of the United States, as the same has been practiced upon by the Government. . . .

The institution of a bank has also a natural relation to the regulation of trade between the States: in so far as it is conducive to the creation of a convenient medium of *exchange* between them, and to the keeping up a full circulation by preventing the frequent displacement of the metals in reciprocal remittances. Money is the very hinge on which commerce turns. And this does not merely mean gold & silver; many other things have served the purpose with different degrees of utility. Paper has been extensively employed. . . .

The Secretary of State objects to the relation here insisted upon, by the following mode of reasoning — To erect a bank, says he, & to regulate commerce, are very different acts. He who creates a bank, creates a subject of commerce, so does he, who makes a bushel of wheat, or digs a dollar out of the mines. Yet neither of these persons regulates commerce thereby. To make a thing which may be bought & sold, is not to *prescribe* regulations for *buying* and *selling*: Thus making the regulation of commerce to consist in prescribing rules for *buying* and *selling.*

This, indeed, is a species of regulation of trade; but is one which falls more aptly within the province of the local jurisdictions than within that of the general government, whose care they must be presumed to have been intended to be directed to those general political arrangements concerning trade on which its aggregated interests depend, rather than to the details of buying and selling.

Accordingly such only are the regulations to be found in the laws of the United States; whose objects are to give encouragement to the enterprise of our own merchants, and to advance our navigation and manufactures.

And it is in reference to these general relations of commerce, that an establishment which furnishes facilities to circulation, and a convenient medium of exchange and alienation, is to be regarded as a regulation of trade.

The Secretary of State further argues, that if this was a regulation of commerce, it would be void, *as extending as much to the internal commerce of every state as to its external*. But what regulation of commerce does not extend to the internal commerce of every State ? What are all the duties upon imported articles amounting to prohibitions, but so many bounties upon domestic manufactures affecting the interests of different classes of citizens in different ways? What are all the provisions in the Coasting Acts which relate to the trade between district and district of the same State? In short, what regulation of trade between the States, but must affect the internal trade of each State? What can operate upon the whole but must extend to every part ? . . .

[T]he Secretary of the Treasury, with all deference conceives . . . that all the special powers of government are sovereign as to the proper objects; that the incorporation of a bank is a constitutional measure, and that the objections taken to the bill, in this respect, are ill founded. . . .

2. *The Concept of "Sovereignty"*

Assignment 4

Whereas the constitutional controversy over the national bank concerned the proper scope of *federal* power, the first major constitutional controversy to be decided by the Supreme Court was over the constitutional limits on *state* power. In particular, whether the Constitution permitted states to be sued by citizens of other states in federal court. The

relevant text of the Constitution is in Article III, section 2, which reads (emphasis added):

> Section 2. 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 all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—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*;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Because Georgia objected to being a defendant to such a lawsuit on grounds of its "sovereignty," this case involved "first principles" that have been debated ever since and to which we will return repeatedly in the chapters that follow.

STUDY GUIDE: *Notice the sharp disagreement on the issue of "sovereignty" between Justice Iredell and rest of the Court, particularly Justice Wilson. We are so accustomed to thinking of sovereignty residing in the states or national government that it is hard to grasp why someone of Wilson's stature and intellectual sophistication would resist this idea. Pay close attention to his reasons for doing so and where he thinks sovereignty resides. Do you see a different conception of "popular sovereignty" in Wilson's opinion than we are accustomed to today? Observe Wilson's repeated reliance on "general principles of right" and his only secondary reliance on the text of the Constitution. Contrast his approach with that of Justice Cushing. Also, notice Justice Iredell's assumption of the existence of judicial review well before the Court's decision in Marbury v. Madison as well as his reliance on a "clear statement" rule. Of what relevance is foreign law, according to Justice Blair? Chief Justice John Jay, speaking last, was the third co-author of the Federalist Papers, though his participation in that project ended soon after it was begun. What difference does he see between sovereignty in Europe and in the United States?*

CHISHOLM v.GEORGIA
2 U.S. 419 (1793)

[In 1777, during the Revolutionary War, the Executive Council of Georgia authorized the purchase of clothing from a South Carolina businessman. After receiving the supplies, Georgia did not deliver payments as promised. After the merchant's death, the executor of his estate, Alexander Chisholm, took the case to the Supreme Court in an attempt to collect from the state. Georgia refused to appear, claiming immunity from the suit as a sovereign and independent state. Before the practice was later ended by Chief Justice John Marshall, opinions of the Supreme Court were delivered separately or "seriatim" from the bench. So the first opinion that follows, delivered by Justice Iredell, was actually the lone dissent in a 4-1 decision of the Court on behalf of Chisholm and against Georgia.]

