

JAMES IREDELL, CHISHOLM, AND THE ELEVENTH AMENDMENT

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Introduction

So much has been written about the Supreme Court under John Marshall and after, but comparatively little is known of the Court before 1800. The Supreme Court convened for the first time on February 4, 1790 in New York about two years after the Constitution became the law of the land. The Constitution in Article 3 Section 1 established the Supreme Court and gave Congress the power to create the lower courts of the federal judiciary, but Article 3 said nothing about the composition of the Supreme Court. That was left to Congress, and from about March 4, until mid-September 1789, they constructed the foundation of the federal judiciary. Known as the Judiciary Act of 1789, it would be notable in itself, but at the same time Congress setup the Executive branch of the government; if only today's Congress worked with such speed.

Signed into law on September 24, 1789 by President George Washington, Section 1 of the Judiciary Act set the number of justices:

The Supreme Court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August...¹

Thus, the basic structure of the Court took form. The Supreme Court heard five cases from 1790 to 1799. The following is an analysis of the Supreme Court case *Chisholm v. Georgia* (1793) focusing on the dissent of Associate Justice James Iredell, and how that dissenting opinion helped pave the way for the Eleventh Amendment to the Constitution in 1798.

Iredell's dissent raises two questions. Was his dissent the first expression of the States Rights Doctrine? Alternatively, was it based on Federalist principles that

¹ *Judiciary Act of 1789* http://www.constitution.org/uslaw/judiciary_1789.htm (accessed March 10, 2007)

Congress agreed with so strongly that it led to the Eleventh Amendment to the Constitution? Through a sketch of Iredell's background, the underlying facts in the case, and a comparison of the majority to Iredell's dissent based on the primary sources—the opinions, and a number of secondary sources it will be seen that Iredell's dissent was founded on Federalist principles. It was not, as Griffith John McRee, the only biographer of Iredell saw it, the very foundation of the States Rights Doctrine.² His book *Life and Correspondence of James Iredell: one of the associate justices of the Supreme Court of the United States* was published in 1857 in North Carolina. At that time in the South, feelings were anti-Federalist to say the least.

James Iredell

James Iredell was nominated by George Washington on February 8, 1790 to replace Robert H. Harrison for he decline to serve.³ In Washington's view, Iredell was of respectable character, and reputed for his abilities and legal knowledge. Additionally, Iredell was from North Carolina a state, according to the President, "of some importance to the Union that has given No character to federal office."⁴ Iredell was confirmed by the Senate on February 10, 1790, and received his Commission March 3, 1790.⁵ He took the Oath of Office on May 12, 1790. Thus at 39 Iredell was the sixth, and youngest Justice of the Supreme Court. In order to understand Iredell's dissent in *Chisholm v. Georgia* (1793) and its significance it is necessary to examine his background.

As a Justice of the Supreme Court Iredell was one of six men that reached the highest judicial post in the United States, and surely the highest point of his legal career

² Don Higginbotham, ed., *The Papers of James Iredell* (Raleigh: Dept. of Cultural Resources, 1976), xxvi, xxix

³ George Washington to the Senate, *The Documentary History of the Supreme Court of the United States, 1789-1800* Vol. 1. (New York: Columbia University Press, 1985), 64–65

⁴ George Washington Diary Entry February 6, 1790, *The Documentary History of the Supreme Court of the United States, 1789-1800* Vol. 1. (New York: Columbia University Press, 1985), 64

⁵ Iredell to The President, March 3, 1790, McRee, Griffith John, *Life and Correspondence of James Iredell: one of the associate justices of the Supreme Court of the United States*, Vol. 2, (1857; reprint, New York: Peter Smith, 1949), 284

which was remarkable considering Iredell came to America, at the age of 17, as one of King George's customs officials in November 1768. Iredell's post was Port Roanoke in Edenton North Carolina. Once there he set upon his duties with enthusiasm and ability that would be noted by George Washington 22 years later. James Iredell, however, did not come to Edenton to find his fortune; he came to provide for his family back in England. Iredell's father, a merchant and a mediocre one, had suffered a debilitating stroke. As a result, James' family was dependant on him. Sometime after his arrival, Iredell was befriended by Samuel Johnson. Johnson, who looked upon young James as a brother, was a wealthy farmer, lawyer, and politician.⁶ In addition to taking, Iredell in Johnson oversaw his study of the law, and within two years of his arrival in North Carolina in 1770, Iredell received from Governor William Tyrone a license to practice law in all the inferior or county courts. Eleven months later, in November 1771, his application to practice in the superior courts was approved by Governor Josiah Martin.⁷ By the age of 20, James Iredell was a respectable customs official and lawyer. For Iredell, this was the calm before the storm of Revolution.

