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THE TRUTH ABOUT JUSTICE IREDELL'S
DISSENT IN CHISHOLM v. GEORGIA (1793)

JOHN V. ORTH*

Professor John Orth delivered this lecture at the University of North Carolina School of Law on April 14, 1994, as part of the Faculty Perspectives Series. Professor Orth explains that Justice Iredell's dissent in Chisolm v. Georgia has long been misrepresented: by the Supreme Court in its interpretation of the events surrounding the Eleventh Amendment's ratification; by Southerners who espoused states rights in the nineteenth century; and by legal historians who verified these accounts. Professor Orth exposes the "truth" in Justice Iredell's dissent—that the opinion of the North Carolina justice not only reveals his Federalist leanings, but also presages Chief Justice John Marshall's reasoning in Marbury v. Madison.

What is truth? said jesting Pilate,
and would not stay for an answer.

Francis Bacon¹

Before the dissolution of the Soviet Union, one of the lesser but revealing crimes of which it stood accused was the promulgation of an official version of history, one that needed to be updated from time to time to suit the vagaries of the "party line." Official history—a selective, laudatory, sometimes mendacious account of the origin and development (usually described as the "rise") of a particular state or institution—was not, however, an exclusive product of the failed socialist state. Other states produced similar, if not quite so ruthlessly enforced, versions of their own official history, and stateless races and ethnic groups did (and do) the same, to the extent permitted by their more limited resources. In the United States the early federal government by and large lacked the means and, mercifully, the will to dictate its view of the national past; yet the Supreme Court, when it relies in its decisions on one version or another of constitutional history, did (and still does) generate a sort of official legal history.


Two hundred years ago in its February Term 1793—on February 18, 1793, to be exact—the Supreme Court announced the decision in its first great case, *Chisholm v. Georgia*, an action by a South Carolina executor of the estate of a South Carolina merchant owed money by the State of Georgia. With an authorized strength of six members but with one vacancy, the Court ruled by a vote of four to one that it had jurisdiction of the case and that judgment by default would be entered against Georgia unless the state could produce a timely legal defense to the claim. Following the immemorial practice of the English judges at Westminster Hall, the American justices then sitting in Philadelphia delivered their opinions seriatim (one at a time), in reverse order of seniority. Speaking first, the newcomer Justice James Iredell of North Carolina delivered a lengthy and scholarly dissenting opinion, a dissent that for reasons both proximate and remote would eventually become part of America's official constitutional history.

The immediate result of the majority decision in *Chisholm* was a proposed constitutional amendment, which would become the first to be adopted after the ten amendments comprising the Bill of Rights. Because of delays to give Georgia an opportunity to respond, final judgment in the case was not entered until February 14, 1794. Within weeks, both houses of Congress had proposed 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." By February 7, 1795, less than a year after its proposal and not quite two years after the Supreme Court's momentous decision in *Chisholm*, the requisite number of state legislatures had acted favorably.

After some skillful casuistry by Chief Justice John Marshall, little was heard in the Supreme Court about the Eleventh Amendment and

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2. 2 U.S. (2 Dall.) 419 (1793).
4. *Id.* at 24-25.
7. U.S. CONST. amend. XI.
8. *See* Jacobs, *supra* note 5, at 67. Presidential proclamation of ratification was delayed almost three years, until January 8, 1798, the date traditionally given for the Amendment. 1 Messages and Papers of the Presidents, 1789-1897, at 260 (James D. Richardson ed., 1897).
nothing about Justice Iredell’s dissent in *Chisholm.*

Then in the 1880s, in a curious repetition of post-Revolutionary history, the Supreme Court was presented with a series of claims against states that had defaulted on their debts. The state bond cases, all involving Southern states and all stemming directly or indirectly from defeat in the Civil War, confronted the Court anew with the challenge of exercising jurisdiction over a recalcitrant state. Like the biblical householder who knows how to bring forth from his storeroom things new and old, the Supreme Court retrieved the Eleventh Amendment.

*Hans v. Louisiana,* argued and submitted on January 22, 1890, and decided on March 3, 1890, was a suit brought by a citizen owed money by his own state; as such, it did not directly implicate the Eleventh Amendment, which applies only to suits by “Citizens of another State” (or by “Citizens or Subjects of any Foreign State”). What was required for decision in *Hans* was a construction of the unamended part of Article III of the Federal Constitution, describing the scope of judicial power. The relevance of the Eleventh Amendment and of Iredell’s dissent in *Chisholm* was in the light they shed, if any, on the meaning of that text. Justice Joseph P. Bradley, on behalf of a unanimous Court in *Hans,* dismissed the case for want of jurisdiction.