JUSTICE IREDELL. . . .

A general question of great importance here occurs. What controversy of a civil nature can

be maintained against a State by an individual? . . . The Attorney-General[3] has indeed suggested . . . a construction, I confess, that I never heard of before, nor can I now consider it grounded on any solid foundation, though it appeared to me to be the basis of the Attorney-General's argument. His construction I take to be this: "That the moment a Supreme Court is formed, it is to exercise all the judicial power vested in it by the Constitution, by its own authority, whether the Legislature has prescribed methods of doing so, or not." My conception of the Constitution is entirely different. I conceive, that all the Courts of the United States must receive, not merely their organization as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only.

This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority. There being many such, at the end of the special enumeration of the powers of Congress in the Constitution, is this general one: "To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." None will deny, that an act of Legislation is necessary to say, at least of what number the Judges are to consist; the President with the consent of the Senate could not nominate a number at their discretion. The Constitution intended this article so far at least to be the subject of a Legislative act. Having a right thus to establish the Court, and it being capable of being established in no other manner, I conceive it necessary follows, that they are also to direct the manner of its proceedings.

Upon this authority, there is, that I know, but one limit; that is, "that they shall not exceed their authority." If they do, I have no hesitation to say, that any act to that effect would be utterly void, because it would be inconsistent with the Constitution, which is a fundamental law paramount to all others, which we are not only bound to consult, but sworn to observe; and, therefore, where there is an interference, being superior in obligation to the other, we must unquestionably obey that in preference.

Subject to this restriction, the whole business of organizing the Courts, and directing the methods of their proceeding where necessary, I conceive to be in the discretion of Congress. If it shall be found on this occasion, or on any other, that the remedies now in being are defective, for any purpose it is their duty to provide for, they no doubt will provide others. It is their duty to legislate so far as is necessary to carry the Constitution into effect. It is ours only to judge. We have no reason, nor any more right to distrust their doing their duty, than they have to distrust that we all do ours. There is no part of the Constitution that I know of, that authorises this Court to take up any business where they left it, and, in order that the powers given in the Constitution may be in full activity, supply their omission by making new laws for new cases; or, which I take to be the same thing, applying old principles to new cases materially different from those to which they were applied before. . . .

If therefore, this Court is to be (as I consider it) the organ of the Constitution and the law, not of the Constitution only, in respect to the manner of its proceeding, we must receive our directions from the Legislature in this particular, and have no right to constitute ourselves an ossicina brevium, or take any other short method of doing what the Constitution has chosen (and, in my opinion, with the most perfect propriety) should be done in another manner. . . .

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[3][The Attorney General was Edmund Randolph.]

I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed. . . .

The only principles of law, then, that can be regarded, are those common to all the States. I know of none such, which can affect this case, but those that are derived from what is properly termed "the common law," a law which I presume is the ground-work of the laws in every State in the Union, and which I consider, so far as it is applicable to the Peculiar circumstances of the country, and where no special act of Legislation controls it, to be in force in each State, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country. . . . No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. 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. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrenderred must remain as it did before. . . .

The only remedy in a case like that before the Court, by which, by any possibility, a suit can be maintained against the crown in England, or could be at any period from which the common law, as in force in America, could be derived, I believe is that which is called a Petition of right. It is stated, indeed, in Com. Dig. 105. That "until the time of Edward I. the King might have been sued in all actions as a common person." . . . But the same authority adds "but now none can have an action against the King, but one shall be put to sue to him by petition." . . .

Blackstone, in the first volume of his commentaries, speaking of demands in point of property, upon the King, states the general remedy thus: — "If any person has, in point of property, a just demand upon the King, he must petition him in his Court of Chancery, where his Chancellor will administer right, as a matter of grace, though not upon compulsion." . . . [I]n all cases of petition of right, of whatever nature is the demand, I think it is clear beyond all doubt, that there must be some indorsement or order of the King himself to warrant any further proceedings. The remedy, in the language of Blackstone, being a matter of grace, and not on compulsion. . . .