By September 1774, Iredell, unlike customs officials in the other colonies, did not bear the brunt of colonists' anger even after the Boston Tea Party and Coercive Acts (Intolerable Acts). Nor did he flee, he, simply, went about his customs business, at least publicly. While the first Continental Congress met in Philadelphia, Iredell issued an address "To the Inhabitants of Great Britain" in which Iredell expressed America's feelings on the actions of Parliament. He said, in essence, Parliament by trying to exercise supreme authority over the American Colonies had gone beyond the English Constitution, and if that was possible, in a legal sense, "we are possessed of no liberty;

⁶ Don Higginbotham, ed., *The Papers of James Iredell* Vol. 1. (Raleigh: Dept. of Cultural Resources, 1976), xxxvii, xlix, li; liv.

⁷ Friedman, Leon., and Fred L Israel, ed. *The Justices of the United States Supreme Court, 1789-1969, Their Lives and Major Opinions*. Vol. 1 (New York: Chelsea House, 1969), 122

we have nothing we can call our own.” “It is the very definition of slavery.”⁸ In the essay, Iredell showed, according to Don Higginbotham editor of the Iredell Papers, “a full measure of practicality and common sense. He acknowledged that clever Englishmen might punch holes in the fabric of his constitutional view of the empire.”⁹ If so, Iredell warned, then “the original rights of mankind should correct and alter them. We would not be cheated out of our liberties by artful syllables.”¹⁰

It is unclear whether Iredell put his name to the essay “To the Inhabitants of Great Britain” or issued it anonymously, but it seems likely that it was anonymous. “To the Inhabitants of Great Britain” was Iredell’s second essay, his first was written in September 1773, published in the North Carolina Gazette, and signed A Planter. In both essays, Iredell looked to the English Constitution, and found in both cases that it limited the powers of the King as well as Parliament. Had officials of the Crown known Iredell authored either they would have found it inappropriate conduct. From 1774 to 1776, Iredell walked a fine line between his Crown duties and the Patriot cause. Iredell resigned from his customs post in July 1776. He was interested in the form the new government of North Carolina would take, when elections were held for the state constitutional convention, in October 1776, Iredell supported the conservative Whigs led by Samuel Johnson.¹¹ Strangely, Iredell stayed in Edenton. It is, however, possible Iredell had played a part in preparing a draft of the new state constitution, for, according

⁸ “To the Inhabitants of Great Britain” McRee, Griffith John, *Life and Correspondence of James Iredell: one of the associate justices of the Supreme Court of the United States*, Vol. 1, (1857; reprint, New York: Peter Smith, 1949), 205, 206, 209.

⁹ Don Higginbotham, ed., *The Papers of James Iredell* Vol. 1. (Raleigh: Dept. of Cultural Resources, 1976), lxiii.

¹⁰ “To the Inhabitants of Great Britain” McRee, Griffith John, *Life and Correspondence of James Iredell: one of the associate justices of the Supreme Court of the United States*, Vol. 1, (1857; reprint, New York: Peter Smith, 1949), 219.

¹¹ Friedman, Leon., and Fred L Israel, ed. *The Justices of the United States Supreme Court, 1789-1969, Their Lives and Major Opinions*. Vol. 1 (New York: Chelsea House, 1969), 124

to Charles Waldrup, "Samuel Johnson had served on a committee which worked on drafting the proposed document."¹²

Once the state constitution had taken effect, the general assembly appointed a committee to review prior laws and to draft new legislation as necessary. Iredell was a member, and in addition, the committee was responsible for drafting new laws to reform North Carolina's judicial system. By November 1777, the committee had finished work, and the assembly had established a permanent judicial system of both County and Superior Courts. Iredell, in late 1777, was nominated as one of three Superior Court judges. He was eager to accept the position, possibly, because as a former Royal officeholder he felt the need to show loyalty to the new state government.¹³

Iredell rode one circuit for the court and resigned in June 1778. The life of a Circuit Court Judge must have been dreadful, riding on horseback 12 to 18 hours a day in the cold, heat, dust, and foul weather would take a toll on any man even Iredell who was in his late twenties. Thus, he when home to continue his private law practice. However, Iredell would not stay home for long, in July 1779; he was appointed Attorney General of North Carolina. That position allowed him to continue his private practice on the side. Iredell held the post of Attorney General until 1781. From 1781 to 1787, he concentrated on his practice. While, Iredell neither sought nor held public office, he maintained contact with Whig state leaders. In 1786, Iredell again took up his pen, for in 1785 "the North Carolina Legislature passed a law prohibiting suits for the recovery of property which was subsequently sold under the Confiscation Acts."¹⁴ That is, loyalists could not sue the county or state to recover property confiscated during the Revolution.

