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THE FOUNDERS’ MULTI-PURPOSE CHIEF JUSTICE: THE ENGLISH ORIGINS OF THE AMERICAN CHIEF JUSTICESHIP

Justin W. Aimonetti* & Jackson A. Myers**

ABSTRACT

During the founding era, the American Chief Justice was nearly unrecognizable to modern eyes. Rather than a purely judicial officer, the Chief Justice was a multi-purpose minister, serving as a judge, an administrator, a diplomat, and an advisor. He was what we call the "multi-purpose Chief Justice."

The multi-purpose Chief Justice of the Early Republic originated with the ancient English office of the Lord Chief Justice. English judges historically served as multi-purpose ministers to the king, engaging in administrative and even political tasks. This was especially true for the Lord Chief Justice. Even as other English judges settled into more limited judicial roles, the Lord Chief Justice remained deeply integrated in British politics and government. The paradigmatic multi-purpose Chief Justice was Lord Mansfield, whose tenure from 1757 until 1789 profoundly influenced the American Framers.

This Article contends that the English conception of a multi-purpose Chief Justice accompanied the title “Chief Justice” to America. The text of the Constitution, the debates at the Constitutional Convention, and the broader legal archive together indicate that the Framers expected the American “Chief Justice” to look and act like its English antecedent. The first Chief Justice, John Jay, did not disappoint. Jay was a Chief Justice cast in the mold of Lord Mansfield, presiding over the Supreme Court while also serving on administrative commissions, engaging in diplomacy, and routinely offering the President legal and political advice.

Our recovery of the Chief Justice’s transatlantic origins offers a new angle on both English legal institutions and on the early American Chief Justice.

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** J.D., University of Virginia School of Law, 2020; M.A. (History), University of Virginia, 2020; B.A., Williams College, 2017.
It also poses questions about the judicial role and the separation of powers, highlighting the tension between modern doctrine and the actual practice of the Framers in the context of the judiciary.

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I. INTRODUCTION

On August 24, 1789, Aedanus Burke of South Carolina rose in the House of Representatives and offered an amendment to what would become the Judiciary Act of 1789. As the Annals of Congress report, “Mr. Burke moved that ‘Chief Justice’ should be struck out. It is, he said, a concomitant of royalty.”

To the modern reader, Burke’s comment may seem odd if not downright bizarre. What could possibly be so offensive about such a mundane title? And what connection could the title “Chief Justice” have to royalty?

Burke’s remark hints at the important but often overlooked origins of the American Chief Justice. This Article recovers that story, adumbrating the origin of the title “Chief Justice” and revealing a conception of the office at odds with modern understandings. Representative Burke recognized that there was more to

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1 1 ANNALS OF CONGRESS 812 (1789) (Joseph Gales & William W. Seaton eds., 1834).
the title “Chief Justice” than met the eye. In the eighteenth century, the title carried with it an entire portfolio of administrative, advisory, and political responsibilities.

From the thirteenth through the nineteenth centuries, “Chief Justices” presided over the principal courts of common law in England. The Court of King’s Bench and the Court of Common Pleas were each made up of one “Chief Justice” as well as three other judges, called “puisne justices.” These judges, along with the Barons of the Exchequer, comprised the “Twelve Judges” who oversaw the common law until the late nineteenth century. Among these twelve, however, the Chief Justice of King’s Bench reigned preeminent—he was widely known simply as the “Lord Chief Justice of England.”

English justices—and especially Lord Chief Justices—during the medieval period were characterized by two overarching but seemingly contradictory expectations. On the one hand, a judge had a duty to decide cases impartially. On the other hand, that judge was also an all-purpose minister of the king, expected to engage in administrative and even political tasks alongside his judicial responsibilities. We refer to this latter expectation as “institutional interconnectedness.” Impartiality and interconnectedness coexisted within the medieval understanding of the judicial role, and the Lord Chief Justice bore the mark of these concurrent expectations more than others.

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2 The use of the title “justice” has a long history, reaching back at least to the twelfth century. The 1177 Assizes of Clarendon, for instance, referred to royal judges as justitiae, the Latin for “justices.” Assizes of Clarendon §§ 1, 4–6, in William Stubbs, Select Charters and Other Illustrations of Our Constitutional History 143–44 (1874) (the Latin text). As the Assizes are clearly referencing an established title, we may safely assume that that the judicial title of “justice” dates back much further, perhaps even to the Norman Conquest. “Puisne” is pronounced like “puny” and translates to “born after,” giving rise to the metaphorical meaning of “junior.” This led to the modern meaning of smallness and weakness, which dates to the 1590s. See Puisne, Oxford English Dictionary (3d ed. 2007). It is well to remember that the number of puisne judges on the bench fluctuated over time.


4 For the nineteenth century reorganization of British courts, see id. at 58–59.


We will use the title “Lord Chief Justice” for this office to distinguish it both from its American namesake and from the Chief Justice of the Common Pleas. It is also worth noting that the Lord Chief Justice was an English office even after the creation of the United Kingdom of Great Britain—Scotland retained its own independent court system even after the Act of Union in 1707. Cf. James E. Pfander & Daniel D. Birk, Article III and the Scottish Judiciary, 124 Harv. L. Rev. 1613, 1615 (2011). Nonetheless, as we discuss in Part II, the eighteenth-century English Lord Chief Justice was also an important player in British government, and we will use those adjectives accordingly.
In the eighteenth century, the Lord Chief Justice sat as a judge while simultaneously serving the king in a variety of extra-judicial roles, including as a political and legal advisor. These extra-judicial functions were just as much a part of the office as was the duty to decide cases. The influential tenure of the deeply interconnected Lord Mansfield, Lord Chief Justice from 1756 until 1788 solidified the multi-purpose role of a “Chief Justice.” In other words, the Lord Chief Justice of 1789 was very much a “concomitant of royalty.”

Lord Mansfield and the multi-purpose Lord Chief Justiceship served as important models for the American Framers. The Constitution specifically uses the title “Chief Justice,” tethering the office to a deep well of past practice and precedent. Drawing on the Constitution’s text, debates at the Constitutional Convention, and other founding-era sources, we argue that the Framers in effect translated the multi-purpose Chief Justiceship across the Atlantic, embedding the expectations of interconnectedness and impartiality in the Constitution itself. The Framers expected the American “Chief Justice” to look and act like his English namesake.

John Jay, the first American Chief Justice, fulfilled this expectation. Jay was a multi-purpose Chief Justice in the mold of Lord Mansfield, serving President Washington in ways strikingly similar to how Lord Mansfield served King George III. Jay was functionally a member of Washington’s cabinet, taking on administrative and diplomatic assignments and serving as a close political and legal advisor to the President.

By connecting early American legal institutions and behavior to English practice, this Article provides crucial context for understanding the Chief Justice in the Early Republic. Though many have described conduct of early Supreme Court Justices at odds with modern norms of judicial behavior, few have sought to rigorously link this conduct to English practice. Legal institutions and actors in the Early Republic cannot be understood in a vacuum, divorced from their transatlantic context. By re-examining the American Chief Justice from this

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6 ANNALS, supra note 1, at 812.
7 U.S. CONST. art. I, § 3, cl. 6.
perspective, this Article joins a swelling tide of scholars seeking to understand early American legal history through a transatlantic lens.9

This Article’s transatlantic perspective reveals an understanding of the Chief Justice that conflicts with modern notions of the appropriate judicial role. Conduct which would now be met with sharp censure was greeted with a shrug in the 1790s. Whereas modern judicial ethics seeks to wall off the judiciary from politics for fear of imperiling the courts’ legitimacy, the Founders saw little contradiction between impartiality and the Chief Justice’s involvement with the political machinations of government. Rather than drawing bright lines between the judicial and executive spheres, the multi-purpose Chief Justice blurred that boundary. Our examination of Chief Justice Jay and his English antecedents shows that, at least in the context of the judiciary, the Founders embraced a more flexible approach to the separation of powers than the formalistic approach that dominates modern jurisprudence. Though we do not argue that the eighteenth-century understanding of the Chief Justice should control current practice, our account highlights the tension between modern doctrine and Founding-era practice and illustrates the Founders’ nuanced attitude toward the relationship of judiciary and executive.

This Article makes its case in four Parts. Part I explores the origins of the first office bearing the title Chief Justice: the Lord Chief Justice of England. The eighteenth-century Lord Chief Justiceship—and in particular the tenure of Lord Mansfield—receives most of the focus, as that period naturally had the greatest influence on the Framers’ conception of the “Chief Justice.” Part II argues that the Framers expected their new Chief Justice to fill a similar role in American government as his English namesake had in Britain. Part III shows that John Jay, the first American Chief Justice, fulfilled this expectation. In Part IV, we suggest possible explanations for the disappearance of the multi-purpose Chief Justice. We also offer concluding thoughts on what the multi-purpose

Chief Justice of the Early Republic means for modern notions of the judicial role and the separation of powers.

II. THE ENGLISH ANTECEDENT

The origins of the American Chief Justice lie with the English office of the Chief Justice of King’s Bench, also called the Lord Chief Justice. This office does not go unmentioned in works of English legal history, but it generally receives haphazard discussion rather than dedicated attention. Part I seeks to remedy this lacuna, synthesizing the detailed work of previous historians into a diachronic portrait of the Lord Chief Justice through the eighteenth century. In doing so, we delve not just into the development of the Chief Justiceship but also the broad contours of the medieval English judiciary. This perspective offers a new angle on medieval English legal institutions and on the office of Lord Chief Justice.

In Part I.A, we offer a thematic narrative centered on two overarching expectations: institutional interconnectedness and impartiality. Institutional interconnectedness refers to the various ways in which medieval English judges were connected to the king: judges derived their authority from the king’s personal power, and they served at his pleasure, subject to unilateral removal from office. Most importantly, English judges were multi-purpose royal agents: in addition to deciding legal cases, they performed administrative, advisory, and even political tasks on behalf of the king. Throughout this period, the Lord Chief Justice’s special relationship with the king manifested in both greater distinction as well as a wide array of extra-judicial responsibilities.

Despite lacking the structural independence that characterizes modern judges, medieval English judges nonetheless had a duty to decide legal matters impartially, without regard to extrinsic pecuniary or political considerations. Though we do not claim that this norm was invariably obeyed, deviations were recognized as violations of a core judicial duty. And just as with interconnectedness, this duty of impartiality was especially pronounced for the Lord Chief Justice.

These two expectations may seem contradictory to modern readers. It is easy for Americans to assume that judicial isolation from the executive and from politics is necessary for impartial judging. Likewise, we often conflate the internal duty of impartiality with the structural safeguards against external interference with judicial decisionmaking, such as life tenure or guaranteed salary. But such safeguards—often referred to under the catch-all term “judicial

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10 The works of Sir John Baker, though remarkable for their erudition, exemplify this higgledy-piggledy discussion of the Lord Chief Justice. While this is by no means a criticism of Baker or other historians, this choice has left a niche that we attempt to fill.
independence” serve only to protect that internal duty of impartiality. The history of the English judiciary casts doubt on the intuition that impartiality cannot exist alongside institutional interconnectedness.

The concurrent expectations of interconnectedness and impartiality formed the foundation of the eighteenth-century multi-purpose Chief Justice, which we discuss in Part I.B. Lord Mansfield, Lord Chief Justice from 1757 until 1789, offers a prime example of the multi-purpose Chief Justice in action. From his appointment on the basis of political reliability to his extensive extra-judicial activities to his influential service as a political and legal advisor in the Cabinet, Lord Mansfield was the quintessential multi-purpose Chief Justice. And it was Mansfield who most strongly influenced eighteenth-century American understandings of what it meant to be a “Chief Justice.”

A. The Medieval Lord Chief Justice

1. Institutional Interconnectedness

In the twelfth and thirteenth centuries, little daylight separated the king from his judiciary. Thirteenth-century justices “brought to the courts in which they sat an authority derived from their own direct relationship with the king. . . . Their sessions could therefore be, and were, described as sessions of the king’s court.” The justices were also members of the king’s general “court” (the curia regis), meaning they often served simultaneously as clerks, accountants, and

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12 See John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 S. CALIF. L. REV. 353, 354 (1999) (“Unless judges can be counted on . . . to act as impartial and morally autonomous agents who share the values that underlie our constitutional democracy, extensive institutional protections are hard to justify.”).

advisors. These early justices were “primarily the king’s servants” and “had no sense of being set apart from other branches of the civil service.”

The office of justiciar exemplified this state of affairs. The justiciar served as the realm’s chief judicial officer and also the day-to-day head of the curia regis, wielding expansive vice-regal powers in all matters of state. Since an independently powerful noble or bishop often occupied the office, the justiciar possessed both tremendous power and a remarkable degree of independence from royal control in day-to-day operations. But that largely unchecked freedom led to the justiciar’s downfall and his replacement by the Chief Justice of King’s Bench in the mid-thirteenth century.

Powerful and manipulative justiciars dominated the early reign of King Henry III, who had assumed the throne in 1216 at the age of nine. In 1234, the frustrated King dismissed his justiciar, Stephen Segrave, and did not name a replacement. Around the same time, he resurrected the coram rege court (“the court before the king himself”), the predecessor of King’s Bench, as a means of “ke[eping] justice close to the king.” The senior justice of the coram rege court filled the void left by the vacant justiciarship, taking on the advisory responsibilities that had once belonged to the justiciar. These new duties of the senior coram rege judge were formalized in 1269, and the position acquired the


See Turner, Reputation, supra note 13, at 311.

E.g., Baker, Introduction, supra note 3, at 15 (“The twelfth-century chief justiciar was really a viceroy, a deputy of the king empowered to act in royal affairs, and as such was concerned with all matters of state, administrative and judicial.”); Plucknett, supra note 14, at 222.

E.g., Alexander Pulling, The Order of the Coiff 64 (1897) (“The great power of the Chief Justiciar seems ever to have been an object of anxiety to the Crown. . . .[and] at the latter end of the reign of Henry III, the office was abolished.”).

For instance, Hubert de Burgh, Earl of Kent, and justiciar from 1219 until 1232, “was more the governor of England than was the King” during his tenure. Turner, Origins, supra note 14, at 248.

R. Malcolm Hogg, Henry III, the Justiciarship, and the Court Coram Rege in 1261, 30 AM. J. LEGAL HIST. 59, 60 (1986).

Ralph V. Turner, Judges, Administrators, and the Common Law 33 (1994); see also id. at 27–29 (“Henry III had managed to rid himself of two troublesome and ambitious justiciars within only a few years, and since the justiciar dominated the Bench at Westminster, he may have felt that another court, in effect a household court, directly dependent on the king, would be a useful counterweight to the justiciar.”).

Turner, Origins, supra note 14, at 249.
title “Chief Justice.” The Chief Justice of King’s Bench was thus birthed in an
effort to “concentrate power in the royal household” without sacrificing the
flexibility which had characterized the justiciarship. This origin laid the
groundwork for the Chief Justice’s close connection to the Crown over the next
time five centuries.