Now let us consider the case of a debt due from a State. . . . Every man must know that no suit can lie against a Legislative body. His only dependence therefore can be, that the Legislature on principles of public duty, will make a provision for the execution of their own contracts, and if that fails, whatever reproach the Legislature may incur, the case is certainly without remedy in any of the Courts of the State. It never was pretended, even in the case of the crown in England, that if any contract was made with Parliament, or with the crown by virtue of an authority from Parliament, that a Petition to the crown would in such case lie. . . .

I have now, I think, established the following particulars. 1st. That 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. 2nd. That Congress has provided no new law in regard to this case, but expressly referred us to the old. 3rd. That there are no principles of the old law, to which, we must have recourse, that in any manner authorise 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.

. . .

JUSTICE BLAIR.

In considering this important case, I have thought it best to pass over all the strictures which have been made on the various European confederations; because, as, on the one hand, their likeness to our own is not sufficiently close to justify any analogical application; so, on the other, they are utterly destitute of any binding authority here. The Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the Union; for, no State could have become a member, but by an adoption of it by the people of that State. What then do we find there requiring the submission of individual States to the judicial authority of the United States? This is expressly extended, among other things, to controversies between a State and citizens of another State. Is then the case before us one of that description? Undoubtedly it is. . . . It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where a State is a party. Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that Congress has not provided any form of execution, or pointed out any mode of making the judgment against a State effectual. . . .

JUSTICE WILSON.

This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this "do the people of the United States form a Nation?" . . .

To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "SOVEREIGN" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.

Having thus avowed my disapprobation of the purposes, for which the terms, State and sovereign, are frequently used, and of the object, to which the application of the last of them is almost universally made; it is now proper that I should disclose the meaning, which I assign to both, and the application, which I make of the latter. In doing this, I shall have occasion incidently to evince, how true it is, that States and Governments were made for man; and, at the same time, how true it is, that his creatures and servants have first deceived, next vilified, and, at last, oppressed their master and maker. . . .

As the State has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed precedence of the State; and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence. The ministers, dignified very properly by the appellation of the magistrates, have wished, and have succeeded in their wish, to be considered as the sovereigns of the State. This second degree of perversion is confined to the old world, and begins to diminish, even there: but the first degree is

still too prevalent, even in the several States, of which our union is composed.

By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members: It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are men. . . .

Is there any part of this description, which intimates, in the remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended that there is. If justice is not done; if engagements are not fulfilled; is it upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that, which will not be voluntarily performed? Less proper it surely cannot be.

The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws. If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully 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. Before a claim, so contrary, in it first appearance, to the general principles of right and equality, be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim, should certainly be well known and authenticated.

Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable. To enumerate all, therefore, will not be expected: To take notice of some will be necessary to the full illustration of the present important cause. In one sense, the term sovereign has for its correlative, subject, In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects. "Citizen of the United States." "Citizens of another State." "Citizens of different States." "A State or citizen thereof." The term, subject, occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet "foreign"[4] is prefixed. In this sense, I presume the State of Georgia has no claim upon her own citizens: In this sense, I am certain, she can have no claim upon the citizens of another State.

In another sense, according to some writers,[5] every State, which governs itself without any dependence on another power, is a sovereign State. Whether, with regard to her own citizens, this is the case of the State of Georgia; whether those citizens have done, as the individuals of England

[4] Art. 3. § 3.

[5] Vatt. B. 1. c. s. 4.

are said, by their late instructors, to have done, surrendered the Supreme Power to the State or Government, and reserved nothing to themselves; or whether, like the people of other States, and of the United States, the citizens of Georgia have reserved the Supreme Power in their own hands; and on that Supreme Power have made the State dependent, instead of being sovereign; these are questions, to which, as a Judge in this cause, I can neither know nor suggest the proper answers; though, as a citizen of the Union, I know, and am interested to know, that the most satisfactory answers can be given.

As a citizen, I know the Government of that State to be republican; and my short definition of such a Government is, one constructed on this principle, that the Supreme Power resides in the body of the people. As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the "People of the United States," did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State. . . .

There is a third sense, in which the term sovereign is frequently used, and which . . . furnishes a basis for what I presume to be one of the principal objections against the jurisdiction of this Court over the State of Georgia. In this sense, sovereignty is derived from a feudal source; and like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American States. . . .

Into England this system was introduced by the conqueror: and to this era we may, probably, refer the English maxim, that the King or sovereign is the fountain of Justice. But, in the case of the King, the sovereignty had a double operation. While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction. "The law," says Sir William Blackstone, "ascribes to the King the attribute of sovereignty: he is sovereign and independent within his own dominions; and owes no kind of objection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the King, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power."