¹² Waldrup, John Charles. "James Iredell and the Practice of Law in Revolutionary Era North Carolina," Ph.D. diss., (Univ. of North Carolina-Chapel Hill, 1985), 17

¹³ Waldrup, John Charles. "James Iredell and the Practice of Law in Revolutionary Era North Carolina," Ph.D. diss., (Univ. of North Carolina-Chapel Hill, 1985), 22

¹⁴ Friedman, Leon., and Fred L Israel, ed. *The Justices of the United States Supreme Court, 1789-1969, Their Lives and Major Opinions*. Vol. 1 (New York: Chelsea House, 1969), 126

In August 1786, an address titled “To the Public” appeared in the Newbern paper; again, Iredell used a pseudonym. Iredell thought that by passing the above law the legislature had gone beyond the Constitution, much as Parliament had done years before:

It was of course to be considered how to impose restrictions upon the Legislature that might still leave it free to useful purposes, but at the same time guard against the abuse of unlimited power.... I have, therefore, no doubt but that the power of the assembly is limited and defined by the Constitution. It is a creature of the Constitution.¹⁵

Iredell believed that the right of petition alone was not sufficient to correct the above error, for it implies that the people have that right because it was given to them by their representatives, and that is not the case. About one year later, he clarified his position in a letter to Richard Spaight, “I confess it has ever been my opinion, that an act inconsistent with the Constitution was void; and that judges, consistently with their duties, could not carry it into effect.”¹⁶ Iredell, above, stated a key Federalist principal that would later become known as Judicial Review.

The following September 1787 the Constitutional Convention in Philadelphia had completed its work and submitted it to the state legislatures. Iredell, as he had for the North Carolina Constitution, began working for the Federal Constitution’s adoption in his state. Iredell, who seemed never to sign his name to any essay that would be read by the public, in January 1788, wrote, “Answers to Mr. Mason’s objections to the New Constitution recommended by the Late Convention at Philadelphia” over the name Marcus. In it, he lists George Mason’s objections then answers each of them. Iredell’s

¹⁵ “To the Public” McRee, Griffith John, *Life and Correspondence of James Iredell: one of the associate justices of the Supreme Court of the United States*, Vol. 2, (1857; reprint, New York: Peter Smith, 1949), 145–146

¹⁶ Iredell to Spaight August 26, 1787, McRee, Griffith John, *Life and Correspondence of James Iredell: one of the associate justices of the Supreme Court of the United States*, Vol. 2, (1857; reprint, New York: Peter Smith, 1949), 170

pamphlet received nationwide attention and appeared contemporaneously with the earliest issues of the Federalist. This work, along with his support in the North Carolina ratifying convention, could not have gone unnoticed by national Federalist leaders; and most likely strongly affected his career.¹⁷

James Iredell clearly believed that constitutions are fundamental laws, and worked for the adoption of both his state's and the national Constitution. His writings from 1774 on support that conviction. It is clear why President Washington nominated him for the Supreme Court.

Chisholm v. Georgia: The Facts

Chisholm v. Georgia (1793) was the first Supreme Court decision rendered before 1800 and led to the Eleventh Amendment of the Constitution. While the opinions of all five justices are available, and will be discussed below, none of them set down the facts in the case. How did Chisholm v. Georgia (hereinafter Chisholm) make its way to the Supreme Court? The Chisholm case had humble pre-constitutional beginnings in 1777.

American troops under the command of General James Jackson, were quartered near Savannah Georgia, and needed supplies. On October 31, 1777, the Executive Council of Georgia authorized Thomas Stone and Edward Davies of Savannah, as commissioners of the state, to purchase goods from Robert Farquhar, a merchant from Charleston South Carolina.¹⁸

The contract was made and delivery of the merchandise was taken in Savannah on December 1, 1777. On December 2, 1777, payment was requested, but Farquhar was refused several times. It seems, according to Mathis, "A committee of the Georgia House of Representatives in 1789 reported that Georgia had given to Stone and Davies the necessary sum in Continental loan office certificates for the specific purpose of satisfying

¹⁷ Friedman, Leon., and Fred L Israel, ed. *The Justices of the United States Supreme Court, 1789-1969, Their Lives and Major Opinions*. Vol. 1 (New York: Chelsea House, 1969), 127.

¹⁸ Doyle Mathis. "Chisholm v. Georgia: Background and Settlement," *The Journal of American History*, 54 no 1 (1967) 20.

Farquhar.” It is unclear why he never received payment. In January 1784, he was knocked overboard and drowned. At the time of Farquhar’s death, his daughter Elizabeth was ten years old. Farquhar’s father John Farquhar, Peter Dean, and Alexander Chisholm were executors of the estate. By 1789, Elizabeth married, and her husband, Peter Trezevant, in concert with Chisholm undertook the efforts of gaining payment for the debt.

The Georgia Legislature received a request for settlement of the debt. The legislature rejected the request for, from their point of view, they had previously authorized payment through Stone and Davies. In the time-honored fashion of shifting the blame, the Georgia Legislature suggested that the proper remedy for recovery of the debt was to bring suit against Stone and Davies. In the wake of the legislature’s decision, Alexander Chisholm filed suit against Georgia in the United States Circuit Court for the district of Georgia asking for 100,000 pounds sterling damages. The Governor answered the petition by stating that the state of Georgia had been for some time and was:

A free, sovereign, and independent state, and that the said state of Georgia cannot be drawn or compelled ...to answer, against the will of the said state of Georgia, before any Justices of the federal circuit court for the district of Georgia or before any court of law or equity whatsoever.¹⁹

Justice James Iredell and Judge Nathaniel Pendleton heard the case at the district level and concluded Georgia could not be sued by a citizen of South Carolina in the Circuit Court.²⁰ Chisholm appealed the decision of the Circuit Court to the United States Supreme Court. It is unclear when the Court decided to hear the appeal; however, the first mention of the case appears in the record of the Supreme Court on Saturday, August 11, 1792.