As the office developed, the Lord Chief Justiceship accumulated various
distinctions setting it apart from the other royal justices. The Chief Justice of
King’s Bench was paid substantially more than any other justice, and he was
appointed by a special writ instead of by letter patent (the method used for the
other justices). The plea rolls of King’s Bench bore the Chief Justice’s name
but not those of his colleagues, and the process writs issued by the court were
required to be “attested by the chief justice.” In addition to these technical
distinctions, the Chief Justice of King’s Bench was widely recognized as the
leader not just of the judiciary but also of the entire English bar, a prestige

The early medieval understanding of judges as the “king’s servants” led
to a tradition of extrajudicial service: the Chief Justice and the other royal justices
served the king as all-purpose ministers rather than as solely judicial figures.
Even after the law courts became distinct from the king’s “court,” the justices

22 See Edward Foss, Biographia Juridica: A Biographical Dictionary of the Judges of
England from the Conquest to the Present Time vii (1870); Pulling, supra note 17, at 67
n.3.
23 Turner, supra note 20.
24 The Chief Justice of Common Pleas had his own perquisites which set him apart from the
other justices. Much like his counterpart in King’s Bench, the Chief Justice of Common Pleas
was paid more than his puisne colleagues and enjoyed an “absolute” prerogative to nominate clerks
and various other officers of his court. See Baker, Oxford History, supra note 5, at 125 (greater
pay), 130–34 (power over court staff).
25 See Baker, Oxford History, supra note 5, at 145 (“[T]he chief justice [of King’s Bench]
received a considerably larger sum than any other judge . . .”).
26 E.g., Robert Richardson, The Attorney’s Practice in the Court of King’s Bench 4
(1739); Philip Hamburger, Law and Judicial Duty 155 n.18 (2008). Edward Coke, himself a
former Chief Justice, found this quirk salient enough to include it in his Institutes. Sir Edward
Coke, Fourth Institute 75 (1644). Some Chief Justices even believed that their distinctive
method of appointment shielded them from the King’s unilateral removal power. See Gilbert
Burnet, The Life of Sir Matthew Hale 38 (1823) (noting that Lord Chief Justice John Keylynge
(Chief Justice from 1666–71) believed that “a Chief Justice being placed by a writ, was not
removable at pleasure, as judges by patent were”).
King’s Bench was also the designated “custodian of the notebooks” for all the Crown’s cases.
James Oldham, Informal Law-Making in England by the Twelve Judges in the Late Eighteenth and
28 Baker, Oxford History, supra note 5, at 411.
29 See supra note 5.
continued to serve as crucial cogs in the administration of the realm.30 They were regularly appointed to ad hoc commissions which did everything from supervising sewers in the countryside to preventing fraud by customs collectors to organizing compensation claims after the 1666 Great Fire of London.31

An institution called the “assizes” offers an excellent illustration of the nature and breadth of the extra-judicial expectations of English justices.32 Twice a year, royal justices rode circuit throughout the country, stopping nearly every day to conduct jury trials and dispose of pending criminal prosecutions.33 Yet the “assize justices” also engaged in “a range of activity no less staggering in its variety than in the degree to which it transcended the conventional limitations of judicial responsibility.”34 Assize justices gathered information for the king about “the distastes and griefs of the people,”35 and they were expected to “represent[] the view of the government to the country.”36 In short, the assize justices were, as Lord Chancellor Francis Bacon told them in 1617, “the planets of the kingdom” who must “do . . . as [the planets] do; move always and be carried with the motion of your first mover, which is your sovereign.”37

The Lord Chief Justice performed the full complement of extrajudicial activities expected of English judges. He participated in the assizes with all of its political and administrative overtones, and he sat on special administrative bodies when so required. But unlike the puisne justices, the Chief Justices were

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31 Jay, supra note 30, at 133; Havighurst, supra note 30, at 66.

32 The name “assize” originally referred to royal enactments which mandated public trials and other legal procedures. As judges were commissioned to preside over these trials, “these justices were naturally called justices of assize, and their sessions in the provinces were called the assizes.” PLUCKNETT, supra note 14, at 109.

33 See generally BAKER, INTRODUCTION, supra note 3, at 21.


35 COCKBURN, supra note 34, at 8–10; see also BAKER, OXFORD HISTORY, supra note 5, at 415 (“[Justices on assize] were not above advising the government on what we should regard as political matters, in the light of their local knowledge gained on circuit.”). The assize justices also served as checks on local magistrates, ensuring that these officials were both competent and loyal. BAKER, OXFORD HISTORY, supra note 5, at 261. Queen Elizabeth I utilized the assize justices to help purge the rolls of local magistrates who were insufficiently Protestant. COCKBURN, supra note 34, at 188–219.

36 BAKER, OXFORD HISTORY, supra note 5, at 415. Their grand jury charges in particular were often “designed to advertise party principles.” NORMA LANDAU, THE JUSTICES OF THE PEACE 46 (1984).

37 COCKBURN, supra note 34, at 151.
also _ex officio_ members of the King’s Privy Council.\(^{38}\) This was no mere honorific. The Privy Council was a substantial part of the realm’s executive apparatus, advising the king on policy matters and issuing administrative regulations enforceable by local Justices of the Peace.\(^{39}\) And prior to the seventeenth century, the Privy Council performed quasi-judicial functions through “conciliar courts” like the infamous Star Chamber, a tribunal on which the Lord Chief Justice often sat.\(^{40}\)

The Chief Justice’s service on the Privy Council paralleled his traditional role as an advisor to the king.\(^{41}\) By tradition, the judges of the courts of common law doubled as “legal advisers of the Crown, and it was to these experts . . . that all political questions involving points of law would naturally be referred.”\(^{42}\) This was particularly the case for the Lord Chief Justice. Francis Hargrave, a noted eighteenth-century legal commentator, referred to the Lord Chief Justice as the king’s “assistant[. . .] in all judgements, for many ages before and after [the Norman Conquest].”\(^{43}\) During the treason trial of Sir Thomas More in 1535, for instance, Lord Chancellor Thomas Audley asked Chief Justice John FitzJames to opine on the legality of the indictment against More. FitzJames’s affirmative answer was a key step towards More’s eventual conviction and execution.\(^{44}\)

### 2. The Duty of Impartiality

Many modern assumptions about what it means to be a “judge” did not apply to medieval English justices. Yet even in the early thirteenth century, when the judiciary was barely distinct from the all-purpose _curia regis_, royal justices

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38 A dearth of literature on the medieval Privy Council makes it unclear how its membership was determined. In both 1711 and 1727, however, the only judges sitting on the Council were the Chief Justices, and newly appointed Chief Justices were swiftly also appointed to the Privy Council. See 2 EDWARD RAYMOND TURNER, THE PRIVY COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 23–26 (1928).

39 See generally LANDAU, supra note 36.

40 Daniel L. Vande Zande, _Coercive Power and the Demise of the Star Chamber_, 50 AM. J. LEGAL HIST. 326, 335 (2010); see generally ALBERT THOMAS CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 136–58, 170–75 (1910). The anti-royal Long Parliament abolished these conciliar courts by statute in 1641.

41 See Jay, supra note 30, at 134; Burset, supra note 9, at 631 (“Medieval and early modern judges routinely gave legal advice to monarchs. This reflected a jurisprudential and political framework that imagined judges as both servants of the Crown and oracles of the law . . . . [A]dvisory opinions were part of a judge’s duty.”).

42 J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 36 (1928); accord HAMBURGER, supra note 26, at 151–52 (“The judges thus had a specific duty to advise the king, and kings regularly requested the judges’ advice on a wide range of issues.”).

43 FRANCIS HARGRAVE, COLLECTANEA JURIDICA 61 (1791).

44 See FOSS, supra note 22, at 261 (citing WILLIAM ROPER, THE LIFE OF SIRE THOMAS MORE 88–89 (S. Singer ed., 1822)).
had a duty to decide cases impartially, without regard to extrinsic pecuniary or political considerations. Despite functioning as all-purpose servants of the king and lacking any of the tenure protections of modern judges, medieval English judges internalized the obligation to decide legal matters impartially, even if that meant ruling against the king himself.45

The oaths sworn by new judges attest to the expectation of impartiality. Thirteenth-century justices took an oath to “do right justice to the best of [their] ability,”46 and one particularly durable formulation required the oath-taker to “do equal Law and Execution of Right, to all the Kings Subjects Rich and Poor, without having regard to any person.”47 Leading scholars of medieval English judgers agree that “[t]he judges seem generally to have taken seriously their oath to render justice impartially to all”48 and that “independence was unquestionably hailed . . . as a virtue and an attainable ideal.”49

This duty to render justice impartially weighed heavily on the Chief Justice. Legal historian J.H. Baker suggests that “the independent stance of particular chief justices may have helped establish a general principle of independence.”50 Lord Chief Justice William Gascoigne (1400–1413), for instance, was said to have imprisoned the future King Henry V after the prince demanded with drawn sword that the Chief Justice release one his servants.51 The story is likely apocryphal, but it was so well known that William Shakespeare could identify Chief Justice Gascoigne (who plays a minor role in Henry IV) merely as “the nobleman who committed the prince [to prison] for striking him.”52 This story and others like it solidified the Lord Chief Justice’s reputation for uprightness in the minds of Englishmen.53 More generally, the Chief Justice remained the leader of the English bar,54 frequently participating in educational

45 See PLUCKNETT, supra note 14, at 228 (noting that judges in a number of cases in the fifteenth century “asserted the rule of law in the face of attempts to introduce royal influence into their courts”); HAMBURGER, supra note 26, at 113 (arguing that judges generally felt a duty “to decide in accord with the law of the land” and to “hold some of the king’s acts contrary to the king’s own law”); see generally id. at 103–47.

46 BRAND, supra note 27, at 149.

47 HAMBURGER, supra note 26, at 111. This formulation also made its way across the Atlantic to the colonies. Virginia required the colony’s justices of the general court to swear an identical oath. An Act for Establishing the General Court, and for Regulating and Settling the Procedures Therein, in 3 WILLIAM WALLER HENING, THE STATUTES AT LARGE 287, 290–91 (1823).

48 Turner, Reputation, supra note 13, at 313.

49 BAKER, OXFORD HISTORY, supra note 5, at 419; see also id. at 413–14 (noting the obligation of early Tudor judges to generally “resist[] improper pressure”).

50 BAKER, INTRODUCTION, supra note 3, at 166.

51 For a more florid retelling of the story, see Foss, supra note 22, at 290.

52 WILLIAM SHAKESPEARE, HENRY IV, PART II act 1, sc. 2.

53 BAKER, INTRODUCTION, supra note 3, at 166–67.

54 BAKER, OXFORD HISTORY, supra note 5, at 411.
exercises at the Inns of Court.\(^{55}\) This active participation in the intensely collegial Inns could only have heightened the Lord Chief Justice’s perceived obligation to model impartial judicial conduct for younger lawyers.

The expectations of interconnectedness and impartiality—despite appearing contradictory to modern readers—coexisted throughout the medieval period. The same judicial oaths that attested to the duty of impartiality also demonstrate its coexistence with institutional interconnectedness. In almost the same breath that the oath taker promised to “do equal Law and Execution of Right,” he also swore to “well and truly . . . serve our Sovereign Lord, the king”\(^{56}\) and to “promote, to the best of his ability, the advantage of the lord King.”\(^{57}\) And at the oath ceremony, judges were instructed that their new obligations were “urged [by the King] in the loyalty by which you are bound to us.”\(^{58}\) Even though sworn to act impartially, the justices remained “planets . . . carried with the motion of [their] first mover,” the king.\(^{59}\)

Fittingly, it is a Lord Chief Justice, John Fortescue, who best exemplifies this surprising coexistence. In his (awkwardly titled) treatise \textit{On the Nature of the Law of Nature}, Fortescue articulated the duty of impartiality.\(^{60}\) “[J]udges,” he wrote, “are all bound by their oaths not to render judgment against the laws of the land, although they should have the commands of the sovereign to the contrary.”\(^{61}\) Even if the king himself should order him to rule one way, the judge was obligated to follow the law rather than the Sovereign. Despite this noble sentiment, Fortescue himself was “certainly not independent of government”\(^{62}\) and “one of the most reliable supporters of the troubled Lancastrian [regime]” while Chief Justice.\(^{63}\) His personal loyalty to King Henry VI even led him to abandon his post at Westminster and follow the King into exile in 1461. It was


\(^{56}\) \textit{Brand, supra} note 24, at 150 (quoting a 1278 oath).


\(^{58}\) \textit{Id.}

\(^{59}\) \textit{Cockburn, supra} note 34 (quoting Lord Chancellor Francis Bacon).

\(^{60}\) \textit{Id.}


there, ironically, that Fortescue wrote his treatise declaring the judge’s duty to be independent of the king in judicial matters.\textsuperscript{64}

3. Abuse and Reform in the Seventeenth Century

The coexistence between the expectations of interconnectedness and impartiality was not always harmonious. Willful monarchs in the sixteenth and seventeenth centuries manipulated the judges’ dependence on the king in order to bend the law to the crown’s will. These instances of royal interference coincide with many of the great episodes in England’s constitutional history, and many, unsurprisingly, star the Lord Chief Justice. The tumultuous seventeenth century and the reforms that emerged from it went a long way toward creating the multi-purpose Chief Justice of the eighteenth century.

King Henry VIII, reigning in the early 1500s, “inculcated” an “awful dread of majesty” in the judges during his reign, using his threatening aura to secure the judges’ approval of his agenda.\textsuperscript{65} The Stuart monarchs of the next century expanded on Henry’s playbook to manipulate the common law courts.\textsuperscript{66} In 1616, King James I removed Edward Coke from his position as Lord Chief Justice for repeatedly asserting his court’s independence from the King and his ministers.\textsuperscript{67} As a result, tenure in office became largely dependent on the content of legal rulings,\textsuperscript{68} and James I’s son, Charles I, took advantage of this dynamic to secure favorable rulings in high-profile cases.\textsuperscript{69}

\textsuperscript{64} Ives, supra note 62.

\textsuperscript{65} See Foss, supra note 22, at 262; see id. at 260 (referring to the “craven subserviency to the royal tyranny with which [every judge] was chargeable”). The King “persuaded” the judges to revolutionize land tenures in Lord Dacre’s Case and deliver him a massive political victory. See E.W. Ives, The Genesis of the Statute of Uses, 82 ENG.HIST.REV. 673 (1967). Previous historians have singled Chief Justice John FitzJames out for criticism on this score, but Edward Foss dispelled many of the claims underlying this focus on the Chief Justice and instead spread the blame throughout the Henrician bench. See Foss, supra note 22, at 260–62; see also J.H. Baker, Sir John Fitzjames, in OXFORD DICTIONARY OF NAT’L BIOGRAPHY, supra note 62 (agreeing and expanding on Foss’s interpretation).

\textsuperscript{66} Baker, Introduction, supra note 3, at 167 (“In the seventeenth century the judiciary came into head-on collision with the Crown on several occasions.”).

\textsuperscript{67} This oversimplifies both Chief Justice Coke’s relationship with King James and the reasons for his removal. For a closer look, see C.W. Brooks, Law, Politics and Society in Early Modern England 124–61 (2009) and Tanner, supra note 42, at 34–40. Philip Hamburger has argued that James I’s decision to dismiss Coke for his unwillingness to succumb to the King’s demands was seen as “an attack on the law itself.” PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 145 (2014).

\textsuperscript{68} See Baker, Introduction, supra note 3, at 167 (“During the next twenty-five years [after 1616], . . . judicial office became less secure than it had ever been.”); George Keeton, Lord Chancellor Jefferys and the Stuart Cause 94 (1965).

\textsuperscript{69} Perhaps the most famous is the Ship–Money Case, in which seven of the twelve judges upheld a questionable scheme to collect taxes without Parliamentary approval. See Tanner, supra
After the Restoration of the Stuart Monarchy in 1660, King Charles’s sons, Charles II and James II, not only continued to remove unfriendly judges but also appointed political lackeys like William Scroggs and George Jeffreys to serve as the Lord Chief Justice. Scroggs and Jeffreys brought an overt partisanship to the Chief Justiceship, aggressively pushing treason prosecutions and enforcing notoriously harsh punishments against those convicted. Historians have called Scroggs and Jeffreys “unscrupulous in any matter which involved politics,” “political lawyer[s] without principles,” and “notorious crown sycophant[s].” Sir Michael Foster, a puisne justice of King’s Bench in the 1760s, called Jeffreys “the very worst judge that ever disgraced Westminster Hall.” J.H. Baker writes that, as a consequence, “the awesome judiciary which the people had revered at the beginning of the century came to be regarded, rightly or wrongly, as an instrument of prerogative rule.”

The excesses of the Stuarts and of their Chief Justices spurred Parliament to action after King James II was deposed in 1688. Under pressure from Parliament, the newly-installed King William III announced that he would commission his judges to serve during “good behaviour” rather than at the king’s pleasure. Parliament then made William’s gesture binding on his successors in the Act of Settlement of 1701.
Commentators both at the time and since have described the Act of Settlement as a sea change in the very nature of the courts, entrenching an independent, rule-of-law-oriented judiciary. The Lord Chief Justice came to symbolize this perceived transition. Whereas Chief Justice Jeffreys was vilified even by contemporary commentators, his successor Sir John Holt became the archetype of “the judge moral, pure, [and] independent” and “the antithesis and antidote to the likes of Scroggs and Jeffreys.” These attitudes, however, overshoot the mark. Although efforts at reform validate the importance of impartiality, the reforms of the 1690s merely restored the traditional coexistence of impartiality and institutional interconnectedness rather than radically transforming the English judiciary. Moving into the eighteenth century, the Lord Chief Justice would remain entangled both institutionally and personally with English politics, religion, and government.

The excesses of the Stuarts and the backlash against their judges did, however, create an even greater gulf between the Lord Chief Justice and his puisne colleagues. Up to this point, the expectation of interconnectedness had applied to the English judiciary broadly, with the Lord Chief Justice exhibiting only a greater degree of interconnectedness. This changed in the eighteenth century. Though puisne justices retained their pseudo-political duties at the Assizes and remained available to offer legal advice, they gradually “retir[ed] from the political arena” after the Act of Settlement. The Lord Chief Justice, by contrast, remained just as interconnected as ever, even expanding the office’s political and advisory functions.