This last position is only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care. Of this plan the author of the Commentaries was, if not the introducer, at least the great supporter. He has been followed in it by writers later and less known; and his doctrines have, both on the other and this side of the Atlantic, been implicitly and generally received by those, who neither examined their principles nor their consequences, The principle is, that all human law must be prescribed by a superior. This principle I mean not now to examine. Suffice it, at present to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.

I have now fixed, in the scale of things, the grade of a State; and have described its composure: I have considered the nature of sovereignty; and pointed its application to the proper object. I have examined the question before us, by the principles of general jurisprudence. In those principles I find nothing, which tends to evince an exemption of the State of Georgia, from the jurisdiction of the Court. I find everything to have a contrary tendency. . . .

With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object, which the nation could present. "The PEOPLE of the United States" are the first personages introduced. Who were those people? They were the citizens of thirteen States, each of which had a separate Constitution and Government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated its Legislative authority: Executive or Judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to ensure domestic tranquillity, to provide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present Constitution. By that Constitution Legislative power is vested, Executive power is vested, Judicial power is vested.

The question now opens fairly to our view, could the people of those States, among whom were those of Georgia, bind those States, and Georgia among the others, by the Legislative, Executive, and Judicial power so vested? If the principles, on which I have founded myself, are just and true; this question must unavoidably receive an affirmative answer. If those States were the work of those people; those people, and, that I may apply the case closely, the people of Georgia, in particular, could alter, as they pleased, their former work: To any given degree, they could diminish as well as enlarge it. Any or all of the former State-powers, they could extinguish or transfer. The inference, which necessarily results, is, that the Constitution ordained and established by those people; and, still closely to apply the case, in particular by the people of Georgia, could vest jurisdiction or judicial power over those States and over the State of Georgia in particular.

The next question under this head, is, Has the Constitution done so? . . . In order, ultimately, to discover, whether the people of the United States intended to bind those States by the Judicial power vested by the national Constitution, a previous enquiry will naturally be: Did those people intend to bind those states by the Legislative power vested by that Constitution? The articles of confederation, it is well known, did not operate upon individual citizens; but operated only upon states, This defect was remedied by the national Constitution, which, as all allow, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just; the defect remedied, on one side, was balanced by a defect introduced on the other: For they seem to think, that the present Constitution operates only on individual citizens, and not on States. This opinion, however, appears to be altogether unfounded. . . .

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. They instituted, for such purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduction, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this Court.

But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself. . . . "The judicial power of the United States shall extend to

controversies, between a state and citizens of another State." Could . . . this strict and appropriate language, describe, with more precise accuracy, the cause now depending before the tribunal? . . . I have now tried this question by all the touchstones, to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of States and Kingdoms; and by the Constitution of the United States. From all, the combined inference is; that the action lies.

JUSTICE CUSHING.

The grand and principal question in this case is, whether a State can, by the Federal Constitution, be sued by an individual citizen of another State? The point turns not upon the law or practice of England, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the United States; and particularly upon the extent of powers given to the Federal Judicial in the second section of the third article of the Constitution. . . . The judicial power . . . is expressly extended to "controversies between a State and citizens of another State." When a citizen makes a demand against a State, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to subject a State to be a Defendant, because it would effect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause; "controversies between two or more States," where a State must of necessity be Defendant. If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended?

Again what are we to do with the last clause of the section of judicial powers, viz. "Controversies between a state, or the citizens thereof, and foreign states or citizens?" Here again, States must be suable or liable to be made Defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the United States and a foreign State, as the clause expresses, one of them must be Defendant. And then, what becomes of the sovereignty of States as far as suing affects it? . . .

As to individual States and the United States, the Constitution marks the boundary of powers. 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. Thus the power of declaring war, making peace, raising and supporting armies for public defence, levying duties, excises and taxes, if necessary, with many other powers, are lodged in Congress; and are a most essential abridgement of State sovereignty. Again; the restrictions upon States; "No State shall enter into any treaty, alliance, or confederation, coin money, emit bills of credit, make any thing but gold and silver a tender in payment of debts, pass any law impairing the obligation of contracts;" these, with a number of others, are important restrictions of the power of States, and were thought necessary to maintain the Union; and to establish some fundamental uniform principles of public justice, throughout the whole Union. So that, 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. If the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment. But, while it remains, all offices Legislative, Executive, and

Judicial, both of the States and of the Union, are bound by oath to support it. . . .