The history of the Eleventh Amendment, according to Justice Bradley, proved that Article III had never been intended to extend jurisdiction to such cases. *Chisholm,* he explained,

created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legis-


10. See id. at 78-79.


12. See Orth, supra note 9, at 66-67, 75.

13. 134 U.S. 1 (1890).

14. U.S. Const. amend. XI.

15. *Hans,* 134 U.S. at 21. Justice John Marshall Harlan concurred only in the holding, “that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued.” *Id.* (Harlan, J., concurring). He expressly disapproved Justice Bradley’s “comments made upon the decision in *Chisholm v. Georgia,*” which Harlan described as “not necessary to the determination of the present case,” adding: “Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.” *Id.* (Harlan, J., concurring).
latures and all courts, actually reversed the decision of the Supreme Court.\textsuperscript{16}

The Eleventh Amendment, in other words, restored—it did not alter—the original understanding of the Constitution. Prompted by \textit{Chisholm}, the Amendment applied literally only to suits against states by citizens of another state (and to similar suits by foreigners); nonetheless, Justice Bradley reasoned, the same understanding extended to suits by citizens of the defendant state as well.\textsuperscript{17}

Here the opinion of Iredell, the sole dissenter in \textit{Chisholm}, was vouched in evidence to support Justice Bradley's version of history:

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of \textit{Chisholm v. Georgia}; and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

Looking back from our present standpoint at the decision in \textit{Chisholm v. Georgia}, [Justice Bradley continued], we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people.\textsuperscript{18}

\textsuperscript{16} Id. at 11.
\textsuperscript{17} Id. at 14-15.
\textsuperscript{18} Id. at 12.
Justice Bradley deployed at this point quotations from Hamilton, Madison, and Marshall against constitutional jurisdiction over suits against states before returning to Iredell's dissent:

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States.

Finally, Justice Bradley turned to the relevant statute in *Hans*, the Judiciary Act of 1875, for what he called "an additional reason why the jurisdiction claimed for the Circuit Court does not exist." Admitting that the language on this point was identical to the Judiciary Act of 1789 and that the majority in *Chisholm* had not found it sufficient to deny jurisdiction, Justice Bradley primly concluded: "Justice Iredell thought differently." Then in a cadenced sentence that ended not only his brief statutory review but also his entire exposition of the official version of *Chisholm*, Justice Bradley announced: "In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard."

Thus was the official version of this chapter of American legal history established. Justice Bradley's line on *Chisholm* and the Eleventh Amendment is familiar to most law students today, whose knowledge of constitutional history (such as it is) is gleaned from cases assigned in law school: *Hans* is a staple of the course on federal jurisdiction. Legal scholars loyally followed the Justice in their "unofficial" histories; for instance, Charles Warren paraphrased *Hans* in his

19. *Id.* at 12-14.
20. *Id.* at 16.
21. *Id.* at 16.
22. *Id.* at 16.
23. *Id.*
24. *Id.*
25. *Id.*
classic three-volume study, *The Supreme Court in United States History*, which set the standard for later accounts:

The decision fell upon the country with a profound shock. Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court; and their surprise was warranted, when they recalled the fact that the vesting of any such jurisdiction over sovereign States had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption.\(^{27}\)

South of the Mason-Dixon Line, Iredell's dissent found a particularly enthusiastic audience. As the sectional division over slavery widened and John C. Calhoun began the systematic exposition of states rights theory, the conjunction of a Southern justice with impeccable Revolutionary credentials and the Eleventh Amendment, a *locus classicus* in the Federal Constitution of state sovereignty, proved irresistible. In the first, indeed until recently the only biography of Justice Iredell,\(^{28}\) published in 1858 by Griffith J. McRee (who had married the Justice's granddaughter), the dissent in *Chisholm* was explicitly related to the burning topic of secession, and Justice Iredell was hailed as a states rightist *avant la lettre*:

The opinion of Judge Iredell enunciates either directly or by implication the leading principles of what has been since known as the "State Rights Doctrine"... [T]he men of the South, in measuring the Sovereignty of the States, do not simply look to the Constitution, because, in the language of Judge Iredell, "A State does not owe its origin to the Government of the United States: it was in existence before it," but regard the records of the past as establishing as a great historical fact that the Government is a confederacy of sovereign States, and not a Government of one, undivided people... \(^{29}\)

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27. 1 Charles Warren, *The Supreme Court in United States History* 96 (1922). Recent research by the editors of *The Documentary History of the Supreme Court of the United States*, 1789-1800, has revealed that the public reaction to the decision in *Chisholm* was "less deeply rooted than scholars have believed." Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J. Sup. Ct. Hist. 73, 86.