Lord Chief Justices in the eighteenth century would also occupy a more influential office than their predecessors, as the Court of King’s Bench emerged as the principal court of common law in the realm. Over the previous two hundred years, King’s Bench had circumvented its initially limited jurisdiction

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80 A particularly whiggish interpretation comes from G.M. Trevelyan, who declared that “the excellent idea of the rule by law . . . had been secured by the events of the [Glorious] [R]evolution [of 1688] and by the consequent irremovability of judges, who were no longer jackals of government but independent umpires, between the crown and the subjects.” G.M. TREVELYAN, ENGLISH SOCIAL HISTORY 350 (1944).


82 Others have recognized that such attitudes fail to capture the complexity of the period. See, e.g., Artley, supra note 81; COCKBURN, supra note 34, at 4; David Lemmings, The Independence of the Judiciary in Eighteenth-Century England, in THE LIFE OF THE LAW 125–27 (Peter Birks ed., 1993).

83 E.g., PLUCKNETT, supra note 14, at 234–35 (“[The Act of Settlement] did not take the bench entirely out of politics: that would be impossible, and perhaps undesirable.”).

84 For Holt in particular, see generally Artley, supra note 81, at 133–211.

85 KEETON, supra note 68, at 95; cf. BAKER, INTRODUCTION, supra note 3, at 168.
through procedural innovations\(^86\) so that by 1750, King’s Bench heard the lion’s share of all suits brought at common law.\(^87\) Furthermore, under Chief Justice Edward Coke, the court asserted the power to supervise and even reverse the decisions of other tribunals, including of the nominally co-ordinate courts of Common Pleas and the Exchequer.\(^88\) In 1765, Blackstone could plausibly label King’s Bench the “supreme court of common law in the kingdom.”\(^89\) Mirroring the rise of his court, the Chief Justice of King’s Bench, by the beginning of the eighteenth century, had become the preeminent common law judge of the realm.

In the century after the Act of Settlement, the Lord Chief Justice attained the markings of a multi-purpose office, influencing Anglo-American understandings of what it was to be a “Chief Justice.”

B. Lord Mansfield and the Multi-Purpose Lord Chief Justiceship

The eighteenth century saw the advent of what we label “the multi-purpose Chief Justice.” Building on the previous half-millennium of practice, the Lord Chief Justice in the eighteenth century not only sat as a judge but society expected the officeholder to serve the king and his ministers in a variety of extra-judicial roles, including as a legal and political advisor in the royal cabinet. These responsibilities, we argue, were not additional to the Chief Justice’s judicial duties; his political and advisory functions were just as much a part of the office as his responsibility to decide cases.\(^90\) To be a “Chief Justice” in the eighteenth century was to be a multi-purpose minister to the king. The expanding political and advisory role of the Lord Chief Justice did not mean, however, that a high standard of impartiality gave way while sitting as a judge. Both interconnectedness and impartiality determined the shape of the Chief Justiceship in the eighteenth century.

This Section focuses on the exceptionally influential (and exceptionally political) Lord Mansfield, who served as Lord Chief Justice from 1756 until

\(^{86}\) See Baker, Introduction, supra note 3, at 41–47.

\(^{87}\) C.W. Brooks, Lawyers, Litigation and English Society Since 1450, at 31–33 (1999). In some years, the case load in King’s Bench was ten times that of the Common Pleas. See James Oldham, The English Common Law in the Age of Mansfield 47–48 (2004).


\(^{89}\) 3 William Blackstone, Commentaries *41. But as Wilfred Ritz explains, this claim was misleading even in Blackstone’s own day. Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789, at 32–35 (Wythe Holt & L.H. LaRue eds., 1990).

\(^{90}\) In using the term “office,” we refer both to formal duties as well as to the public perceptions of and societal expectations for the Lord Chief Justice. We argue that the norms and practices set out in Part II were so open and notorious that they can justly be called part of the “office” of the Lord Chief Justice.
1788. Though perhaps an outlier in the extent of his political involvement, Mansfield’s career both before and during his tenure as Chief Justice illustrates the multi-purpose Chief Justiceship as it existed in the late eighteenth century.

We highlight three characteristics of the multi-purpose Chief Justice. First, we show that Chief Justices attained their appointments based on political rather than purely legal criteria, a selection process that reinforced the political and advisory functions of the office. Second, we emphasize the Lord Chief Justice’s continuing extrajudicial functions, focusing on his service on the Privy Council and on his role in offering advisory opinions to the king and to Parliament. Last but not least, we detail Lord Mansfield’s service in the Cabinet as a crucial advisor to the king and to several Prime Ministers. Yet even under the exceptionally political Lord Mansfield, the expectation of impartiality did not wane. Alongside its judicial aspect, the Chief Justiceship under Lord Mansfield was a multi-purpose minister at the service of the king, defined by the concurrent expectations of interconnectedness and impartiality.

1. The Appointment Process

In eighteenth-century Britain, appointment as Lord Chief Justice was determined in large part by considerations other than legal merit. Judicial appointments in Britain had long been the prerogative of the king, but with the rise of the position of Prime Minister under George I (1714–1727), appointment decisions were often outsourced to the ministry. Under the powerful Prime Minister Robert Walpole (1721–1742), for example, the predominant factor that determined an appointment to the bench was the candidate’s political reliability. For instance, Walpole once refused to appoint a recommended candidate for a spot on the Court of the Exchequer because he “was Tory . . . [and Walpole] never found any service from Tories.”

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91 Several other Chief Justices such as Lord Hardwicke (1733–37) and Sir Dudley Ryder (1754–57) served in many of the same roles that defined Mansfield’s Chief Justiceship. Mansfield takes center-stage, however, principally because of his long tenure.
92 E.g., BAKER, INTRODUCTION, supra note 3, at 166.
94 This emphasis on political loyalty was characteristic of Walpole’s political strategy, which relied in large part on the distribution of patronage. See generally J.H. PLUMB, THE GROWTH OF POLITICAL STABILITY IN ENGLAND 1675–1725 (1967); J.H. PLUMB, SIR ROBERT WALPOLE (1972). As one less-than-friendly historian put it, Walpole “systematized the means of corruption, with unusual blatancy” and treated “[h]igh politics [as] a predatory game with recognized spoils.” E.P. THOMPSON, WHIGS AND HUNTERS 214 (1975).
95 See Lemmings, supra note 82, at 142 (“Walpole seems to have considered judicial appointments almost entirely on the narrow basis of politics and the interest of the government.”).
96 Id. at 143 (quoting the diary of Attorney-General Dudley Ryder relating the anecdote).
This attitude toward judicial appointments created what David Lemmings has called a judicial “fast-track,” in which promising Whig barristers “entered parliament at an early stage in their careers, attracted the patronage of the ministry, and served their political masters until they were made judges.”\(^\text{97}\) This pattern of advancement was especially pronounced among the most senior judicial positions.\(^\text{98}\)

The path to the Lord Chief Justice ship had an even more specific and even more politically oriented stepping stone: service as Attorney-General. There was a strong presumption that, should the Chief Justiceship fall vacant, the Attorney-General would be named to the seat.\(^\text{99}\) But the eighteenth-century British Attorney-General did far more than just offer legal advice and represent the king in litigation. Both the Attorney-General and his fellow law officer, the Solicitor-General, were distinctly political positions, customarily sitting in the House of Commons and defending government proposals on a political as well as legal basis.\(^\text{100}\) The effectiveness of this Parliamentary advocacy went a long way toward determining a law officer’s prospects for promotion to the Chief Justiceship.\(^\text{101}\) As such, “the men who became [Chief Justice] had clearly proved their reliability [and] had been very carefully selected on the basis of their politics.”\(^\text{102}\)

Lord Mansfield’s pre-judicial career encapsulates the reciprocal relationship between politics, government, and the bench that characterized the path to the Lord Chief Justiceship in the eighteenth century. Known then as William Murray, Mansfield was by all accounts a brilliant lawyer, and his ability and ambition caught the attention of the Duke of Newcastle, a leading Whig

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\(^\text{97}\) Id. at 129.
\(^\text{98}\) Id. at 139.
\(^\text{99}\) See EDMUND HEWARD, LORD MANSFIELD 30 (1979) (“[The] Attorney-General had the right of being appointed Chief Justice of the Court of King’s Bench when a vacancy occurred.”); see also BAKER, INTRODUCTION, supra note 3, at 174. For an anecdote illustrating the strength of this presumption, see 13 HOLDSWORTH, supra note 73, at 215.
\(^\text{100}\) Rita W. Cooley, Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies, 2 AM. J. LEGAL HIST. 304, 307 n.9 (1958) (“From 1688—1832 it was the usual thing for the Treasury to purchase a seat for the Attorney General.”).
\(^\text{101}\) Lemmings, supra note 82, at 140–41 (“Sir John Fortescue and Sir Richard Lloyd were sidelined into junior judgships because they did not perform well in the role of solicitor general.”).
\(^\text{102}\) Id. at 141–42. A brief survey of the biographies of the Chief Justices of the Hanoverian period further illuminates the path to the Lord Chief Justiceship. Thomas Parker (Chief Justice from 1710 until 1717) cut his teeth by spearheading the partisan impeachment of Tory preacher Henry Sacheverell. See 12 HOLDSWORTH, supra note 73, at 204. Robert Raymond proved his Whig bona fides when he initiated treason prosecutions against his former Tory allies just before his appointment as Chief Justice in 1722. THOMPSON, supra note 94, at 207. Philip Yorke became Solicitor-General in 1720 at age 29 through the intercession of powerful Lord Chancellor Lord Macclesfield and then “moved by way of the office of Attorney-General and Lord Chief Justice to the Chancellorship.” Id. at 208; see also 12 HOLDSWORTH, supra note 73, at 238–40.
politician.\textsuperscript{103} Through Newcastle’s efforts, Murray became Solicitor-General and a member of the House of Commons in 1742.\textsuperscript{104} As Solicitor-General, Murray developed into a prominent speaker and “the principal spokesman for the Ministry in the House of Commons.”\textsuperscript{105} After twelve years as Solicitor-General and three more as Attorney-General, King George II appointed Murray as Lord Chief Justice in 1757.

This politically-oriented “fast-track” to the Chief Justiceship says a great deal about the office’s role in British government. Appointing reliable political actors to the bench ensured a reserve of competent and trusted political advisors—David Lemmings argues that “[Walpole’s] appointees may have been virtually government ministers, rather than men who regarded themselves as heads of an independent judiciary.”\textsuperscript{106} This was not an accident: given the extra-judicial and advisory responsibilities of the Lord Chief Justice as detailed in the next two sections, political prerequisites for appointment make perfect sense. The judicial “fast-track” complemented and reinforced the political and advisory aspects of the Lord Chief Justiceship.\textsuperscript{107}

2. Extra-Judicial Service

The extra-judicial responsibilities of the Lord Chief Justice continued in the eighteenth century as they had before: the Assizes retained their central role in the legal system, and assize justices continued to engage in distinctly political

\textsuperscript{103} Oldham, supra note 87, at 1–6 (describing Murray as being “positioned to be drawn in by the tentacles of patronage of the Duke of Newcastle”).

\textsuperscript{104} Heward, supra note 99, at 29–30 (“Murray was appointed [Solicitor-General] and became MP for Boroughbridge in Yorkshire, one of the many seats in the gift of the Duke of Newcastle.”); Plucknett, supra note 14, at 249.

\textsuperscript{105} Norman S. Poser, Lord Mansfield: Justice in the Age of Reason 86 (2013); Jay, supra note 30, at 175; see also 1 Horace Walpole, Memoirs of the Reign of George II 48, at 123–24, 143–44 (Lord Holland ed., 1847) (repeatedly mentioning Murray’s advocacy in the Commons). The Duke of Newcastle’s efforts to keep Murray in Parliament demonstrate his effectiveness as a speaker—when Murray’s appointment to the bench was imminent, Newcastle offered him a high title and an exorbitant pension if he would turn down the Chief Justiceship and instead stay in the Commons. Heward, supra note 99, at 41–42.

\textsuperscript{106} Lemmings, supra note 82, at 144.

\textsuperscript{107} To be sure, Walpole’s emphasis on politics in judicial selection was not an entirely new phenomenon. See Brand, supra note 13, at 166–67 (“[Early medieval justices] were lawyers who had . . . provided the king (and his advisers) with proof not just of their professional competence but of their assiduity in the promotion and protection of the king’s interests.”); Turner, supra note 13, at 310. The eighteenth-century “fast-track,” however, was a much more structured and predictable pathway into the judiciary. Additionally, the connection identified by Lemmings between judicial and Parliamentary service is an eighteenth-century innovation, which likely connects to Parliament’s increasingly central role in English government during this period.
activities.108 The Chief Justice retained his ex officio place on the Privy Council, which had grown in importance alongside the growth of Britain’s overseas empire. It operated as a hub for decision-making related to the colonies. The Council heard appeals in private lawsuits between colonial subjects and fielded challenges to colonial statutes alleged to be “repugnant to the laws of England.”109 King George II (1727–1760) once remarked that Privy Council “[m]inisters are Kings in this country[,] for he could not govern without them.”110

The King took advantage of the Lord Chief Justice’s presence on the Privy Council. The Chief Justice customarily sat on the Committee for Hearing Appeals for the Plantations, and Lord Mansfield often authored the Committee’s opinions.111 But Privy Council adjudication was different from common law litigation—eighteenth-century Chief Justices rendered decisions as an arm of the king’s executive apparatus rather than strictly as judges.

Advisory opinions also remained a staple of the judicial role in the eighteenth century.112 The justices weighed in on the validity of treason indictments, opined on the king’s power to control the marriages of his grandchildren, and offered counsel regarding the legality of a death sentence imposed by a court-martial.113 The justices also “advised as to the drafting . . . of legislation [and] answered questions addressed to them by the executive.”114

But this practice was not without controversy.115 Over the course of the seventeenth and eighteenth centuries, the justices cabined the practice.116 After issuing a particularly controversial 1760 opinion in Sackville’s Case,117 Lord

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108 In one notable example from 1792, Justice William Henry Ashurst “excoriated what he termed the absurd and pernicious critics of the British constitution: ‘seditious reformers with dark and gloomy hearts who wished to inflict on Britain the miseries of republican France.’” See Douglas Hay, Sir William Henry Ashurst, in OXFORD DICTIONARY OF NAT’L BIOGRAPHY, supra note 62. The speech was widely reported and prompted an acerbic response by Jeremy Bentham, entitled “Truth versus Ashhurst.” Id.


111 BILDER, supra note 9, at 125–26.

112 E.g., Jay, supra note 30, at 147; Van Vechten Veeder, Advisory Opinions of the Judges of England, 13 HARV. L. REV. 358, 358 (1900). Blackstone still characterized the royal courts as a “council of the King.” 1 WILLIAM BLACKSTONE, COMMENTARIES *222.

113 See Jay, supra note 30, at 147.

114 KEIR, supra note 34, at 29; Burset, supra note 9, at 631.


116 Burset, supra note 9, at 631–38.

117 See id. at 624; Jay, supra note 30, at 148–150.
Mansfield informed the King that the justices were “very averse to giving extra-judicial opinions, especially where they affect a particular case.”\textsuperscript{118}

Despite nixing the formal advisory opinion, Lord Mansfield’s 1760 letter did not eliminate the Chief Justice’s advisory function: the practice just moved underground.\textsuperscript{119} And it was Lord Mansfield who would exercise this advice-giving role more than any of his predecessors. In addition to his judicial service, Mansfield was a key political player in the British government for nearly thirty years. He offered legal advice, devised political strategy, and even drafted legislation.

3. The Lord Chief Justice’s Advisory Role

During his tenure as Chief Justice, Lord Mansfield maintained a close, confidential relationship with both the king and his ministers. As a trusted source for advice on matters ranging from day-to-day administration to matters of grand strategy, Mansfield was deeply entwined with the highest levels of British government.