JAY, CHIEF JUSTICE.

The question we are now to decide has been accurately stated, viz. Is a State suable by individual citizens of another State?

It is said, that Georgia refuses to appear and answer to the Plaintiff in this action, because she is a sovereign State, and therefore not liable to such actions. In order to ascertain the merits of this objection, let us enquire, 1st. In what sense Georgia is a sovereign State. 2nd. Whether suability is incompatable with such sovereignty. 3rd. Whether the Constitution (to which Georgia is a party) authorises such an action against her. Suability and suable are words not in common use, but they concisely and correctly convey the idea annexed to them.

1st. In determining the sense in which Georgia is a sovereign State, it may be useful to turn our attention to the political situation we were in, prior to the Revolution, and to the political rights which emerged from the Revolution. All the country now possessed by the United States was then a part of the dominions appertaining to the crown of Great Britain. Every acre of land in this country was then held mediately or immediately by grants from that crown. All the people of this country were then, subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing or exercised here, flowed from the head of the British Empire. They were in strict sense fellow subjects, and in a variety of respects one people. When the Revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people, of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman Provinces, viz. only that affinity and social connection which result from the mere circumstance of being governed by the same Prince; different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.

The Revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves

as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, coining money, etc. etc.

If then it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State, it may be useful to compare these sovereignties with those in Europe, that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter, are so essential to the former. There is reason to suspect that some of the difficulties which embarrass the present question, arise from inattention to differences which subsist between them.

It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and privileges; it is easy to perceive that such a sovereign could not be amenable to a Court of Justice, or subjected to judicial controul and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the Prince having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.

From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. Their Princes have personal powers, dignities, and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

2nd. The second object of enquiry now presents itself, viz. whether suability is compatible with State sovereignty.

Suability, by whom? Not a subject, for in this country there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally, sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them?

Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the Governor and Attorney General of Delaware, as on the Mayor or other Officers of the Corporation of Philadelphia? Will it be said, that the fifty odd thousand citizens in Delaware being associated under a State Government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former? In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in another place be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of Delaware holds an office of superior rank to the Mayor of Philadelphia, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.

If there be any such incompatability as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this, any one State in the Union may sue another State, in this Court, that is, all the people of one State may sue all the people of another State. It is plain then, that a State may be sued, and hence it plainly follows, that suability and state sovereignty are not incompatible. As one State may sue another State in this Court, it is plain that no degradation to a State is thought to accompany her appearance in this Court. It is not therefore to an appearance in this Court that the objection points. To what does it point? It points to an appearance at the suit of one or more citizens. But why it should be more incompatible, that all the people of a State should be sued by one citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike. Nor can I observe any greater inconveniencies in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light. But if any reliance be made on this inferiority as an objection, at least one half of its force is done away by this fact, viz. that it is conceded that a State may appear in this Court as Plaintiff against a single citizen as Defendant; and the truth is, that the State of Georgia is at this moment prosecuting an action in this Court against two citizens of South Carolina.[6]

The only remnant of objection therefore that remains is, that the State is not bound to appear and answer as a Defendant at the suit of an individual: but why it is unreasonable that she should be so bound, is hard to conjecture: That rule is said to be a bad one, which does not work both ways; the citizens of Georgia are content with a right of suing citizens of other States; but are not content that citizens of other States should have a right to sue them. . . .

Let us now turn to the Constitution. The people therein declare, that their design in establishing it, comprehended six objects. 1st. To form a more perfect union. 2nd. To establish justice. 3rd. To ensure domestic tranquillity. 4th. To provide for the common defence. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful to consider and trace the relations which each of these objects bears to the others; and to show that they collectively comprise every thing requisite, with the blessing of

[6]Georgia v. Brailsford, et al. Ant. 1.

Divine Providence, to render a people prosperous and happy on the present occasion such disquisitions would be unseasonable, because foreign to the subject immediately under consideration.

It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The question now before us renders it necessary to pay particular attention to that part of the second section, which extends the judicial power "to controversies between a state and citizens of another state."' It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a State may be Plaintiff. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

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, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions. . . .

If the Constitution really meant to extend these powers only to those controversies in which a State might be Plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the Constitution.

It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the Constitution. What is it to the cause of justice, and how can it effect the definition of the word controversy, whether the demands which cause the dispute, are made by a State against citizens of another State, or by the latter against the former? When power is thus extended to a controversy, it necessarily, as to all judicial purposes, is also extended to those, between whom it subsists.