¹⁹ Doyle Mathis. “Chisholm v. Georgia: Background and Settlement,” *The Journal of American History*, 54 no 1 (1967) 21–22

²⁰ *Ibid* 23

Whereupon, the Court ordered:

Any person having authority to appear for the state of Georgia in this suit brought in this court by Alexander Chisholm citizen of the state of South Carolina... against the said state of Georgia , is required to come forth and appear accordingly, it was moved by the plaintiff by Edmund Randolph [United States Attorney General] his counsel that unless the said state of Georgia shall after reasonable notice cause an appearance to be entered on behalf of said state, on the Fourth day of next term or shall then show cause to the contrary, judgment shall be entered against the said state and a writ of inquiry of damage shall be awarded.²¹

On February 4, 1793, no one appeared before the Court for the state of Georgia to argue in opposition to Randolph's motion. The case was taken under advisement on February 5, 1793. Thirteen days later, on February 18, 1793, the Court's decision was announced. In a four to one decision, the court found for the plaintiff and ruled a state can be sued by citizens of another state.

The Opinions

From a dispute over a South Carolina, merchant's bill sprang the first major Supreme Court decision. Georgia eventually settled with the Farquhar estate. The key question in the case as John Jay stated it was "The question we are now to decide has been accurately stated, *viz.*, is a State suable by individual citizens of another State?"²² The short answer, according to, John Jay, John Blair, William Cushing, and James Wilson, was yes. Only James Iredell dissented, and his biographer, Griffith John McRee, saw the

²¹ Fine Minutes August 11, 1792, *The Documentary History of the Supreme Court of the United States, 1789-1800* Vol. 1. (New York: Columbia University Press, 1985), 205

²² *Chisholm v. Georgia* 2 US 419 (1793) Jay, Chief Justice
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZX3.html (accessed March 20, 2007)

dissent as the foundation of the States Rights Doctrine.²³ Did Iredell's dissent lay the foundation of the States Rights Doctrine, or was it a narrow interpretation of Article 3 Section 2 of the Constitution?

In order to answer the question, it is necessary to compare the opinions of the majority to Iredell's dissent. The majority's opinions were based on a broad interpretation of Article 3 Section 2 of the Constitution, which stated in part:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority... to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State.... In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction.²⁴

Chief Justice John Jay's view was the word "party" could mean "both... plaintiff and defendant, we cannot limit it to one of them in the present case." He also stated, "This extension of power is remedial, because it is to settle controversies. It is therefore to be construed liberally. It is politic, wise, and good that not only the controversies in which a State is plaintiff, but also those in which a State is defendant..."²⁵

Jay's conclusion was clear, the Constitution gave the Court jurisdiction, and if a state could be a plaintiff under the above clause, then a state could be a defendant.

²³ McRee, Griffith John, *Life and Correspondence of James Iredell: one of the associate justices of the Supreme Court of the United States*, Vol. 2, (1857; reprint, New York: Peter Smith, 1949), 381

²⁴ Constitution of the United States Article 3 Section 2

²⁵ *Chisholm v. Georgia* 2 US 419 (1793) Jay, Chief Justice
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZX3.html (accessed March 20, 2007)

Justice James Wilson concurred with the Chief Justice, but Wilson did not take a straight-line approach in his opinion. His rather long oratory is hard to follow in many places. In general, Wilson's conclusions are expressed in the following statement:

A state, like a merchant, makes a contract. A dishonest state, like a dishonest merchant, willfully refuses to discharge it. The latter is amenable to a court of justice. Upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice by declaring, "I am a Sovereign state?" Surely not.²⁶

Justice Wilson went on to state a nationalistic view, "Whoever considers, in a combined and comprehensive view, the general texture of the Constitution will be satisfied that the people of the United States intended to form themselves into a nation for national purposes." The idea that governmental power derives from the consent of the governed, expressed not only in the Declaration of Independence but also in the preamble to the Constitution suggests, if a state is a sovereign entity, then its sovereignty is vested in it by the people. Since no person is exempt from the jurisdiction of the national government, no state should be exempt from the jurisdiction of the national government.²⁷ Thus, Georgia could not claim sovereign exemption.

The above could also be analyzed in the following way, a dispute between A and B is the same as a dispute between B and A, which was how Justice John Blair analyzed the question. Additionally, he argued the clause "Controversies between two or more States....," of necessity made a state a defendant. Justice Blair went on to conclude, "When a State, by adopting the Constitution, has agreed to be amenable to the judicial

²⁶ *Chisholm v. Georgia* 2 US 419 (1793) Wilson, Justice
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZX1.html (accessed March 25, 2007)

²⁷ Ibid

power of the United States, she has, in that respect, given up her right of sovereignty.” Blair saw no reason to restrict a citizen to a defendant.²⁸

Justice William Cushing found the Constitution allowed for a state to be sued by citizens of another state, and if the clause quoted above meant a state could only be a plaintiff then an exemption clause should have been written. Agreeing with Justice Blair, Cushing concluded states give up their sovereignty to the Union:

Whatever power is deposited with the Union by the people for their own necessary security is so far a curtailing of the power and prerogatives of States. This is, as it were, a self-evident proposition; at least it cannot be contested. ... I think no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole.²⁹

Thus, the argument of the majority was simple Article 3 Section 2 of the Constitution gave the Supreme Court jurisdiction to hear the case. Additionally, because of its language the Constitution permitted a state to be a defendant and be sued by citizens of another state. Therefore, Georgia, having adopted the Constitution, could not claim sovereign exemption. Based on the four majority opinions their conclusions seem clear the Constitution seemed to allow the action being asked for in the case and suing Georgia seemed to be an appropriate form of redress of the grievance. After all, her agents failed to pay for goods that were clearly delivered under a legal contract. How then could Justice James Iredell looking at the same set of facts and reading the same Constitution have reached the opposite conclusion?

²⁸ *Chisholm v. Georgia* 2 US 419 (1793) Blair, Justice
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZX.html (accessed March 25, 2007)

²⁹ *Chisholm v. Georgia* 2 US 419 (1793) Cushing, Justice
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZX2.html (accessed March 25, 2007)

Justice Iredell's dissent was based on the postulate that the Supreme Court was, not only the organ of the Constitution, but of the law as well. He looked to the Judiciary Act of 1789 and Article 3 Section 2 of the Constitution. Iredell looked at the following clauses of Article 3 Section 2 of the Constitution "Controversies between two or more States; between a State and Citizens of another State.... In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction,"³⁰ and found nothing that clearly stated jurisdictional intent. In Iredell's view, the ambiguity of the words necessitated interpretation, and there was no part of the Constitution that he knew of that authorized the Supreme Court to take up any business where the framers left it. In the absence of any clear jurisdiction from the Constitution, Iredell believed the Court must receive its directions from the legislature.³¹ In contrast, the majority, as stated above, interpreted the clauses in a manner, which permitted the Supreme Court jurisdiction. Additionally, the majority held if the "state and citizens of another state" clause was intended to convey sovereign exemption the framers should have written it. Since the framers did not write a sovereign exemption clause, no exemption was intended.

Iredell went on to Section 13 of The Judiciary Act of 1789 which states in part:

The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.³²

³⁰ Constitution of the United States Article 3 Section 2

³¹ *Chisholm v. Georgia* 2 US 419 (1793) Iredell, Justice
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZO.html (accessed March 30, 2007)

³² *Judiciary Act of 1789* http://www.constitution.org/uslaw/judiciary_1789.htm (accessed March 30, 2007)

Iredell defined original but not exclusive jurisdiction, as the Supreme Court had no more or less authority to act in such a case than another court. If no other court could act in such a case then neither could the Supreme Court:

...This Court hath a concurrent jurisdiction only, the present being one of those cases where, by the Judicial Act, this Court hath original, but not exclusive, jurisdiction. This Court, therefore, under that Act, can exercise no authority in such instances but such authority as from the subject matter of it may be exercised in some other court.³³

Iredell concluded the Judiciary Act of 1789 was the limit of the Court's authority. In addition, he found no other court that would have any grounds for jurisdiction in the case.

While Section 13 of the Judiciary Act, in Iredell's view, did not provide jurisdiction Section 14 provided a place to look, and states in part:

That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.³⁴

Iredell articulated his belief that the "principles and usages of law" meant the legislature required the Court to look at pre-existing law, law common to all the states:

Whatever writs we issue that are necessary for the exercise of our jurisdiction must be agreeable to the principles and usages of law. This is a direction... we cannot supersede because it may appear to us not sufficiently extensive. If it be not, we must wait till other remedies are provided by the same authority. From

³³ *Chisholm v. Georgia* 2 US 419 (1793) Iredell, Justice http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZO.html (accessed March 30, 2007)

³⁴ *Judiciary Act of 1789* http://www.constitution.org/uslaw/judiciary_1789.htm (accessed March 30, 2007)

this, it is plain that the legislature did not [choose] to leave to our own discretion the path to justice, but has prescribed one of its own.³⁵

Iredell found no pre-existing law that was applicable to the case; therefore, he concluded that the suit could not be maintained. It is clear Iredell held the majority opinion was making new law, which was the province of Congress. ...“The application of law, not the making of it, is the sole province of the Court.” Iredell did discuss state sovereignty in his opinion, but his conclusions were not based on the state sovereignty argument. In fact, his conclusions are clear:

1. The Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the legislature appointing courts and prescribing their methods of proceeding.
2. Congress has provided no new law in regard to this case, but expressly referred us to the old.
3. There are no principles of the old law, to which, we must have recourse that in any manner authorize the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with.

Iredell went on to state that he was “strongly against any construction of it which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence....”³⁶

The answer to the question stated above: How could Justice James Iredell looking at the same set of facts and reading the same Constitution have reached the opposite

³⁵ *Chisholm v. Georgia* 2 US 419 (1793) Iredell, Justice
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZO.html (accessed March 30, 2007)

³⁶ Ibid

conclusion; seems clear, Iredell took a narrow view of the question posed by Jay. He did define the nature of state sovereignty, and did not view Article 3 Section 2 of the Constitution as liberally as his colleagues.