The clearest indication of this central role for the Lord Chief Justice is his service in the Cabinet, an amorphous body of parliamentary leaders and royal confidantes, which had over time replaced the Privy Council as the “country’s executive governing body.”\textsuperscript{120} Despite the general trend of the judiciary “retiring from the political arena,” the Lord Chief Justice was a mainstay of the Royal Cabinet in the eighteenth century.\textsuperscript{121} Lord Chief Justice Hardwicke, for example, was an integral part of the Cabinet in the 1730s,\textsuperscript{122} and Lord Mansfield joined the body upon taking his seat as Chief Justice, remaining a member until his retirement three decades later.\textsuperscript{123}

From his position in the Cabinet, Lord Mansfield served as a crucial advisor to the king’s leading ministers, especially the Duke of Newcastle (Prime Minister from 1757–1762) and Lord North (Prime Minister from 1770–1782). Newcastle, who had long been Mansfield’s political patron, “thought that

\textsuperscript{118} Sackville’s Case, 28 Eng. Rep. 940, 941 (1760).

\textsuperscript{119} Jay, supra note 30, at 137.

\textsuperscript{120} Id. at 131; see generally Edward Raymond Turner, The Cabinet Council of England in the Seventeenth and Eighteenth Centuries 1622–1784 (1930).

\textsuperscript{121} Keeton, supra note 68, at 95; accord Wexler, supra note 8, at 1376 (2006) (noting the “long-standing tradition of having the chief justice . . . serve in the cabinet and provide extrajudicial advice to the king”); see also Arthur Lyon Cross, Judges in the British Cabinet and the Struggle Which Led to Their Exclusion After 1806, 20 Mich. L. Rev. 24, 39 (1921).

\textsuperscript{122} In a letter to Hardwicke in 1736, the Duke of Newcastle “urge[d] [Hardwicke’s] attendance at a meeting of the ministers, adding ‘dear Hardwicke, without you we are nothing.’” 6 HolDSWORTH, supra note 73, at 244.

\textsuperscript{123} See Poser, supra note 105, at 125; Heward, supra note 99, at 83.
[Mansfield’s] advice is preferable to any others”¹²⁴ and sought the Chief Justice’s counsel regarding not just matters of state¹²⁵ but also the distribution of political patronage in Mansfield’s native Scotland.¹²⁶ The Chief Justice then served as one of Lord North’s closest advisors during his ministry;¹²⁷ historian Paul Langford called Mansfield “the eminence grise of [North’s] Cabinet.”¹²⁸ At times, Lord Mansfield even acted as a kind of political kingmaker. When the outbreak of the Seven Years War created a stalemate in Parliament between the Duke of Newcastle and his rival William Pitt, it was the Lord Chief Justice who arranged a political truce and facilitated the coalition government that led the nation through the rest of the conflict.¹²⁹

In addition to his close relationship with the king’s ministers, George III himself often relied on Mansfield’s advice.¹³⁰ In one striking episode, Mansfield wielded his clout with the King to influence the appointment of a puisne justice to his own court. Prime Minister Lord North consulted with Mansfield about candidates and then advertised the Chief Justice’s approval of North’s choice in a letter to the King.¹³¹ The King then replied suggesting a fallback option “whom Lord Mansfield thinks superior in talents.”¹³²

Lord Mansfield’s position in the political leadership of the nation extended beyond consultations with government officials—the Chief Justice served as an influential legislator in Parliament. Upon elevation to the Chief

¹²⁴ Poser, supra note 105, at 141; Heward, supra note 99, at 78.
¹²⁵ For instance, Newcastle consulted Lord Mansfield on how to solve military logistical issues during the Seven Years War. See Heward, supra note 99, at 82–83. Mansfield was also reckoned by many “the chief author of the American war.” Walpole, supra note 105, at 578. He advocated for a harsh response to the colonists and, during the war, consulted on various legal issues which arose. See Amanda L. Tyler, Habeas Corpus and the American Revolution, 103 Calif. L. Rev. 635, 662 (2015) (noting Mansfield’s input regarding the legal status of American prisoners of war held on English soil).
¹²⁶ Poser, supra note 105, at 122; Jay, supra note 30, at 176.
¹²⁷ Poser, supra note 105, at 143.
¹²⁹ E.g., Poser, supra note 105, at 122; Jay, supra note 30, at 176.
¹³⁰ James Oldham, Judicial Activism in Eighteenth-Century English Common Law in the Time of the Founders, 8 Green Bag 2d 269, 271 (2005) (noting Mansfield’s “role as a close advisor to George III”). For instance, the King frequently consulted with Mansfield on the management of day-to-day business in the House of Lords. See Letter from King George III to Lord North (Mar. 16, 1770) (“As there are so many [Bills] ready for my assent, I yesterday acquainted Lord Mansfield with my intention of going to this day to the House of Lords.”), available at https://gpp.rct.uk/GetMultimedia.ashx?db=Catalog&type=default&fname=GEO_MAIN_1956.pdf.
¹³¹ Letter from Lord North to George III (June 16, 1770), available at https://gpp.rct.uk/GetMultimedia.ashx?db=Catalog&type=default&fname=GEO_MAIN_995.pdf
Justiceship, William Murray received the Barony of Mansfield, a peerage which entitled him to sit in the House of Lords.\footnote{Both Lord Mansfield and his patron the Duke of Newcastle lobbied the King to grant the new Chief Justice a peerage, likely in part because Newcastle wanted to retain Murray’s assistance as an advocate in Parliament. See supra note 105 and accompanying text.} This he did with regularity: Horace Walpole remarked that Chief Justice Mansfield and his legislative allies “governed [the House of Lords] entirely.”\footnote{Walpole, supra note 105, at 18.} Mansfield also participated in drafting legislation,\footnote{See Walpole, supra note 87, at 9; Plucknett, supra note 14, at 236.} including statutes relating to the business of King’s Bench.\footnote{In 1785, Mansfield leveraged his place in Parliament to alter the time when the Lords would hear criminal trials so that they would not overlap with his obligations in King’s Bench. Oldham, supra note 87, at 60.} And through a constitutional quirk of the British system, the Chief Justice’s seat in the House of Lords enabled him to sit on appeals from his own judgments, as the Lords served as the highest court of appeal in the realm.\footnote{See, e.g., Great Christian Jurists in English History 189 (Mark Hill & R.H. Helmholz eds., 2013); cf. Thompson, supra note 94, at 250–51 (“[A]s Lord Chancellor, [Lord Hardwicke] managed to maintain for twenty years his position as the only law lord, so that any appeal against his decisions to the House of Lords, sitting in its judicial capacity, would be, in effect, to himself.”).}

Not all British politicians supported Lord Mansfield’s interconnectedness with the ministry. Some even advanced arguments based on separation-of-powers principles: the Earl of Shelburne reminded the House of Lords that “[i]t is necessary] to keep the judicial and executive powers as separate and distinct as possible, so as to prevent a man from advising in one capacity what he was to execute in another.”\footnote{18 Journal of the House of Lords 281 (1775); see also Hamburger, supra note 26, at 151–52 (“Some contemporary critics complained that judicial separation from executive control was impaired through such practices as cabinet service by chief justices.”).}

The Chief Justice also came under withering criticism from the pseudonymous letter writer Junius.\footnote{The Letters of Junius were a remarkably influential set of pseudonymous letters leveling scathing critiques of the new Tory ministry of the 1770s. See, e.g., Francesco Cordasco, Junius, in Oxford Dictionary of Nat’l Biography, supra note 62.} Apostrophizing Mansfield, Junius wrote:

You would fain be thought to take no share in government, while, in reality, you are the main spring of the machine. Here, too, we trace the little, prudential policy, of a Scotchman. Instead of acting that open, generous part, which becomes your rank and station, you meanly skulk into the closet and give your Sovereign such advice, as you have not spirit to avow or defend. You secretly engross the power, while you decline the title of minister.\footnote{Letter XLI (Nov. 14, 1770), in The Letters of Junius 206, 215 (John Cannon ed., 1978).}
The Chief Justice himself recognized “the potential for damage, personal or otherwise, from assuming a public position in cases with notoriety.”

Despite this smattering of criticism of Mansfield’s role in the ministry, these complaints do not vitiate the reality that the multi-purpose Chief Justice was a fact of life during the reign of George III. Though the extent of Mansfield’s political involvement was not unanimously embraced, eighteenth-century British legal culture accepted the Chief Justice’s multi-purpose role. In 1806, for example, the House of Commons approved the appointment of Lord Chief Justice Ellenborough to the cabinet—over certain members’ objections—on the basis of historical practice.142

Yet even the deeply political Lord Mansfield understood his ongoing obligation to decide cases impartially. The Chief Justice demonstrated a “sharp sensitivity” to the frequent suggestions that his rulings on the bench were slanted towards the government.143 Mansfield responded defiantly to such criticisms during the controversial 1768 trial of opposition politician John Wilkes: “If, during this king’s reign, I have ever supported his government, and assisted his measures, I have done it without any other reward, than the consciousness of doing what I thought right.”144 Flattering Mansfield’s reputation for impartiality was seen as a way to get into the Chief Justice’s good graces. In an open letter to Mansfield, lawyer Andrew Stuart assured his addressee that “[t]he best and the ablest man... can scarcely ever foretell upon what grounds any important cause will be taken up and decided by your Lordship.”145 Despite Mansfield’s well-publicized connection to political leaders like the Duke of Newcastle and Lord

141 Jay, supra note 30, at 189. William Pitt, Mansfield’s life-long political rival, is said to have quipped that Mansfield was stricken with “political leprosy.” See ROSS J. HOFFMAN, THE MARQUIS: A STUDY OF LORD ROCKINGHAM 260 (1973).


143 Jay, supra note 30, at 186. For some of these suggestions of improper behavior, see Letter signed “Tribunus,” London Evening Post (Mar. 19, 1772), in 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 33–34 (1992) (“[Mansfield has] sedulously sought, and carefully improved, every opportunity of extending prerogative, and making the King absolute.”); THE LETTERS OF JUNIUS, supra note 140, at 32 (“[Mansfield] will not scruple to prostitute his dignity, and betray the sanctity of his office, whenever an arbitrary point is to be carried for government.”).

144 19 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 1112 (T. Howell ed. 1809); see generally Peter D.G. Thomas, John Wilkes, in OXFORD DICTIONARY OF NAT’L BIOGRAPHY, supra note 62. Mansfield enjoyed a solid reputation for impartiality among his contemporaries. Cross, supra note 121, at 28 (“In spite of being so immersed in partisan politics, [Mansfield] actually maintained a reputation for lack of prejudice.”); accord PLUCKNETT, supra note 14, at 236 (1948). Some historians, however, have been more skeptical. See THOMPSON, supra note 94, at 252–54; Lemmings, supra note 82, at 144.

145 ANDREW STUART, LETTERS TO THE RIGHT HONOURABLE LORD MANSFIELD 5 (1773).
North, the Chief Justice “wished to be known as a man outside of party politics.”\textsuperscript{146} Mansfield, his flatterers, and his critics all expected the multi-purpose Chief Justice to remain impartial as a judge, an expectation that had been a hallmark of the English judicial office since the thirteenth century. Especially in the wake of the Act of Settlement of 1701, “[t]he ideal of judicial dispassion as to politics became entrenched in the mind of the public,”\textsuperscript{147} and Englishmen of that era “would have viewed it not only as wrong but contrary to the constitution for the government to dictate to judges the outcome of cases.”\textsuperscript{148} The surprising coexistence of impartiality and interconnectedness, which characterized the medieval Lord Chief Justice, lived on in the multi-purpose Chief Justice of the eighteenth century.

III. TRANSATLANTIC CONTINUITY

Part II introduced the office of Lord Chief Justice and adumbrated the concurrent expectations of impartiality and interconnectedness that characterized that office. Building on these norms and using Lord Mansfield as an example, we then sketched out the eighteenth-century conception of the “multi-purpose Chief Justice”: an officer expected not just to decide cases impartially but also to serve the king as a political and legal advisor.

This Part crosses the Atlantic to examine the influence of the multi-purpose Chief Justice on Americans. The Framers were familiar with the extra-judicial and advisory responsibilities which had come to define the office of “Chief Justice.” We argue that it was no mere coincidence that the senior judge of the federal judiciary shares its name with the Lord Chief Justice. Marshalling evidence from the text of the Constitution, the Constitutional Convention, and the broader legal archive, this Part contends that the Framers modeled the American Chief Justice—both its title and its role in the new government—on its English namesake. The Framers expected the “Chief Justice” (whose title is expressly mentioned in the Constitution) to be a multi-purpose officer in the mold of Lord Mansfield. It was these extra-judicial expectations, having been translated from England and embedded in the Constitution, that motivated Aedanus Burke’s 1789 comment that the title “Chief Justice” was a “concomitant of royalty.”\textsuperscript{149}

\textsuperscript{146} Jay, supra note 30, at 196.
\textsuperscript{147} Hamburger, supra note 26, at 176
\textsuperscript{148} Shapiro, supra note 13, at 626.
\textsuperscript{149} See supra note 1 and accompanying text.
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A. The “Chief Justice” in Colonial America

Britain and its legal institutions served as the principal point of reference for the Constitution’s Framers. At the Constitutional Convention, “[n]o political system was quoted as frequently in the debates as the British constitution.”150 Scholars from Roscoe Pound to Felix Frankfurter have noted the importance of the English model, and in particular the Court of King’s Bench,151 to American judicial organization.152 Though the Constitution did not mimic the overwrought English judicial system, the English example exerted a powerful force on the design of early American legal institutions.153 Take it from John Jay himself: “The history of Great-Britain is the one with which we are in general the best acquainted, and it gives us many useful lessons.”154

American lawyers of the late eighteenth century were intimately familiar with both the structure and norms of King’s Bench and the Lord Chief Justice.155 For one, the majority of American colonies (and later, states) had courts modeled after King’s Bench, complete with a “Chief Justice.”156 Like the Lord Chief

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151  See Wexler, supra note 8, at 1375.
152  See Roscoe Pound, Organization of Courts 10 (1914) ("Judicial organization in the United States was determined immediately, of course, by the then existing English model."); see also Coleman v. Miller, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.) ("The framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union.").
153  This is so even when, as Wilfred Ritz has argued, it served as a “model rather to be avoided than emulated.” See Ritz, supra note 89, at 41; accord id. at 35; see also Pfander & Birk, supra note 5, at 1627–31.
155  As Wilfrid Ritz and, more recently, James Pfander and Daniel Birk remind us, “careful scholarship must demonstrate a nexus between ‘an eighteenth-century information source . . . and accessibility to the same information in the United States.’” Pfander & Birk, supra note 5, at 1625 n.57 (alteration in original) (quoting Ritz, supra note 89, at 32).
156  See Erwin C. Surrency, The Courts in the American Colonies, 11 AM. J. LEGAL HIST. 253, 268 (naming Maryland, New Jersey, Connecticut, and North Carolina as colonies with courts “presided over by the chief justice and associates”). Other colonies following the pattern included Georgia, GA. CONST. OF 1776, art. 40, in 4 Francis Newton Thorpe, The Federal and State Constitutions 783 (1909); South Carolina, S.C. CONST. OF 1776, § 34, in 6 Thorpe, supra, at 3247; Rhode Island, Amasa M. Eaton, The Development of the Judicial System in Rhode Island, 14 YALE L.J. 148, 151 (1905); and Pennsylvania, An Act For Establishing Courts Of Judicature in This Province, Ch. 255, § 6, in 3 The Statutes at Large of Pennsylvania from 1682 to 1801, at 298, 302 (James T. Mitchell and Henry Flanders eds., 1896). So too with other British colonies: when Parliament established a formal judicial system for its incipient colony in India, the court they created consisted of “a Chief Justice and three other Judges.” An Act for Establishing Certain Regulations for the Better Management of the East India Company § 13, 13 Geo. 3 c. 63 (1773) [hereinafter The Regulating Act].
Justice, these colonial Chief Justices were paid more than their colleagues, and they generally possessed similar administrative responsibilities.

Colonial Chief Justices were also multi-purpose Chief Justices like the English Lord Chief Justice. The Chief Justice of Pennsylvania, for instance, doubled as a local admiralty judge and as a member of the colonial council, “where his advice would be important in judicial matters.” On some occasions, the Chief Justice “would hear appeals from himself,” reflecting the institutional arrangement which permitted Lord Mansfield to hear appeals from King’s Bench in the House of Lords. On both sides of the Atlantic, the office of Chief Justice “was one of dignity, and its occupant was generally a respected member of the government.”

In addition to their own colonial courts, the founding generation knew about the multi-purpose role of English judges, especially the Lord Chief Justice. Law during this period was a transatlantic enterprise. The American colonies were under British law; American lawyers and law students read British

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157 See The Regulating Act, supra note 156, at § 21 (allocating the Chief Justice three thousand pounds more per year than his puisne colleagues); An Act for Regulating and Establishing Fees, Ch. 169, § 1 in 2 STATUTES AT LARGE OF PENNSYLVANIA, supra note 156, at 331, 334 (providing that the Chief Justice receive ten shillings more per day as well as five shillings per case heard on a writ of error).

