of Jefferson and the collision of personality and principle between Jefferson and Hamilton, see ibid., 58–64, 66, 173, 176–77; for the institution of suits over the French prizes, see ibid., 133–38; and for grand jury charges of Jay to the Virginia Circuit on May 22, and of Wilson to the Pennsylvania Circuit on June 22, both of which spoke to many of the questions Jefferson would put to the judges in late July, see ibid., 131, 147–49.


57. Thomas Jefferson to Philip Mazzei, April 5, 1790, *Jefferson Papers* 16:307 (diary entry of December 3, 1789: “Called on Mr. Blair in Wmsburg. He was very sick.”); *Documentary History* 1:183 n.56 (Blair too ill to attend February 1791 term of Court); John Blair to William Cushing, June 12, 1795, ibid., 1:756–57 (source of first quote); John Blair to James Iredell, October 10, 1795, ibid., 1:820 (source of second quote); ibid., 1:244 n.191 (Blair too ill to attend August 1795 term of Court); John Blair to George Washington, October 25, 1795, ibid., 1:59.

Henry Tazewell to [John Page?], June 3, 1797, ibid., 3:189; Peregrine Fitzhugh to Thomas Jefferson, June 20, 1797, ibid., 3:201; John Blair to [Mary Blair Braxton Burwell Prescott], July 5, 1799, in Blair, Banister, Braxton, Horner & Whiting Papers; DAB, s.v. John Blair (1732–1800), 1:338.


60. See Edmund Pendleton to Nathaniel Pendleton, February 3, 1794, Documentary History 5:250 (compare “the Ch.f Justice & Judge Wilson plainly found theirs on a favorite wish to Anihilate the State Governments” with “[t]he other Judges [in Chisholm, i.e., Blair] appear to adhere too litterally to General words, which will indeed bear the meaning, but having an Application without, ought not to be extended to so important a case, in which, if meant to be comprehended, a mode of proceeding would surely have been pointed out”).

61. Compare John Hamilton to Lord Grenville, April 4, 1793, File 2, F05, PRO (criticizing Justice Johnson’s “evasional maneuver” of postponing the North Carolina Circuit because of indisposition) with Hamilton to Grenville, June 20, 1795, File 11, F05, PRO (no criticism of Blair’s refusing to hear cases in which he was interested).