In that narrow view, Iredell's definition of state sovereignty was "Every State in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign as the United States are in respect to the powers surrendered."³⁷ This definition seems to be an explanation of the Tenth Amendment, which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."³⁸

The definition and the Tenth amendment are far from enunciating the States Rights Doctrine, and not as Griffith John McRee implied the foundation of it. According to Higginbotham, McRee considered "his volumes on Iredell to be not only a literary weapon to use against the North but a political weapon as well."³⁹ McRee stated, "Extreme Federalists in determining the character of state sovereignty look chiefly to the Constitution itself, and resting upon the declaration of its preamble... regard it somewhat in the light of a mere *abstraction*." The preamble, of course, refers to the people of the United States, and not to the states themselves. McRee, then, went on to quote Iredell's opinion in part, "A State does not owe its origin to the Government of the United States.... It was in existence before it."⁴⁰ McRee's argument was that men of the South looked not only to the Constitution, but also to the past to define the nature of state sovereignty, and

³⁷ *Chisholm v. Georgia* 2 US 419 (1793) Iredell, Justice
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZO.html (accessed March 30, 2007).

³⁸ Bill of Rights, Amendment 10.

³⁹ Don Higginbotham, ed., *The Papers of James Iredell* (Raleigh: Dept. of Cultural Resources, 1976), xxix

⁴⁰ McRee, Griffith John, *Life and Correspondence of James Iredell: one of the associate justices of the Supreme Court of the United States*, Vol. 2, (1857; reprint, New York: Peter Smith, 1949), 381.

established the fact that the government was a confederation of sovereign states, and not one of a united people.⁴¹ McRee implied that Iredell's opinion supported his argument, and the portion McRee quoted seems to suggest that it did. However, McRee only quoted that part which appeared to support his argument; thus, clearly, serving his own agenda, was sectionalist. Iredell's next sentence suggests that he would disagree with McRee's characterization. The full phrase reads, "A State does not owe its origin to the Government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of the people."⁴²

In his opinion, Iredell did not lay the foundation of the States Rights Doctrine, he, simply, dealt with the case before him. State sovereignty was not cited in his conclusions as a reason for not granting jurisdiction. McRee's characterization of Iredell's dissent was based on an 1857 point of view, which placed the issue of state sovereignty out of context. That is, McRee was attempting to use Iredell's opinion to justify the Southern view of state sovereignty, but state sovereignty in 1793 did not mean the same thing as state sovereignty in 1857. The Constitution was new, and there were no major sectional divisions in 1793 of the kind that existed in 1857. Alexander Hamilton, in Federalist 81, viewed the clauses of Article 3 Section 2 of the Constitution, quoted above, as limiting a state to a plaintiff. He stated in part:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.... To what purpose would

⁴¹ Ibid, 381-382.

⁴² *Chisholm v. Georgia* 2 US 419 (1793) Iredell, Justice http://www.law.cornell.edu/supct/html/historics/USSC_CR_0002_0419_ZO.html (accessed March 30, 2007).

it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident; it could not be done....⁴³

If Iredell based any one of his conclusions on the grounds of state sovereignty, it is likely he would have done so along the same lines as Hamilton. Additionally, John Marshall supported the above during the Virginia ratifying convention. He stated, "I hope that no gentlemen will think that a state will be called at the bar of the federal court... It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states."⁴⁴

Years before Iredell's opinion, two prominent Federalists Hamilton and Marshall read the clauses of Article 3 Section 2 of the Constitution as permitting a state to be a plaintiff only. Thus, at the very least, that narrow view shared by Iredell, can be called Federalist. That view of state sovereignty promoted national unity. Unlike Iredell's view, McRee's interpretation did not promote national unity, and was a function of the time in which he was writing. It is clear, as Christopher T. Graebe, suggests, "Iredell was not the great champion of states rights, as he has been labeled, nor even a spokesman primarily for state sovereignty."⁴⁵

The Eleventh Amendment

The majority decision was rendered on February 18, 1793, and as stated in the ruling quoted above, judgment was awarded to Chisholm, for Georgia did not appear. A writ of inquiry was awarded in February 1794, but it was never executed. In Congress, on February 19, 1793, a resolution for a Constitutional amendment was introduced in the

⁴³ Alexander Hamilton, Federalist 81 http://thomas.loc.gov/home/histdox/fed_81.html (accessed March 30, 2007)

⁴⁴ William A. Fletcher, "A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition against Jurisdiction," *Stanford Law Review* 35.6 (1983): 1049. Note 68.

⁴⁵ Christopher Graebe, "The Federalism of James Iredell in Historical Context," *North Carolina Law Review* 69 (1990): 271.