158 Like the Lord Chief Justice, the Pennsylvania Chief Justice formally witnessed the writs issued by his court. An Act for Establishing Courts of Judicature in This Province, supra note 156, § 7; cf. supra note 27.

159 E.g., Wexler, supra note 8, at 1396 (“[I]n colonial and early state governments . . . lines between judicial and nonjudicial functions were often blurred.”).

160 Surrency, supra note 156, at 272; see also id. at 358, 362 (describing the similarly multifarious roles of the Chief Justice of New York).

161 Id. at 372.

162 See supra note 137 and accompanying text.

163 Surrency, supra note 156, at 372. The Chief Justice of the Supreme Court of Bengal may have possessed the authority to cast a second vote in order to break a tie, indicating his special status. See B.N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA 121–22 (1967). We thank T.C.A. Achintya for bringing this to our attention.

164 At one point at the Constitutional Convention, Gouverneur Morris listed out many of the examples of institutional interconnectedness that we highlighted in Part II: “[T]he Judges in England had a great share in [ ] Legislation. They are consulted in difficult & doubtful cases. They may be and some of them are members of the Legislature. They are or may be members of the privy Council and can there advise the Executive . . . ” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 75 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].
treatises and, increasingly, court decisions;165 and wealthy members of the American bar even traveled to England to study at the Inns of Court.166

Lord Mansfield, in particular was well-known in America, as much for his politics as for his legal innovations. Though Mansfield was an undoubtedly influential legal figure,167 his “nonjudicial activities were often more prominently noted by observers than his position on the King’s Bench.”168 Americans knew of his concurrent service in the House of Lords,169 and, thanks to his outspoken opposition to the American Revolution,170 Mansfield was a mainstay of Revolutionary rhetoric against the Ministry in the 1770s.171


See Eric Stockdale & Randy J. Holland, Middle Temple Lawyers and the American Revolution, at xvii (2007); Minot, supra note 165, at 1376–77.

This influence was not always seen as salutary. Thomas Jefferson, for example, objected to Mansfield’s jurisprudence, e.g., Letter from Thomas Jefferson to Phillip Mazzei (Nov. 1785), in 9 The Papers of Thomas Jefferson 67, 72 (Julian P. Boyd ed., 1954), and he famously complained that Blackstone’s Commentaries expressed a “honeyed Mansfieldism” which was poisonous for young American lawyers. John Marshall, on the other hand, thought that Mansfield was “one of the greatest Judges who ever sat on any bench.” See Gordon S. Wood, The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less, 56 Wash. & Lee L. Rev. 787, 801–03. Historians too have recognized Mansfield’s outsize influence on Anglo-American law. E.g., William R. Leslie, Similarities in Lord Mansfield’s and Joseph Story’s View of Fundamental Law, 1 Am. J. Legal Hist. 278, 302 (1957); Morton J. Horwitz, The Transformation of American Law 18 (1977).

E.g., Wexler, supra note 8, at 1399 (“Lord Mansfield, chief justice of the King’s Bench, was notorious on this side of the Atlantic for his advice to George III that the colonists should be dealt with harshly, and was generally perceived as a pernicious and shadowy influence on the Crown.”). This reputation was not undeserved. See supra note 125.

In his Novanglus letters, published in the winter of 1774–75, John Adams repeatedly refers to the troika of “Bute, Mansfield, and North” as a stand-in for nefarious British ministers. See, e.g., Letter V (Feb. 20, 1775), in 2 The Papers of John Adams 269, 280 (Robert J. Taylor ed., 1977); Letter XI (Apr. 10, 1775), in id. at 363, 370; see also Diary Entry (June 2, 1775), in 3 Adams Diary, supra note 165, at 351–52. Adams records that Richard Henry Lee and Benjamin Harrison also spoke about Mansfield in this way. See Diary Entry (Sept. 3, 1774), in 2 Adams Diary, supra note 165, at 120.
B. The “Chief Justice” and the Constitution’s Text

The Framers of the Constitution conceived the federal judiciary in light of English precedent, and the text of the document they drafted suggests that the Chief Justice of the King’s Bench served as the principal model for the American Chief Justice.

Article III of the Constitution vests the “judicial Power of the United States” in “one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”172 It was to be “Judges” who staff those courts, “hold[ing] their Offices during good Behaviour” and with a guarantee that their salaries will not be reduced during their tenure.173 Article II provides that the President “shall nominate, by and with the Advice and Consent of the Senate . . . [the] Judges of the supreme Court.”174 Thus, the only sections of the Constitution specifically about the federal judiciary uniformly refer to the members of the “supreme Court” as “Judges.”

There is little inherent semantic difference between “judge” and “justice,” and the two were used interchangeably in founding-era documents, sometimes even within the same text.175 But despite the Constitution’s deliberately consistent nomenclature, the title “Chief Justice” found its way into America’s founding document. Article I, Section 3 lays out the procedure for the impeachment and removal of federal officials, vesting the Senate with the “sole Power to try all Impeachments.”176 It then specifies that “[w]hen the President of the United States is tried, the Chief Justice shall preside.”177

This textual asymmetry was no oversight. Even setting aside the fact that the Framers drafted the Constitution with extreme particularity,178 substantial

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172 U.S. Const. art. III, § 1.
173 Id.
174 Id. art. II, § 2, cl. 2.
176 U.S. Const. art. I. § 3.
177 Id. (emphasis added). Today, the Chief Justice’s full title is “Chief Justice of the United States,” but this was not finalized until 1864. Before then, the office was frequently called “Chief Justice of the Supreme Court of the United States.” See Josiah M. Daniel III, Chief Justice of the United States: History and Historiography of the Title, 1983 Y.B. Sup. Ct. Hist. Soc’y 109, 109–10 (1983); William A. Richardson, Chief Justice of the United States, or Chief Justice of the Supreme Court of the United States?, 49 New Eng. Hist. Genealogical Reg. 275, 278 (1895) (relating a personal conversation with Chief Justice Salmon Chase about the change in title).
evidence suggests that “Chief Justice” was a deliberate departure from the otherwise consistent usage of “Judges.” Alexander Hamilton made the distinction explicit in his alternate draft of a constitution,\(^\text{179}\) and other eighteenth century legal documents draw an identical distinction between a “Chief Justice” and “Judges.”\(^\text{180}\) Even after the Judiciary Act of 1789 renamed the Constitution’s “Judges” as “Associate Justices,”\(^\text{181}\) President Washington continued to use the constitutional titles “Chief Justice” and “Associate Judge” in his correspondence,\(^\text{182}\) including in his official nomination of the first six Justices.\(^\text{183}\) Clearly, something more than idiosyncrasy or scrivener’s error was at work.\(^\text{184}\)

But what are readers to make of the Framers’ deliberate choice? We argue that the appearance of “Chief Justice” in the Constitution indicates that the Framers modeled the Chief Justice on the English office that shares its name. First, the textual distinctiveness of the “Chief Justice” matches the substantive distinctiveness of the English Lord Chief Justice. As we saw in Part I, the Lord Chief Justice had long been formally and functionally set apart from the other English judicial offices.\(^\text{185}\) The Constitution’s use of “Chief Justice,” as

\(^{179}\) See The Hamilton Plan, in 3 FARRAND’S RECORDS, supra note 164, at 623, 625.

\(^{180}\) See An Act for Establishing Courts of Judicature in This Province, supra note 156, § 7; S.C. CONSTITUTION OF 1776, supra note 156, § 34; The Regulating Act, supra note 156, §§ 13, 17, 21–23.

\(^{181}\) See Judiciary Act of 1789 § 1, ch. 20, 1 Stat. 73, 73.


\(^{183}\) John Jay was nominated to be “Chief-Justice,” while the other nominees were referred to as “Associate Judges.” Message from George Washington to the United States Senate (Sept. 24, 1789), in 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 75 (Dorothy Twohig ed., 1993).

\(^{184}\) This conclusion draws support from the common interpretive technique of “read[ing] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase,” which Professor Akhil Amar calls “intratextualism.” Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747, 748 (1999); see also McCulloch v. Maryland, 17 U.S. 316, 414–15 (1819); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 576 U.S. 787, 829 (2015) (Roberts, C.J., dissenting) (“When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.”).

\(^{185}\) See supra notes 24–29 and accompanying text. This pattern of formal and functional distinctiveness was also true of colonial Chief Justices. See supra notes 156–160 and accompanying text.
opposed to the otherwise consistent and generic “Judge,” matches with and, we argue, continues that tradition of distinctiveness.\footnote{See, e.g., G. Edward White, The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy, 154 U. Pa. L. Rev. 1463, 1465–69 (2006) (discussing “why, as a historical matter, the chief justiceship was treated as a position distinct from that of the other justiceships”).}

Second, Article I’s mention of a “Chief Justice” is not just a departure from the document’s practice: “Chief Justice” as it appears in Article I is a \textit{title}. The Constitution, like much formal writing in the late eighteenth century, capitalizes nouns but not other parts of speech like adjectives.\footnote{E.g., Carlton F.W. Larson, The Declaration of Independence: A 225th Anniversary Re-Interpretation, 76 Wash. L. Rev. 701, 738 n.157 (2001).} Take, for example, “good Behaviour” and even “supreme Court.”\footnote{U.S. Const., art. III, § 1; cf. Ritz, supra note 89, at 60–61 (discussing the ramifications of the fact that “supreme” is not capitalized in the Constitution).} But Article I, Section 3 capitalizes both the adjective “Chief” and the noun “Justice.” The fairest reading of “Chief Justice” is thus as a noun phrase, a discrete and unified title. And of course, this title had a storied history and a particular connotation in Anglo-American law.

Third, the English origins of “Chief Justice” surface in the seemingly absentminded way in which the office was created. Unlike Article III’s focus on establishing the federal judiciary, Article I, Section 3 is not even about judges. Rather, the clause concerns impeachment, and in particular the conflict of interest which would arise if the Vice President presided in the impeachment trial of the President.\footnote{See Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 110 (2d ed. 2000).} To solve this problem, the Framers drew upon their background assumptions rooted in English practice. The Chief Justice’s appearance in Article I, Section 3 shows that those background assumptions included not only an office like the Chief Justice but an office \textit{titled} “Chief Justice.”\footnote{Although there were a few mentions of a Chief Justice in the Convention debates, see infra notes 202–206 and accompanying text, there is no indication of a deliberate decision to create such an office. The office was, rather, assumed from the start.} Put another way, the Chief Justice was not created \textit{in order} to preside at the impeachment of a President—it was instead a convenient solution that the Framers presupposed would be available because of their assumptions about legal institutions. And what was the basis for such an assumption? The most plausible answer is the Lord Chief Justice of England.

Sure enough, when the First Congress stood up the federal courts, the American Chief Justice received many of the same responsibilities and perquisites that characterized colonial and English Chief Justices. He was paid more than his colleagues and even outmatched the Secretary of State’s salary.\footnote{Act of Sept. 23, 1789, ch. 18, § 1, 1 Stat. 72, 72.} Likewise, the Process Act of 1789 specified that “all writs and processes issuing
from a supreme or a circuit court shall bear test of the Chief Justice of the Supreme Court.” 192 This administrative duty matches those imposed on both the Lord Chief Justice and on the Pennsylvania Chief Justice. 193 Though seemingly minor, these details further confirm that the American Chief Justice was the transatlantic successor to a long Anglo-American tradition of Chief Justices.

C. The Multi-Purpose Chief Justice at the Constitutional Convention

It was not just minor administrative details and a distinctive title that the new American Chief Justice inherited from his English namesake. The Framers expected their new Chief Justice to not just look but also act like the Lord Chief Justice of England.

Several proposals at the Constitutional Convention demonstrate that federal judges were expected to exhibit the same kind of interconnectedness that had characterized their English counterparts. Many delegates favored “vest[ing] the federal judiciary with supplemental, nonjudicial duties.” 194 James Wilson, for instance, proposed that federal judges “share in the Revisionary [veto] power.” 195 His suggestion garnered the support of leading lights of the Convention, including George Mason, 196 future Chief Justice Oliver Ellsworth, 197 and James Madison. 198 A different proposal would have “formally empowered” the President “to seek legal advice from the Court.” 199 Though not every delegate agreed that it was wise to, in the words of Elbridge Gerry, “mak[e] Statesmen of the Judges,” 200 one modern scholar has nonetheless concluded that “many of the framers expected judges to make off-the-court contributions to the government, and . . . that they viewed such a prospect favorably.” 201

This was particularly true of the Chief Justice. Whenever the delegates referred to the “Chief Justice,” it was always as an interconnected, all-purpose

192 An Act to Regulate Processes in the Courts of the United States § 1, 1 Stat. 93, 93 (1789).
193 See supra notes 27, 157.
194 CASTO, supra note 8, at 23.
195 2 FARRAND’S RECORDS, supra note 164, at 73.
196 Id. at 78 (suggesting “further use to be made of the judges”).
197 Id. at 73–74.
198 Id. at 74; see also JACK N. RAKOVE, A POLITICIAN THINKING: THE CREATIVE MIND OF JAMES MADISON 81 (2017).
199 CASTO, supra note 8, at 25; 2 FARRAND’S RECORDS, supra note 164, at 340–41. This proposal was not adopted, but Akhil Amar argues that it was the progenitor of the Article II’s Opinion Clause. See Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 VA. L. REV. 647, 656 (1996).
200 2 FARRAND’S RECORDS, supra note 164, at 75; see also id. (noting the similar objection of Caleb Strong); PETER G. FISH, THE OFFICE OF CHIEF JUSTICE OF THE UNITED STATES 14 (1984).
201 Wheeler, supra note 8, at 126.
minister to the President.\textsuperscript{202} James Madison submitted a proposal calling for the Chief Justice to sit on a “Privy-Council” to advise the President “in matters respecting the execution of [the President’s] Office.”\textsuperscript{203} Gouverneur Morris promoted a similar “council of state,” which included the Chief Justice.\textsuperscript{204} Under Morris’s proposal, the Chief Justice would not only assist the President in “conducting the Public Affairs” but would also be a legal advisor, “recommend[ing] such alterations of . . . the Laws of the United-States as may in his opinion be necessary to the due administration of Justice.”\textsuperscript{205} Morris even suggested later at the Convention that the Chief Justice—rather than the Vice President or a legislative officer—ought to be the “provisional successor” to the President should he be removed from office.\textsuperscript{206}

Though none of these proposals made it into the ratified document, the text of the Constitution leaves open the possibility of federal judges engaging in extrajudicial service.\textsuperscript{207} The Incompatibility Clause of Article I, Section 6 forbids any “[p]erson holding any Office under the United States” from being “a Member of either House [of Congress] during his Continuance in Office.”\textsuperscript{208} This clause, however, does not apply to judges or executive officials. In light of the delegates’ repeated suggestions that “further use be made of the judges,”\textsuperscript{209} this deliberate omission suggests a tacit expectation that judicial officers like the Chief Justice would fulfill extra-judicial functions.\textsuperscript{210}

To be sure, some delegates at the Convention did fret over involving judges too closely in the affairs of state. As noted, Elbridge Gerry pithily objected “Statesmen of the Judges.”\textsuperscript{211} But declining to enshrine a formal advisory role for the Chief Justice is hardly the same as jettisoning the centuries-old expectation of institutional interconnectedness. Based on Americans’

\begin{footnotesize}

\begin{enumerate}
\item See Wexler, supra note 8, at 1399.
\item See 2 FARRAND’S RECORDS, supra note 164, at 367. Note the parallel with English practice: the Chief Justices of King’s Bench and Common Pleas, alone among the common law judges, sat ex officio on the King’s Privy Council. See supra note 38.
\item FISH, supra note 200, at 14.
\item See 2 FARRAND’S RECORDS, supra note 164, at 335.
\item 2 FARRAND’S RECORDS, supra note 164, at 427. These proposals “reflected British custom,” Wexler, supra note 8, at 1399, and Peter Fish argues that the delegates were explicitly “influenced by the English model.” FISH, supra note 200, at 13.
\item See CASTO, supra note 8, at 25.
\item U.S. CONST. art. I, § 6, cl. 2.
\item 2 FARRAND’S RECORDS, supra note 164, at 78 (statement of George Mason).
\item FISH, supra note 200, at 14.
\end{enumerate}
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familiarity with the multi-purpose Chief Justice, the Constitution’s textual suggestion that the “Chief Justice” was modeled on the Lord Chief Justice, and the delegates’ remarks at the Convention, we argue that the Founders expected the American Chief Justice to take on a multi-purpose role much like Lord Mansfield.