The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: To the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one State, a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them. . . .

I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.

As this opinion, though deliberately formed, has been hastily reduced to writing between the intervals of the daily adjournments, and while my mind was occupied and wearied by the business of the day, I fear it is less concise and connected than it might otherwise have been. I have made no references to cases, because I know of none that are not distinguishable from this case; nor does it appear to me necessary to show that the sentiments of the best writers on Government and the rights

of men, harmonize with the principles which direct my judgment on the present question. . . .

For my own part, I am convinced that the sense in which I understand and have explained the words "controversies between States and citizens of another State," is the true sense. The extension of the judiciary power of the United States to such controversies, appears to me to be wise, because it is honest, and because it is useful. It is honest, because it provides for doing justice without respect of persons, and by securing individual citizens as well as States, in their respective rights, performs the promise which every free Government makes to every free citizen, of equal justice and protection. It is useful, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action, and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges; and they ought not to forget, that nothing but the free course of Constitutional law and Government can ensure the continuance and enjoyment of them. . . .[7]

The Eleventh Amendment (1795)

Chisholm v. Georgia was argued on February 5, 1793 and decided on February 18, 1793. On March 4, 1794, Congress proposed the following amendment, which was approved on February 7, 1795 when it was ratified by the twelfth of what were then fifteen States:

> Amendment XI: 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.

STUDY GUIDE: *What is the legal significance of this Amendment? Does it stand for the proposition that the Court in* Chisholm *was wrong in its interpretation of the Constitution and that Congress afterwards corrected it? Or does it signify that, while its interpretation may have been correct, this implication of the Constitution was politically unacceptable? Or is there no right or wrong of the matter; the Court simply felt one way about state sovereignty, while the Congress and the States felt another? Does it matter which of these descriptions of the relationship between the ruling in* Chisholm *and the Eleventh Amendment is right? Put another way, how would the*

[7]In February Term, 1794, judgment was rendered for the Plaintiff, and a Writ of Enquiry awarded. The Writ, however, was not sued out and executed; so that this cause, and all the other suits against States, were swept at once from the Records of the Court, by the amendment to the Federal Constitution, agreeably to the unanimous determination of the Judges, in Hollingsworth et al. v. Virginia, argued at February Term, 1798.

interpretation of the Eleventh Amendment today depend on which of these descriptions of how it relates to Chisholm *is correct? What does passage of the Eleventh Amendment say about the use of amendments either to correct judicial mistakes (assuming the Court erred) or to correct mistakes in the Constitution itself (assuming the Court was correct)? Should amendments be used more liberally? How would such a practice affect the Supreme Court and the Constitution itself? To appreciate fully the significance of these issues, you should know that there is now a modern "Eleventh Amendment" line of cases concerning the immunities of States from lawsuits in federal court that is discussed in Chapter 10 of this casebook (though not always covered in constitutional law courses).*

Assignment 5

3. *Fundamental Principles v. Expressed Constraints*

One of the striking aspects of the opinions in *Chisholm* was the degree to which Justices based their decision on fundamental principles, and only secondarily on the text of the Constitution. This practice, which was commonplace during this era, became the subject of a famous disagreement between Justices Chase and Iredell in the next case. This exchange provides a useful prelude to the last of the three earliest constitutional controversies covered in this chapter: The Aliens and Sedition Acts.

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

STUDY GUIDE: *How does Justice Iredell's opinion in* Calder *square with his representation to the North Carolina ratification convention (quoted in Section B) that "it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." Is he contradicting himself here? If not, was his previous affirmation misleading in any respect?*

The Court of Probate for Hartford disapproved a will naming Caleb Bull and his wife beneficiaries of the estate of Norman Morrison. As a result Calder and his wife were to inherit the estate. When the Bulls were prevented from contesting the probate court's decision because of a statute barring appeals initiated eighteen months after a ruling, they successfully prevailed upon the Connecticut legislature to enact a statute that permitted the appeal. They prevailed in their suit, thereby disinheriting the Calders who then brought this lawsuit. The Calders "contend, that the said resolution or law of the Legislature of Connecticut, granting a new hearing, in the above case, is an ex post facto law, prohibited by the Constitution of the United States; that any law of the Federal government, or of any of the State governments, contrary to the Constitution of the United States, is void; and that this court possesses the power to declare such law void." The Court held that the statute was