House of Representatives that would nullify the decision.⁴⁶ Reaction to the decision, according to Fletcher, was “immediate and hostile,” with the most venomous reaction coming from Georgia. The Georgia House of Representatives passed a bill declaring that “any persons attempting to levy judgment in the [Chisholm] case are hereby declared to be guilty of a felony, and shall suffer death without benefit of clergy, by being hanged.”⁴⁷ However, the bill did not pass the Georgia Senate.⁴⁸

Fletcher argued that other states were alarmed not merely because of the implications of the decision on state sovereignty, but additionally because of their postwar debt. In September 1793, the Legislature of Massachusetts passed a resolution, after being called into special session by Governor John Hancock, urging Congress to adopt such amendments to the Constitution as will remove any clause or article of it that would permit a state to be compelled to answer in any suit by an individual in any federal Court.⁴⁹ According to Mathis, “The reason for swift action on the part of the state legislatures was the number of suits being filed by individuals against other states.” There were at least three suits filed between 1793 and 1797, and all for the recovery of money.⁵⁰ Interestingly, Fordham concluded, “There is reason to believe that the avoidance of debt and not the preservation of state dignity was the principal moving force behind the countrywide protest against the decision in *Chisholm v. Georgia*.”⁵¹

⁴⁶ Jeff B. Fordham, “Iredell’s Dissent in *Chisholm v. Georgia*,” *The North Carolina Historical Review* 8 (1931): 162.

⁴⁷ William A. Fletcher, “A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition against Jurisdiction,” *Stanford Law Review* 35.6 (1983): 1058.

⁴⁸ Jeff B. Fordham, “Iredell’s Dissent in *Chisholm v. Georgia*,” *The North Carolina Historical Review* 8 (1931): 162.

⁴⁹ William A. Fletcher, “A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition against Jurisdiction,” *Stanford Law Review* 35.6 (1983): 1058.

⁵⁰ Doyle Mathis, “The Eleventh Amendment: Adoption and Interpretation,” *Georgia Law Review* 2 (1968): 228-230.

⁵¹ Jeff B. Fordham, “Iredell’s Dissent in *Chisholm v. Georgia*,” *The North Carolina Historical Review* 8 (1931): 163.

Thus, if Iredell did not base his dissent on state sovereignty, as has been shown, and, as seems likely, states protested the decision for purely monetary reasons; then state sovereignty in 1793 was used as nothing more than a respectable smokescreen to cover the avoidance of paying state debt. The resolution introduced in the House on February 19, 1793, under the cloak of state sovereignty, read:

...No state shall be liable to be made a party defendant in any of the judicial courts, established, or shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate within or without [of] the United States.⁵²

The language of the above resolution was clearly intended to prohibit suits by individuals against states whether those individuals were citizens or foreigners. This proposal went beyond Iredell's opinion.

For some reason, possibly due to the language of the above resolution, a second resolution was introduced in the House on February 20, 1793. That resolution read:

The Judicial Power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.⁵³

Both houses of Congress adjourned without considering either resolution. In January 1794, a third resolution was proposed, and ultimately became the Eleventh Amendment:

The Judicial power of the United States shall not *be construed* to extend to any suit in law or equity, commenced, or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.⁵⁴

⁵² William A. Fletcher, "A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition against Jurisdiction," *Stanford Law Review* 35.6 (1983): 1058.

⁵³ *Ibid* 1059.

⁵⁴ Constitution of the United States Amendment 11

By comparing the three resolutions, it is clear, as Fletcher suggests, the intent was to narrow the interpretation of Article 3 Section 2 of the Constitution so that states could be sued by their own citizens, and brings suits against citizens of other states in Federal court. If the framers of the Eleventh Amendment intended to exclude suits by all individuals, they would have adopted the first resolution or one much like it.⁵⁵

The narrowness of the above amendment suggests it was, in some way, influenced by Iredell's dissent, for he stated that its citizens convey a state's sovereignty upon it. Thus, Iredell's view did not preclude states from being sued by their own citizens as long as the suit is not for the recovery of monetary damages, and neither did the Eleventh Amendment. Although the amendment was proposed quickly, there were only thirteen months between the third resolution's introduction in Congress in February 1793, and its proposal to the states in March 1794, the sense of urgency on the part of the states seemed to die away. Georgia, the state that raised the issue by not paying Farquhar in the first place, took nearly eight months to ratify the Eleventh Amendment; doing so on November 29, 1794. Similarly, Virginia and Vermont took the same amount of time to ratify the amendment. Interestingly, Iredell's home state of North Carolina was the last state to ratify the amendment before it became law; however, it did not do so until February 7, 1795.