IV. JOHN JAY, AMERICAN (LORD) CHIEF JUSTICE

Part II argued that the American Chief Justice was modeled on the English Lord Chief Justice. But we acknowledge that the Constitution itself left the shape of the federal judiciary in large part undefined.\(^\text{212}\) Though the title “Chief Justice” carried with it a transatlantic tradition and many implicit expectations, the first Chief Justice and the inaugural President would shape the nature and scope of the Chief Justice’s role.\(^\text{213}\)

This Part shows that English practice dominated the understandings of both President George Washington and his Chief Justice, John Jay. Jay was, in no uncertain terms, a multi-purpose Chief Justice in the mold of Lord Chief Justice Mansfield.\(^\text{214}\) Jay received his commission in large part because of his diplomatic expertise rather than his judicial acumen, indicating that both he and President Washington expected the Chief Justice to do far more than preside over

\(^{212}\) See CASTO, supra note 8, at 5–15 (2012) (discussing the debates and compromises at the Federal Convention regarding the jurisdiction of the federal courts).


Although this section focuses exclusively on John Jay, his immediate successors as Chief Justice also evinced many of the same characteristics of the multi-purpose Chief Justice. Oliver Ellsworth served as an ambassador to France in 1799 during his tenure as Chief Justice. See CASTO, supra note 8, at 118–19. And John Marshall, not unlike Jay or Lord Mansfield for that matter, possessed a distinctly variegated resume prior to his appointment, serving as a Federalist leader in the House, an ambassador to France, and then Secretary of State under President Adams. See generally 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL: POLITICIAN, DIPLOMATIST, STATESMAN (1916). Even more like Jay, Marshall served concurrently as Secretary of State and Chief Justice in the waning days of the Adams administration. And both of Jay’s successors inherited his statutory role on the Sinking Fund Commission, which maintained its political salience throughout the 1790s. See infra note 236; see also Mistretta v. United States, 488 U.S. 361, 398–99 (1989).

\(^{214}\) This parallelism supports our claim in Part III that the Framers anticipated an interconnected, multi-purpose Chief Justice: “The frequency with which the early Presidents looked to Jay and his contemporary Justices implies that some of the men who had helped write and ratify the Constitution believed it was ethically proper and constitutionally permissible for Supreme Court Justices to concurrently hold executive posts.” Melissa E. Loewenstern, The Impartiality Paradox, 21 YALE L. & POL’Y REV. 501, 506 (2003); see also Michael Bhargava, The First Congress Canon and the Supreme Court’s Use of History, 94 CALIF. L. REV. 1745 (2006) (exploring the Court’s use of early practice to interpret the Constitution).
the Supreme Court. Indeed, Jay was frequently assigned important and controversial extra-judicial tasks, particularly in the realm of foreign affairs. And on a day-to-day basis, Chief Justice Jay functionally served as a member of Washington’s Cabinet, routinely providing the President with advice on strategic, political, and legal matters.

A. The Appointment Process

John Jay became the first Chief Justice not primarily for his legal abilities. Rather, it was Jay’s aptitude for extrajudicial service—in particular his diplomatic expertise and the confidential relationship he shared with President George Washington—that led to his appointment as Chief Justice. Just as the English judicial “fast track” was tied to the Lord Chief Justice’s political and advisory roles,215 the appointment of the new nation’s senior diplomat as the first Chief Justice suggests that both Washington and Jay saw the Chief Justiceship as more than an exclusively judicial office.

As the first President, George Washington had the opportunity to nominate all six judges statutorily allotted to the Supreme Court, including the first Chief Justice.216 Though Washington took his responsibility to appoint all six judges seriously,217 the search for a Chief Justice seized his attention. Many assumed that the Chief Justice would be “the Court’s commanding officer, whose status outranked that of his judicial colleagues.”218 Naturally, then, the leading legal lights of the fledgling nation jockeyed behind-the-scenes to secure appointment to the post.219 Those in the running included John Rutledge, an esteemed South Carolina lawyer and Chief Justice of that state’s Court of Chancery; James Wilson, the Scottish-born legal thinker who played a key role in drafting and then ratifying the Constitution; and William Cushing, Chief Justice of the Massachusetts Supreme Judicial Court.220

All three of those men would eventually be nominated to the Supreme Court as Associate Justices, but it was the New Yorker John Jay whom the President selected as Chief Justice. In contrast to Rutledge and Cushing, Jay had

215 See supra note 97 and accompanying text.
216 See Judiciary Act of 1789 § 1, ch. 20, 1 Stat. 73, 73.
217 See, e.g., Letter from Washington to Rutledge (Sept. 29, 1789), in 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES, supra note 182, at 114; Letter from Washington to the Associate Judges of the Supreme Court (Sept. 30, 1789), in 10 THE WRITINGS OF GEORGE WASHINGTON 35 (Jared Sparks ed., 1855).
218 White, supra note 186, at 1466.
219 Charles Anthony Smith, Credible Commitments and the Early American Supreme Court, 42 L. & SOC’Y REV. 75, 102 (2008).
220 Wexler, supra note 8, at 1378.
served as a judge only briefly and to little acclaim. And, unlike Wilson, Jay was not a first-rate legal theorist. But what Jay lacked in judicial experience, he made up for with his record of political and diplomatic service. Jay represented New York in the First and Second Continental Congresses, serving as President of the Congress in 1778. He then made his name as a highly-respected diplomat: Jay served as ambassador to Spain during the Revolution, helped negotiate the 1783 Treaty of Paris, and became secretary of foreign affairs under the Articles of Confederation. Jay was also a leading advocate for the ratification of the Constitution, contributing five essays to the Federalist Papers.

Jay also enjoyed a close, personal relationship with the new President. It had been Jay “more than any other correspondent” who convinced Washington to attend the Constitutional Convention in Philadelphia. Historian Herbert Johnson notes that “Chief Justice Jay might well have owed his appointment to his personal friendship and close association with the president . . .” And during his Presidency, Washington sought Jay’s advice in the “freedom, [and] frankness of friendship.”

Jay’s competitors also recognized that the New Yorker’s non-judicial experience played a significant role in his appointment. South Carolinian John Rutledge, for one, was “disgruntled that he had not been offered the chief justiceship.” He later told Washington that his “friends” had “conceiv[ed], (as

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221 Id. at 1380 (“While John Jay was a lawyer and had briefly served as chief justice of the New York Supreme Court of Judicature in the 1770s, he did so ‘erratically and without distinction.’”); Matthew P. Harrington, Jay and Ellsworth, The First Courts: Justices, Rulings, and Legacy 35 (2008).


223 Casto, supra note 8, at 57.

224 For Jay’s pre-1789 exploits, see id.; Harrington, supra note 221, at 22; Herbert A. Johnson, John Jay and the Supreme Court, 81 N.Y. Hist. 59, 60–61 (2000); and Prakash, supra note 210, at 27.

225 Jay is believed to have written Nos. 2–5 and No. 64. See The Federalist, supra note 154, at xlv.


227 Johnson, supra note 224, at 61; see also Wheeler, supra note 8, at 145 (“[Washington and Jay] had a personal acquaintance that persisted into the new government.”).


I thought, very justly,) that my Pretensions to the Office of Chief Justice were, at least, equal to Mr. Jay’s, in point of Law-Knowledge, with the Additional Weight, of much longer Experience, & much greater Practice . . . .”

Rutledge was not wrong: “Law-Knowledge,” “Experience,” and “Practice” came second to other considerations in Washington’s search for a Chief Justice. The President sought more than a brilliant legal mind—those he tended to appoint as Associate Justices. Instead, not unlike Prime Minister Robert Walpole’s attitude in the 1720s and 30s, Washington sought a Chief Justice he could trust both on and off the bench. John Jay fit the bill.

B. Extra-Judicial Service

Once confirmed, Chief Justice Jay took up both judicial and non-judicial tasks. Like his English counterpart, Chief Justice Jay warmed a seat on several of the most important administrative bodies of the Early Republic. In 1790, Congress named the Chief Justice to the “Sinking Fund Commission,” a body charged with paying down the federal government’s debt. Two years later, Congress made “the Chief Justice” one of the supervisors of the newly-created U.S. Mint. These posts were no sinecures. The Sinking Fund Commission met often, and the Chief Justice contributed practical as well as legal advice to his

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231 *E.g.*, James R. Perry, *Supreme Court Appointments, 1789–1801: Criteria, Presidential Style, and the Press of Events*, 6 J. EARLY REPUBLIC 371, 375 (1986) (noting that the appointment of Jay was “influenced by [his] skills not only in the legal field but also in political and diplomatic arenas”); Wexler, supra note 8, at 1380 (“One thing is fairly clear: Washington was not looking primarily for legal scholarship and ability.”).

232 Associate Justice James Wilson in particular had a reputation for this kind of brilliance, an opinion historians tend to share. *See Casto, supra* note 8, at 60; Wexler, *supra* note 8, at 1380–81.

233 *See supra* note 95 and accompanying text.

234 Wexler, *supra* note 8, at 1382–83 (2006) (“[Washington] wanted to install someone as Chief Justice whom he knew well and whose judgment he trusted.”); *see also* id. (noting the “expectation that Jay would function as at least an informal adviser to the President”); Wheeler, *supra* note 8, at 146 (discussing Washington’s “unders[anding] that the Chief Justice in his official capacity was to work with the executive officers”).

235 *See supra* notes 30–31, 38–40 and accompanying text.

236 *See An Act Making Provision for the Reduction of the Public Debt § 2, ch. 47, 1 Stat. 186, 186 (1790); see also* Wheeler, *supra* note 8, at 141; Wexler, *supra* note 8, at 1397.

237 Coinage Act of 1792 § 18, 1 Stat. 246, 250.

fellow Commissioners. And even though these positions required the exercise of substantial discretion over some of the most controversial political issues of the day, it appears that few, if any, questioned the propriety of the Chief Justice serving on these bodies.

Another well-known instance of judges serving in an administrative capacity illustrates how Chief Justice Jay saw his role in the new government. In the Invalid Pensions Act of 1792, Congress directed the federal Circuit Courts, which at the time consisted of Supreme Court Justices sitting alongside district court judges, to examine the veracity of disability claims brought by veterans of the Revolutionary War. But the judges’ findings were not final. The circuit courts were instead to report their conclusion to the Secretary of War, and it was he (and eventually Congress) who had the last word on whether the veteran was entitled to a pension.

Chief Justice Jay and his colleagues believed that executive review of their judicial determinations presented grave constitutional problems, and they expressed those concerns in formal letters to the President. In Jay’s words, “neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.”

What is even more important here, however, is what Jay’s objection was not. It was only the potential for second-guessing by an executive officer that

239 Meeting of the Commissioners of the Sinking Fund (Mar. 26, 1792), in 11 THE PAPERS OF ALEXANDER HAMILTON 193, 193–94 (Harold C. Syrett ed., 1966) (requesting that the Chief Justice resolve a question “on the construction of the act establishing the Board” which “turn[ed] upon the mere words of the law”); HARRINGTON, supra note 221, at 82 (noting another instance when Jay “wrote an opinion . . . on the legality of a proposal to repurchase some of the public debt”).

240 The Sinking Fund Commissioners received the broad congressional instruction to purchase debt “in such a manner and under such regulations as shall appear to them best calculated to fulfill the intent of this act.” See An Act Making Provision for the Reduction of the Public Debt § 2, ch. 47, 1 Stat. 186, 186 (1790). For the controversial subject matter of these commissions, see Steven G. Calabresi & Joan L. Larsen, One Person One Office: Separation of Powers or Separation of Personnel?, 79 CORNELL L. REV. 1045, 1133 (1994); Wheeler, supra note 8, at 142.

241 Wheeler, supra note 8, at 141–42 (“At no time in the debate on the controversial funding plan or its operation was opposition expressed to this ‘further use’ of the Chief Justice . . . making ‘further use’ of the judges by way of ex officio extrajudicial activity was generally accepted.”).

242 See Judiciary Act of 1789 § 4, 1 Stat. 73, 75.


244 Act of Mar. 23, 1792 § 4, ch. 11, 1 Stat. 243.

245 These letters are often referred to as Hayburn’s Case, but this appellation is imprecise. Although the letters were published alongside the Court’s eventual decision in Case of Hayburn (and hence can be read in the U.S. Reports under that name), the actual decision in Hayburn’s Case turned on a separate issue. See Marcus & Teir, supra note 243, at 534–41.

246 Case of Hayburn, 2 U.S. 408, 410 (1792).
bothered Jay—he harbored no qualms with the Act’s requirement that the Justices engage in extrajudicial, administrative service.247 Chief Justice Jay’s proposed solution to the problem makes this clear: rather than concluding that the whole Act was unconstitutional, Jay instead offered to interpret the law as appointing the Justices as commissioners in their personal capacity.248 In essence, Jay volunteered for extrajudicial duties in order to save the constitutionality of the Pensions Act. Rather than erecting a clear-cut distinction between the executive and the judicial, this episode instead reflects the Chief Justice’s endorsement of the interconnectedness inherent in the multi-purpose Chief Justiceship.

The principal arena in which Chief Justice Jay engaged in extra-judicial service was foreign affairs. This makes perfect sense, as it was Jay’s diplomatic expertise which had led Washington to appoint him as Chief Justice in the first place.249 As permitted by the Constitution’s Incompatibility Clause,250 Jay began his tenure as Chief Justice while simultaneously serving as Acting Secretary of State,251 filling that role until Thomas Jefferson, Washington’s nominee, returned from France.252

Even after Jefferson assumed his post, Jay remained a key foreign affairs adjunct to President Washington.253 The most memorable episode of Jay’s tenure as Chief Justice was diplomatic rather than judicial: the 1794 “Jay Treaty” with Britain.254 Tensions between the United States and Britain had festered ever since

247 Id.; see Neal Kumar Katyal, Judges as Advicegivers, 50 STAN. L. REV. 1709, 1731 (1998) (“The court was not upset by the Act’s order that its judges perform executive tasks. Instead, the members of the court were concerned about being asked by another branch to perform these duties in their capacity as judges.”) (emphasis added).

248 Case of Hayburn, 2 U.S. at 410 n.*1 (“[T]he act can only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal description. That the judges of this court regard themselves as being the commissioners designated by the act . . . and as the judges desire to manifest . . . their high respect for the national legislature, they will execute this act in the capacity of commissioners.”); accord Katyal, supra note 247, at 1731; Marcus & Teir, supra note 243, at 531 n.24 (1988) (“[Jay] characterize[d] [himself] as a voluntary agent[] of the federal government.”).

249 See supra notes 216–218 and accompanying text.

250 See U.S. CONST. art. I, § 6, cl. 2; see also supra notes 207–210 and accompanying text.


252 Prakash, supra note 210, at 28. In his capacity as Acting Secretary, Jay was unambiguously “Washington’s subordinate” and “the instrument of the Chief Executive,” despite his simultaneous judicial position. See Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 YALE L.J. 231, 298–300 (2001).

253 This included as an advisor, a role covered in more depth in the next sub-section. See, e.g., infra notes 270–271, 274 (discussing Jay’s role in the Nootka Sound Crisis).

the Treaty of Paris ended hostilities in 1783.255 By 1793, many Americans were preparing for another war with Britain,256 but President Washington sought to preempt conflict through diplomacy. Rather than turn to Secretary of State Edmund Randolph or to the American ministers already in Europe, Washington sent a special envoy from his inner circle: Chief Justice John Jay.257 The Chief Justice accepted the assignment promptly, though not before a who’s who of influential Founders urged him to do so.258 The political leaders of the time saw the Chief Justice as an officer who was not only eligible but affirmatively desirable for a high-stakes diplomatic mission. Jay seems to have agreed: his appointment as envoy was “a necessary, if personally inconvenient, exercise of duty and expertise.”259

The Chief Justice’s appointment as special envoy was not without controversy. The nomination required Senate confirmation,260 and some opponents raised constitutional objections to Jay’s selection. Then-Senator Aaron Burr introduced a motion calling Jay’s appointment “contrary to the spirit of the Constitution” and “mischiefous and impolitic,” as it “tend[s] to expose [the Chief Justice] to the influence of the Executive.”261 Outside of Congress, newspapers loyal to the nascent Democratic-Republican faction criticized Jay’s nomination on the grounds that he might be called to interpret the treaty in his capacity as Chief Justice.262

But Senator Burr’s motion failed 17–10, and Jay’s nomination passed by a similar margin later that day.263 The appointment of Jay as Special Envoy required the approval of the President, the Chief Justice, and the Senate. All three passionately denounced in the United States [as the Jay Treaty].”); HARRINGTON, supra note 221, at 38.

255 See generally ELKINS & McKITRICK, supra note 254, at 375–94 (recounting the events leading up to Jay’s nomination as special envoy).


257 See ELKINS & McKITRICK, supra note 254, at 393–94. John Adams, Alexander Hamilton, and Thomas Jefferson were all also under consideration for the role. Id. at 394.

258 HARRINGTON, supra note 221, at 38; ELKINS & McKITRICK, supra note 254, at 394–95. This list includes Alexander Hamilton, Oliver Ellsworth, Caleb Strong, and Rufus King.

259 VanBurkleo, supra note 251, at 269.

260 The post likely fell in the category of “[a]mbassadors [and] other public Ministers and Consuls” whose appointment required Senate confirmation. U.S. CONST. art. II, § 2, cl. 2.


262 ELKINS & McKITRICK, supra note 254, at 395 (“If a Chief Justice is to sit in judgment on his own acts, if he is to be the expositor of a law of his own making, our boasted constitution has become a dead letter.”) (quoting BOS. INDEP. CHRON., Apr. 28, 1794). Modern scholars have also identified this problem with Jay’s service as Special Envoy. See CASTO, supra note 8, at 182.

263 See S. EXEC. JOURNAL, 3d Cong. 1st Sess. 152 (1828); CASTO, supra note 8, at 89.
signed off, even though the position “straddl[ed] . . . the executive and judicial branches.”

The President and his advisors, including Jay, understood that their conduct would set a precedent. Yet Jay’s high-profile appointment as Special Envoy was the only one of his multifarious extra-judicial responsibilities that drew any protest. His service as Acting Secretary of State, his position on the Sinking Fund Commission, and his role adjudicating pension claims were not only accepted by most but seen as desirable by many. Jay’s multi-purpose service mirrors the flexibility with which kings and prime ministers utilized the Chief Justices of King’s Bench.

C. The Chief Justice’s Advisory Role

In addition to serving in a variety of executive and administrative positions, Chief Justice Jay was an integral member of the President’s circle of advisors. Just as King George III and successive British Prime Ministers relied on Lord Chief Justice Mansfield, President Washington often turned to Chief Justice Jay for advice on a wide variety of matters. Functionally, Jay was just as much a member of the Cabinet as Secretaries like Hamilton and Jefferson.

The President regularly requested opinions from Chief Justice Jay alongside the “principal Officers” of his Cabinet. When it appeared that Britain and Spain might be heading for war in modern-day British Columbia, Washington asked not just the Cabinet but also the Vice President and the Chief


265 E.g., 1 ANNALS OF CONG. 514 (1789) (Joseph Gales ed., 1834) (reporting James Madison as saying: “The decision that is at this time made will become the permanent exposition of the constitution . . . Hence, how careful ought we to be to give a true direction to a power so critically circumstanced!”); JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 189–90 (2004) (discussing Washington’s attention to precedents).

266 See Prakash, supra note 210, at 30–31 (”[Although] Jay’s double duty . . . could have triggered a legal debate, apparently nothing of the sort emerged.”); Wexler, supra note 8, at 1397 (noting that Jay’s appointment to the Sinking Fund Commission was motivated by the desire to “ensure public confidence in [its] operation”); Wheeler, supra note 8, at 140–41.

267 See Wexler, supra note 8, at 1418 (noting the similarity between British practice and Jay’s behavior as Chief Justice); STEAMER, supra note 213, at 6 (same).

268 E.g., Calabresi & Larsen, supra note 240, at 1133 (”President Washington repeatedly sought all kinds of advice from Chief Justice Jay, whom he seems almost to have regarded as a member of his Cabinet.”).

269 Cf. U.S. CONST. art. II, § 2, cl. 1 (“[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”).

270 See ELKINS & MCKITRICK, supra note 254, at 212–22.
Justice for their opinions.\textsuperscript{271} Likewise, when the House of Representatives considered placing substantive conditions on funding for the State Department, Washington, suspecting that this action would infringe on his foreign affairs power, sought the opinion of Secretary of State Jefferson, then-Representative James Madison, and Chief Justice Jay.\textsuperscript{272}

Jay’s opinions for the President were frequently legal in nature. Although American judges shared their British counterparts’ skepticism toward advisory opinions,\textsuperscript{273} Jay clearly did not feel precluded from offering Washington legal advice. In his opinion on the Nootka Sound incident, Jay not only suggested diplomatic and military strategy but also included a detailed analysis of the legal ramifications of the United States’ neutrality.\textsuperscript{274} And Jay’s response regarding the President’s foreign affairs power necessarily involved interpreting Articles I and II of the Constitution.\textsuperscript{275} Washington even directed other cabinet officials to “take the opinion of the Chief Justice” if they encountered legal questions in the discharge of their duties.\textsuperscript{276} Jay also seems to have been Washington’s go-to advisor for criminal justice matters, with the President referring questions about criminal activity or pardons to the Chief Justice.\textsuperscript{277} Jay himself was a conduit for reports of local law enforcement activity

\textsuperscript{271} Harrington, supra note 221, at 78.
\textsuperscript{272} See Casto, supra note 8, at 72. The text of Jay’s opinion was not preserved, but President Washington summarized Jay’s response in his diary. See George Washington, Diary Entry (Apr. 27, 1790), in 6 The Diaries of George Washington, supra note 182, at 68; Prakash & Ramsey, supra note 252, at 306.
\textsuperscript{273} E.g., Burset, supra note 9, at 650–51 (“Colonial Americans had inherited the classical understanding of extrajudicial advice. They recognized its dangers while also accepting its legitimacy and utility.”); cf. supra notes 113–118 and accompanying text. For more discussion of advisory opinions, see infra notes 325–330 and accompanying text.
\textsuperscript{274} See Letter from John Jay to George Washington (Aug. 28, 1790), in 6 The Papers of George Washington, Presidential Series, 353–56 (Mark A. Mastromarino ed., 1996); Harrington, supra note 221, at 78 (reporting that Jay’s opinion discussed “both the political and legal aspects of the problem”); Wheeler, supra note 8, at 146; Casto, supra note 8, at 72 (“The President’s actions [during the Nootka Sound Crisis] suggest, however, that he viewed the Chief Justice as an appropriate source of both political and legal advice. Moreover, Chief Justice Jay displayed no hesitation in advising the President on the proper application of international legal principles to the diplomatic case at hand.”).
\textsuperscript{275} See Prakash & Ramsey, supra note 252, at 306.
\textsuperscript{276} Washington, for example, pointed Secretary of War Henry Knox in Jay’s direction for help interpreting a congressional appropriation. See George Washington, Diary Entry (Feb. 17, 1790), in 6 The Diaries of George Washington, supra note 182, at 35.
\textsuperscript{277} See Letter from George Washington to John Jay (June 13, 1790), in 5 The Papers of George Washington, Presidential Series 517 (Dorothy Twohig, Mark A. Mastromarino, & Jack D. Warren eds., 1996) (consulting with Jay regarding a request for a pardon); Letter from George Washington to David Forman (Jan. 21, 1790), in 5 The Papers of George Washington, Presidential Series, supra, at 28, 28–29 (informing Forman that his report of counterfeiting in New York State had been referred to the Chief Justice).
to Washington, a function more akin to the modern-day Attorney General than to the Chief Justice.\textsuperscript{278}

Beyond offering legal advice, Chief Justice Jay also provided input on the drafting of presidential documents. The President, for example, explicitly sought Jay’s suggestions in preparing his first two annual messages to Congress.\textsuperscript{279} Jay responded to Washington’s request at length, opining on everything from Congress’s authority to punish counterfeiters to the federal government’s power to repair post roads to the importance of inspecting imported products.\textsuperscript{280} And after France declared war on Great Britain in 1793, the Chief Justice worked closely with Alexander Hamilton to shape the administration’s response, including drafting a neutrality proclamation at Hamilton’s request.\textsuperscript{281} The next year, the Chief Justice helped craft the presidential instructions for his own impending mission as special envoy to Britain.\textsuperscript{282}

Chief Justice Jay’s friendship with Washington bolstered his role as an advisor to the President. The pair dined and socialized together,\textsuperscript{283} and on at least one occasion, Washington “request[ed] the company of the Chief Justice and his Lady” to join him and Martha at the theater, “present[ing] the tickets as to his friends.”\textsuperscript{284} As Washington himself put it in a letter asking for Jay’s input, the

\textsuperscript{278} For instance, in March 1791, Jay forwarded the President a report from New Jersey U.S. Attorney Abraham Ogden about his efforts to stop a local counterfeiting ring. \textit{See} Letter from John Jay to George Washington (Mar. 11, 1791), \textit{in} \textit{7 The Papers of George Washington, Presidential Series} 543 (Jack D. Warren ed., 1998).


\textsuperscript{283} \textit{E.g.}, George Washington, Diary Entry (Mar. 25, 1790), \textit{in} \textit{6 The Diaries of George Washington, supra} note 182, at 53; George Washington, Diary Entry (Apr. 15, 1790), \textit{in} \textit{6 The Diaries of George Washington, supra} note 182, at 62; \textit{see also} Wheeler, \textit{supra} note 8, at 145 (“Washington and Jay] had a personal acquaintance that persisted into the new government.”).

\textsuperscript{284} Letter from George Washington to John Jay (Nov. 30, 1789), \textit{in} \textit{4 The Papers of George Washington, The Presidential Series} 340 (Dorothy Twohig ed., 1993). In another episode,
President’s relationship with his Chief Justice partook of “the freedom and frankness of friendship.”285 This friendship linked the Chief Justice to the executive, just as Lord Mansfield’s integration with British politics went hand-in-hand with his confidential relationship with successive Prime Ministers. Indeed, Jay even used his pull with Washington to recommend potential officeholders,286 not unlike Mansfield’s input on judicial appointments.287

John Jay was a multi-purpose Chief Justice cast in the mold of Lord Chief Justice Mansfield. Though judicial duties formed an important component of the Chief Justice’s portfolio, Jay, like Lord Mansfield, undertook a variety of administrative, diplomatic, and advisory functions as a part of his official obligations. Although Jay “regard[ed] his Duty to attend the Courts as being in point of legal Obligation primary,”288 he admitted to Alexander Hamilton in 1792 that he could also “conceive [sic] that the Order [of those priorities] would be sometimes inverted, if only the Importance of the occasion was considered.”289 Chief Justice Jay was not moonlighting as an advisor and draftsman on top of his judicial day job: to be a “Chief Justice” in the 1790s was to be a multi-purpose minister.

V. W(H)ITHER THE MULTI-PURPOSE CHIEF JUSTICE?

The ministerial role played by Lord Mansfield, anticipated by the Framers, and endorsed by John Jay bears little resemblance to the Chief Justice of the twenty-first century.290 In this Part, we explore the disappearance of the

Washington had to carpool with the Chief Justice to church, explaining to Jay that “the President’s Carriage was so much injured . . . [that] [i]f Mr. Jay should propose going to Church this morning the President would be obliged to him for a seat in his Carriage.” Letter from George Washington to John Jay (Apr.–Dec., 1789), in 4 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 466 (Dorothy Twohig ed., 1993).


286 Jay seems to have taken a particular interest in his wife’s cousin Matthew Clarkson. Jay first lobbied Alexander Hamilton to give Clarkson a post at the Treasury, see Letter from John Jay to Alexander Hamilton (Dec. 22, 1790), in 7 THE PAPERS OF ALEXANDER HAMILTON 377 (Harold C. Syrett ed., 1963), and when that failed, he suggested to President Washington that Clarkson become a federal marshal. See Letter from John Jay to George Washington (Mar. 13, 1791), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 412 (Henry P. Johnston, ed. 1891).

287 Cf. supra notes 131–132 and accompanying text.


289 Id.

290 The resemblance, however, has not entirely vanished. Vestiges of the multi-purpose Chief Justice lurk underneath the modern office. Several Chief Justices in the past century have engaged in conspicuous and even controversial extra-judicial service, such as Chief Justice Warren’s leadership of the investigation into the assassination of John F. Kennedy. See, e.g., Schmidhauser, supra note 8, at 314; Jonathan Lippman, The Judge and Extrajudicial Conduct: Challenges,
multi-purpose Chief Justice from American legal culture, focusing on institutional and structural reasons why Americans no longer expect the Chief Justice to serve the President as an all-purpose minister. We also offer thoughts on what this change says about modern understandings of judicial ethics and the separation of powers. The contrast between the expectations of judicial interconnectedness in the eighteenth century and of judicial isolation in the twenty-first is stark. Likewise, the acceptance of the multi-purpose Chief Justice in the Early Republic evinces a pragmatic approach to the separation of the judiciary from its coordinate branches, an approach that seems at odds with the modern, bright-line understanding of the judge’s proper place.

The multi-purpose Chief Justiceship of the eighteenth century has long since been glossed out of American government. What caused this reversal? One cause lies with Article III itself. In order to insulate judges from improper external pressure, the Constitution incorporated the same tenure protections enjoyed by English judges after the Act of Settlement of 1701: service “during good Behaviour.” The interaction of life tenure with the advent of ideological political parties, however, spelled doom for the multi-purpose Chief Justice.

The early 1790s was an exceptional time in American political history, marked by what William Casto called a “unique harmony of interest between the early Supreme Court and the political branches.” When this harmony evaporated with the rise of the Jeffersonian faction, the political conditions which facilitated the multi-purpose Chief Justiceship vanished as well. Judicial life tenure meant that a President could find himself serving alongside an entrenched Chief Justice with whom he disagreed or even personally despised. This is precisely the situation Thomas Jefferson faced in 1801, taking office opposite his

Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities Beyond the Bench, 33 Cardozo L. Rev. 1341, 1373–80 (2012). The Chief Justice also continues to act as a spokesman for and even lobbyist on behalf of the judiciary. See generally Resnik & Dilg, supra note 213, at 1601–21; see also Steamer, supra note 213, at 187–92.

More substantively, the Chief Justice possesses the power to appoint a dizzying array of officials such as the Director of the Administrative Office of the U.S. Courts and the membership of the Foreign Intelligence Surveillance Court. See generally Theodore W. Ruger, The Judicial Appointment Power of the Chief Justice, 7 U. Pa. J. Const. L. 341 (2004); James E. Pfander, The Chief Justice, the Appointment of Inferior Officers, and the “Court Of Law” Requirement, 107 Nw. L. Rev. 1125, 1132–37 (2013). Perhaps most intriguingly, the Chief Justice himself sits on the Board of Regents of the Smithsonian Institution, by custom serving as its Chancellor. See 20 U.S.C.A. §§ 41–42 (West 2021); Resnik & Dilg, supra note 213, at 1620. The Chief Justice’s place on the Board of the Smithsonian in 1846 alongside the President, Vice President, and senior Cabinet Secretaries parallels the membership of the “Privy Council” proposed at the Constitutional Convention by James Madison. See 2 Farrand’s Records, supra note 164, at 367.

Though now only vestiges remain, the twenty-first century Chief Justice’s idiosyncratic administrative responsibilities and appointment prerogatives bear the mark of the multi-purpose understanding of the office which dominated the Early Republic.

291  U.S. Const. art. III, § 1.
292  Casto, supra note 8, at 249.
third cousin, the recently-appointed Chief Justice John Marshall. A particularly long-tenured Chief Justice like Marshall or his successor Roger Taney could outlast not just individual Presidents but even entire political coalitions. In a way, then, the demise of the multi-purpose Chief Justice resulted from the constitutional structure colliding with the realities of government, frustrating the Framers’ own expectations about how their government would work.

The practice of judicial review also likely played a role in glossing away the multi-purpose Chief Justice. Judicial review heightens the stakes for judicial impartiality. Courts have long internalized that their mandates are not, as Andrew Jackson pithily pointed out, self-enforcing. “The power of a court,” Justice Anthony Kennedy wrote, “stand[s] or fall[s] by one measure and one measure alone: the respect accorded its judgments.” This inherent weakness is especially pronounced when the Court seeks to compel a member of a coordinate branch to take (or desist from taking) action. Faced with such a test of its authority, the Court must jealously safeguard its perceived legitimacy, including its appearance of impartiality. This concern for the appearance of impartiality
likely helped turn the interconnectedness which once characterized the Chief Justice ship from a positive into a negative. Though judicial review does not create the need for a court to maintain a reputation for impartiality, it does bring the importance of perceived legitimacy into stark relief.