For two years, the Eleventh Amendment was the law of the land, but no one knew it. It seems according to Braxton, that the states were slow in notifying the Federal Government. Additionally, Congress had moved onto other issues, then, finally in February 1797, it passed a resolution "calling on the President to ascertain and report to the next session of Congress what action had been taken upon its ratification by the

⁵⁵ William A. Fletcher, "A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition against Jurisdiction," *Stanford Law Review* 35.6 (1983): 1060.

states.”⁵⁶ Meanwhile, the Supreme Court had cases pending, and the Eleventh Amendment had not officially been ratified; the decision in *Chisholm v. Georgia* was law. The Court heard argument in those cases, but, like Georgia, the other states refuse to appear. In one case, *Hollingsworth v. Virginia* (1798), as a result, the plaintiff moved, in March 1796, that the Court issue a writ compelling the state of Virginia to appear. “The Court postponed decision in consequence, as it said, of a doubt whether the remedy should be furnished by the Court itself or by the legislature.”⁵⁷ Doubtless the Court was aware of the amendment proposed by Congress and sent to the states for ratification. Thus, it seems, the Court was reluctant to decide cases where a state was a defendant due to public opinion as Braxton suggests.⁵⁸

Alternatively, the Court could have been at a loss as to how to compel a state to appear before it, for if as, Alexander Hamilton, states recoveries of money could not have been enforced, then as a practical matter, the Supreme Court had no means of compelling a state to appear before it regardless of the *Chisholm* ruling. The Eleventh Amendment was officially adopted in January 1798, and *Hollingsworth v. Virginia* (1798), raised two interesting questions: First, “Whether the Amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?”⁵⁹ In other words, was the intent of the Eleventh Amendment to end all pending, as well as future litigation in which a state was sued by a citizen of another state? If that were true, the Eleventh Amendment would appear to be an *ex post facto* law and in violation of Article 1 Section 9 of the Constitution.

⁵⁶ Allen Caperton Braxton “The Eleven Amendment,” *Virginia State Bar Association Reports* 20 (1907): 191.

⁵⁷ Charles Warren, “The First Decade of the Supreme Court of the United States,” *University of Chicago Law Review* 7.4 (1940): 643.

⁵⁸ Allen Caperton Braxton “The Eleven Amendment,” *Virginia State Bar Association Reports* 20 (1907): 191.

⁵⁹ *Hollingsworth v. State of Virginia*, 3 U.S. 378 (1798) Chase, Justice <http://supreme.justia.com/us/3/378/case.html> (accessed March 30, 2007)

However, the amendment was not an ex post facto law, for according to Justice Chase:

A law, however, cannot be denominated retrospective, or ex post facto, which merely changes the remedy, but does not affect the right: In all the states, in some form or other, a remedy is furnished for the fair claims of individuals against the respective governments. The amendment is paramount to all the laws of the union; and if any part of the judicial act is in opposition to it, that part must be expunged. There can be no amendment of the constitution, indeed, which may not, in some respect, be called ex post facto; but the moment it is adopted, the power that it gives, or takes away, begins to operate, or ceases to exist.⁶⁰

Thus, the amendment was intended to supersede pending cases in which a state was a defendant, and not in violation of Article 1 Section 9 of the Constitution.

The second question of interest in *Hollingsworth v. Virginia* (1798) was, were the provisions of Article 5 of the Constitution satisfied? The plaintiff's objection was that the amendment was void for it lacked the President's official approval. However, an inspection of Article 5 clearly shows that the President has no part in the amendment process.⁶¹ Article 5 states in part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution... [they] shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States....⁶²

All that is necessary is for each state to inform the federal government upon the ratification of the amendment, so the federal government is aware when the amendment becomes law.

⁶⁰ *Hollingsworth v. State of Virginia*, 3 U.S. 378 (1798) Chase, Justice <http://supreme.justia.com/us/3/378/case.html> (accessed March 30, 2007).

⁶¹ *Ibid*

⁶² Constitution of the United States Article 5.

Therefore, when did the Eleventh Amendment become law, on February 7, 1795, or January 1798? The question is philosophical much like if a tree falls in the woods and no one is there to hear it, does it make a sound? Clearly, the federal government needs to be aware that three-fourths of the state legislatures have ratified the amendment before it can act in accordance with the amendment. Thus, January 1798 would be the date the Eleventh Amendment became law, but as stated above February 7, 1795 was when North Carolina became the last state needed to ratify the amendment for it to become law. Thus by the language of Article 5 of the Constitution, it seems, the Eleventh Amendment was part of the Constitution from that date. It took three years for the federal government to become aware of the adoption of the amendment.

Conclusion

The dissent of Associate Justice James Iredell in *Chisholm v. Georgia* (1793) was clearly Federalist, and not the first expression of the States Rights Doctrine, for McRee twisted Iredell's opinion to fit his argument. Iredell, though a fine persuasive essayist, confined himself, in his opinion, to the facts before him. It is clear Iredell had no agenda; he simply expressed a legal opinion, and in doing so demonstrated the strength of character noted by George Washington. Additionally, it is reasonable to conclude, his opinion paved the way for the Eleventh Amendment, for Iredell pointed out that, in his view, Congress had not clarified the Supreme Court's jurisdiction, and pre-existing law was not sufficient. Furthermore, the majority opinion clearly led to an undesirable result. Thus, Congress proposed a constitutional amendment that was, in part, based on Iredell's opinion.

Chisholm v. Georgia (1793) and the ratification process of the Eleventh Amendment provide unique inside into the early workings of the federal government. It is for that reason that *Chisholm v. Georgia* (1793) and Iredell's dissent are important to the history of the Supreme Court.

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