Judicial review also generates the possibility for direct conflict between all three coordinate branches. The nineteenth century is strewn with examples of Presidents contesting the power of legal pronouncements made by the Chief Justice.300 And though it was rare for the Court to invalidate federal statutes before the Civil War, the mere potential for judicial review created a new institutional dynamic unlike that in effect in the 1790s. As the judiciary became an autonomous, independently powerful branch capable of checking the other branches, its relationship with the Executive was characterized by institutional opposition rather than a “harmony of interests.” Against this background, it is no wonder that the multi-purpose Chief Justice’s close and sometimes subservient relationship with the President came to be seen as improper.

We do not claim that the above suggestions offer a complete explanation for the change in judicial norms over the past 250 years. But whatever the source, the contrast between modern notions of the judicial role and those manifested by Chief Justice Jay and President Washington could not be more stark.301

Rather than overt interconnectedness, judicial isolation dominates today. The ABA’s Model Code of Judicial Conduct takes a stand against judges engaging in any sort of political activity. And the Code discourages judges


299 See Shapiro, supra note 13, at 577–78 (arguing that the power of any court is based on the “socio-logic of the triad,” in which the decider must be seen by the loser as legitimate and fair in order to avoid “[the] universally unjust phenomenon [of] two against one”).

300 Andrew Jackson and Abraham Lincoln are the most prominent examples. For Jackson’s views, see Andrew Jackson, Veto Message (July 10, 1832), in 3 COMPI LATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James Richardson ed., 1897); Gerard N. Magliocca, Veto! The Jacksonian Revolution in Constitutional Law, 78 NEB. L. REV. 205, 226–36 (2004). For Lincoln’s views, see Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 COL LECTED WORKS OF ABRAHAM LINCOLN 421 (Roy P. Basler ed., 1953).

301 See, e.g., CASTO, supra note 8, at 247 (“The abiding theme of the early Supreme Court, however, was precisely to the contrary [of the modern dynamic between the Court and political branches]. The Court sought to support the political branches of the new federal government, not to oppose them.”).

302 MODEL CODE OF JUD. CONDUCT r. 4.1(A) (AM. BAR ASS’N, 2020). Judicial elections thus pose a particular puzzle—how can a judge who must run for election be expected to cut herself off from the political considerations and mechanisms necessary for obtaining the judicial post? This tension has even generated litigation, with some judicial ethics codes facing successful challenges on First Amendment grounds. See Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015); Steele Trotter, Williams-Yulee and the Changing Landscape of Judicial Campaigns, 28 GEO. J. LEGAL ETHICS 947 (2015); see generally Shirley S. Abrahamson, The Ballot and The Bench, 76 N.Y.U. L. REV. 973, 978–87 (2001). For our purposes, however, the very existence of this tension attests to the
from serving in “governmental position[s]” unless the position “concerns the law, the legal system, or the administration of justice.” This is particularly true of a Justice serving as a close presidential advisor: Justice Abe Fortas’s advisory role in the Johnson White House helped sink his nomination as Chief Justice, thus reinforcing this norm of isolation. Retired Justice Anthony Kennedy summed up the reality of the modern judge’s silo. In his words, the “life of a judge can be difficult. Neutrality requires detachment, and detachment is often not compatible with social discourse and community participation.” This modern norm makes it hard to imagine a scenario where the Chief Justice could serve as an advisor, draftsman, or confidante to a President without raising eyebrows.

The public seems to share the bar’s apprehension about judicial engagement in extrajudicial activities. When Chief Justice John Roberts publicly defended the impartiality of the judiciary from attacks by President Donald Trump, commentators repeatedly emphasized how Roberts’s statement was “downright unprecedented in modern times.” Such interactions, according to commentators, imperil the Court’s legitimacy by calling the Justices’ impartiality into question. Many today view the norms that characterized the eighteenth-century prevailing expectation that a sitting judge must isolate herself from even the appearance of political activity.

303 Model Code of Jud. Conduct r. 3.4(A) (Am. Bar Ass’n 2020).
305 Kennedy, supra note 288, at 1072.

century Chief Justice as threatening, rather than complementing, judicial impartiality.308

The Founders, however, saw the multi-purpose Chief Justice as consistent with judicial impartiality. They believed in the importance of an independent and impartial judiciary.309 In his Lectures on Law, James Wilson wrote that “[J]udges should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by any thing, except their own behavior and its consequences.”310 Alexander Hamilton was even more explicit in the Federalist Papers, arguing that Article III’s protections ensured that a judge “can never be deterred from his duty by the apprehension of being placed in a less eligible situation.”311

But concern for judicial independence did not stop many influential Framers from thinking of “federal judges as political magistrates” to whom could be delegated various extrajudicial roles, just as their English counterparts had been.312 At the Constitutional Convention, these same men supported various provisions embroiling the Chief Justice in sensitive matters of state, including granting the Chief Justice a seat on an advisory Privy Council.313 During the first years of the Washington administration, John Jay shouldered controversial tasks because he was the Chief Justice.314 But he did not undertake these tasks

308 See, e.g., Loewenstern, supra note 214, at 524.
309 E.g., RUSSELL WHEELER, JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE 13 (1988) (noting the Founders’ belief that “an essential protection of public liberty was having judges decide cases on the basis of legal principles alone”).
311 THE FEDERALIST NO. 79, supra note 154, at 408–09 (Alexander Hamilton).
312 Wood, supra note 167, at 803; see also Ralph Lerner, The Supreme Court as a Republican Schoolmaster, 1967 SUP. CT. REV. 127 (1967).
313 See supra note 203 and accompanying text.
314 The Jay Treaty is the most obvious example of such a task, but the Sinking Fund Commission too embroiled Jay in the issue of the national debt, a key flashpoint in the politics of the 1790s. As Russell Wheeler put it: “[J]udges, by dint of their training and experience, had a certain element of wisdom and statesmanship which could properly be tapped for duties other than deciding law cases. Moreover, the involvement of the Chief Justice would create public confidence in the government operations with which he was associated.” Wheeler, supra note 8, at 140; accord Wexler, supra note 8, at 1397 (“[T]he presence of the Chief Justice on the Sinking Fund Commission and the board of the Mint, it was thought, would ensure public confidence in their operation.”).
thoughtlessly: Jay assessed whether his extra-judicial activities were consistent with his judicial obligations. He answered “yes” more often than modern attitudes would permit.\footnote{See supra notes 243–251 and accompanying text.} In his view, the expectation of impartiality enshrined in Article III was by and large consistent with his role as a multi-purpose minister for President Washington and the nation.

The Founders were the products of their age: the previous five hundred years of Anglo-American legal culture had not only permitted but expected interconnectedness alongside impartiality. This aspect of the eighteenth-century mindset did not disappear with the Constitution’s ratification. John Jay’s Chief Justiceship illustrates its continued vitality.

The multi-purpose Chief Justice of the Early Republic also lays bare a broader constitutional contrast. Modern norms of judicial isolation are often grounded in the separation of powers, which has been interpreted in recent years to mandate a relatively rigid division between the coordinate branches.\footnote{Over the course of two terms, the Court has deemed three different statutes unconstitutional for violating the Appointments Clause. See Collins v. Yellen, 141 S. Ct. 1761 (2021); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021); Seila Law L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020). None other than Justice Stephen Breyer, writing in dissent in Arthrex, characterized this string of decisions “as one part of a larger shift in our separation-of-powers jurisprudence” towards a “formalist approach.” Arthrex, 141 S. Ct. at 1996 (Breyer, J., dissenting); see also Timothy G. Duncheon & Richard L. Revesz, Seila Law as an Ex Post, Static Conception of Separation of Powers, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-duncheon-revesz/; Jodi L. Short, Facile Formalism: Counting the Ways the Court’s Removal Jurisprudence Has Failed, YALE J. ON REGUL. (Dec. 14, 2020), https://www.yalejreg.com/nc/facile-formalism-counting-the-ways-the-courts-removal-jurisprudence-has-failed-by-jodi-l-short/.} Recent decisions regarding the President’s removal power\footnote{See Stern v. Marshall, 564 U.S. 462 (2011); see also, e.g., Gillian E. Metzger, Appointments, Innovation, and the Judicial-Political Divide, 64 DUKEL.J. 1607, 1614 (2015); Anthony J. Casey & Aziz Z. Huq, The Article III Problem in Bankruptcy, 82 U. CHI. L. REV. 1155, 1165 (2015).} and non-Article III adjudication\footnote{It is worth noting that the Court has in the past treated the question of extra-judicial service with a more flexible approach. In Mistretta v. United States, 488 U.S. 361 (1989), the Court fielded a challenge to the composition of the U.S. Sentencing Commission on the grounds that requiring judges to serve on the Commission “unconstitutionally conscripts individual federal judges for political service and thereby undermines the essential impartiality of the Judicial Branch.” Mistretta, 488 U.S. at 397. In upholding the constitutionality of the Commission, the Court cited “[o]ur 200-year tradition of extrajudicial service” as “additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.” Id. at 401. Justice Blackmun even described the opinion as proceeding from “the pragmatic, flexible view of differentiated governmental power to which we are heir.” Id. at 381. But Justice Scalia dissented on formalist grounds, seeking to draw sharper lines between the branches. E.g., Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. PA. L. REV. 1513, 1525–27 n.54 (1991). And it is Justice Scalia’s approach which has found more purchase in recent cases.} highlight the more formalistic approach which dominates today.
Justice Antonin Scalia recycled poet Robert Frost to pithily sum up the modern view: “Good fences make good neighbors.”

Yet the separation of powers is not expressed in the Constitution’s text, and, as we have already noted, the Constitution leaves open the possibility of branch-straddling by federal officers. Though Montesquieuian separation of powers mattered to the Framers, James Madison himself recognized that a general commitment to this ideal did not mandate complete separation between the branches: “If we look into the constitutions of the several States we find that, notwithstanding the emphatical . . . terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.”

Rather, as many scholars have noted, the Framers’ understanding “was not so much a separation of the branches of government as, more basically, a matter of distinguishing the three specialized powers of government . . .”

At least in the context of judicial-executive relations, John Jay’s multi-purpose Chief Justiceship demonstrates that, whatever the Framers’ ideological commitments, notions of a strict separation of powers frequently took a back seat when the rubber met the road. The goal of federal officials in the 1790s was first and foremost to establish a working government, not to abstemiously apply Montesquieu doctrine.

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320 Rather, it is implied “from the structure of the Constitution’s allocation of power among the three branches of the federal government.” Wendy E. Ackerman, Separation of Powers and Judicial Service on Presidential Commissions, 53 U. CHI. L. REV. 993, 1001 (1986); see also John F. Manning, Separation of Powers as Ordinary Interpretation, 124 HARV. L. REV. 1939, 1984–85 (2011) (“[The Framers] made countless choices about how to implement [the principle of separation of powers] in the U.S. Constitution—including many about when to blend rather than separate powers as a way of checking government authority.”).
321 See supra notes 207–210; see also Mistretta, 488 U.S. at 399 (pointing in particular to John Jay’s appointment as special envoy as “significant evidence that the constitutional principle of separation of powers does not absolutely prohibit extrajudicial service”).
322 See THE FEDERALIST NO. 47, supra note 154, at 249 (James Madison) (“[T]he accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”).
323 Id. at 252. This was certainly the case in the English system, which so strongly influenced the Framers and indeed Montesquieu himself. See id. at 250 (“[Montesquieu] appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty . . . .”); Wexler, supra note 8, at 1374 (“[A] British and colonial tradition of blurring the distinction between the executive, legislative, and judicial branches continued to form people’s assumptions about how the federal government would function.”).
324 HAMBURGER, supra note 67, at 325; see also M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. PA. L. REV. 603 (2001); M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 VA. L. REV. 1127 (2000) (arguing that the modern doctrine of separation of powers conflates the concepts of “separation of functions” with “balance of power” and advocating the disaggregation of these dissimilar principles).
The issue of advisory opinions presents the contrast between eighteenth-century practice and twenty-first-century doctrine in microcosm. Hornbook law tells us that judicial advice to the executive outside of the context of a lawsuit violates Article III’s “case or controversy” requirement. Case law restating this orthodoxy cite none other than Chief Justice Jay himself, in particular his 1794 letter refusing to offer an advisory interpretation of a treaty with France. Writing for the Court, Jay told the President:

The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks upon each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to . . . .

Though this language is often cited as confirming the modern, hard-and-fast rule against advisory opinions, Jay’s position could not, in reality, have been so absolute. As we showed in Part III, the Chief Justice frequently gave advice

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325 E.g., Carney v. Adams, 141 S. Ct. 493, 498 (2020) (“We have long understood [the case or controversy requirement] to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions.”); Flast v. Cohen, 392 U.S. 83, 96 (1968) (“The rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.”).


327 Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), in 5 THE SELECTED PAPERS OF JOHN JAY 545 (Elizabeth M. Nuxoll ed., 2017). Many other scholars have delved into the meaning behind this letter, and a rich debate exists over why the Jay Court took such a strong stand in this particular situation. See STEWART JAY, MOST HUMBLE SERVANTS 174–77 (1997) (arguing that the letter is best understood as the product of the political context of 1793 and that Jay’s position was designed to maintain Federalist power amidst the activities of French ambassador Edmond Genêt); Robert J. Pushaw, Jr., Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective, 87 GEO. L.J. 473, 477–91 (1998) (“taking] the Justices’ stated rationale at face value” and arguing that constitutional ideology played a significant role in the Justices’ refusal); Golove & Hulsebosch, A Civilized Nation, supra note 9, at 1025–28 (“It seems likely, in the crisis atmosphere in which [the Justices] were acting, that a substantial part of their concern [about the requested advisory opinion] was with preserving the ability of the Court to resolve disputed international law issues in a manner that would be persuasive in the eyes of the European belligerents.”); Burset, supra note 9, at 659–60 (arguing that changes in the nature of legal authority in the eighteenth century led Anglo-American judges to “worry that their advisory pronouncements would be misused in ways that might harm both the development of the law and their own reputations”).

328 Cf. Burset, supra note 9, at 653 (“The separation-of-powers approach [to explaining the 1793 letter] does not even fit the American story. As is well known, some of the first Justices served simultaneously in the executive branch. It is hard to see why an advisory opinion would
to the President on legal questions, including questions which could foreseeably come before him in his judicial capacity. Few if any of the precedent-conscious Founders in Washington’s Cabinet questioned the propriety of Jay’s advice-giving role. And more generally, with the lone exception of his politically-charged appointment as Special Envoy, Jay’s myriad extra-judicial connections and activities as Washington’s Chief Justice were received with acceptance and a lack of surprise rather than skepticism and constitutional objection.

To be sure, we do not argue that the Founders’ understanding of the judicial role or of the Chief Justice should control modern practice or doctrine. Indeed, as many have noted, practice over time can shape the meaning of constitutional principles, especially where the text itself is silent. We do, however, offer this account of the eighteenth-century multi-purpose Chief Justice as a cautionary tale: modern notions of the judicial role were neither foreordained nor inevitable, and they are a far sight removed from the actual practices of the Early Republic. The Founders’ multi-purpose Chief Justice is just one example of the nuanced, sometimes counter-intuitive practices of past actors. This Article’s re-examination of John Jay’s tenure as Chief Justice should make us second-guess claims that strictly enforcing lines between the judiciary and its coordinate branches is necessary to faithfully implement the Constitution.

VI. CONCLUSION

This Article has re-examined the early history of the American Chief Justice in the transatlantic context that gave it its name. By tracing the origins and development of the English office of Lord Chief Justice, Part II showed that institutional interconnectedness and impartiality characterized the Lord Chief Justiceship. In the eighteenth century, these expectations gave rise to what we have termed the “multi-purpose Chief Justice,” whose duties were not just judicial but also administrative, advisory, and political. Part III argued that the inclusion of the title “Chief Justice” in the Constitution implicitly expressed the Framers’ expectation that the American Chief Justice would function like his English namesake. Part IV demonstrated that John Jay did not disappoint those

have offended the separation of powers while serving as an ambassador or Secretary of State did not.


330 See supra note 262.

331 See supra note 261.

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expectations, serving in a variety of administrative, diplomatic, and advisory roles and mirroring the role of Lord Mansfield in late eighteenth-century Britain. As the title “Chief Justice” crossed the Atlantic, so too did the norm of close integration with the executive. Though the multi-purpose Chief Justice has largely vanished from modern American government, its dominance in the eighteenth century raises questions about modern understandings of the judicial role and the separation of powers.