29. 2 Griffith J. McRee, *Life and Correspondence of James Iredell* 381-82 (1858) (quoting with unindicated omission from Justice Iredell's dissent in *Chisholm*, 2 U.S. (2 Dall.) at 448). The ideas that *Chisholm* concerned states rights and that Justice Iredell's dissent concerned the Constitution may have come from George Van
After the Civil War and the agonies of Reconstruction, Iredell’s dissent was even more cherished in certain Southern circles. “In Chisholm v. Georgia, standing alone, Iredell enunciated and, with a wealth of learning and ‘arsenal of argument,’ maintained the position that a State could not be ‘haled into court’ by a citizen of another State,”30 wrote the learned United States District Judge for the Eastern District of North Carolina, Henry Groves Connor, in 1912 in the University of Pennsylvania Law Review. He concluded that the Eleventh Amendment “was essentially a reversal of the decision of the court and writing into the Constitution the dissenting opinion of Justice Iredell.”31

White Southerners’ interpretation of Reconstruction came to dominate national historiography. In a revealing assignment for the monumental Dictionary of American Biography in the 1930s, a lead-

Santvoord, Sketches of the Lives, Times and Judicial Services of the Chief Justices of the Supreme Court of the United States 53-55 (1854), which McRee quoted:

This great case excited an unusual degree of attention, both on account of the novelty of the questions raised, and the important political consequences that were supposed to be involved in the decision. The doctrine of State Sovereignty and State Rights was for the first time brought before the Court for discussion.

....

These views [of the other justices] were not concurred in by Judge Iredell, who delivered a dissenting opinion. That able jurist considered the question also in a Constitutional point of view, and as a question of strict construction.

McREE, supra, at 51-54.

The modern editor of the Iredell papers has described McRee’s work as a “political weapon” against the North, explaining that McRee “discovered in several of Justice Iredell’s writings, most notably in his dissenting opinion in the Supreme Court case of Chisholm v. Georgia, the ‘first authoritative expounder of the doctrine of States’ rights (Sovereignty of the States) .... ’” 1 THE PAPERS OF JAMES IREDELL xxix (Don Higginbotham ed., 1976) (quoting letters from McRee to David L. Swain).

The states rights label was repeated in 1 HAMPTON L. CARSON, THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY 174-75 (1892) (“From these views Iredell, alone, dissented, in an opinion of which it has been truly declared that it enunciates either directly or by implication all the leading principles of what has since become known as State Rights Doctrine . . . .”).

30. H.G. Connor, James Iredell: Lawyer, Statesman, Judge, 60 U. PA. L. REV. 225, 240 (1912) (footnote omitted). In an ingenuous remark, Connor admitted that “[i]t is a singular fact that, although Hamilton, in the Federalist, and Marshall and Madison in the Virginia Convention had expressed the opinion maintained by Iredell, neither he nor either of the other justices referred to such opinions.” Id. at 244. The singularity vanishes with the recognition that the remarks of Hamilton, Marshall, and Madison, made during the ratification process, concerned the Constitution, while Justice Iredell strictly limited himself to the later-passed Judiciary Act. See infra text accompanying notes 35-39.

31. Connor, supra note 30, at 244; see Junius Davis, Address at the Presentation of the Portraits of Alfred Moore and James Iredell to the Supreme Court of North Carolina on Behalf of the North Carolina Society of the Sons of the Revolution (Apr. 29, 1899) in 124 N.C. 559, 565 (1899).
ing historian of Reconstruction, J.G. deR. Hamilton, was asked to write the article on Justice Iredell. Conflating McRee and Connor, Hamilton presented the Justice as first and foremost a states rightist:

His most famous opinion was that in *Chisholm vs. Georgia* . . . where, in holding that a state could not be "haled" into court by a citizen of another state, he enunciated, either directly or by implication, all the leading principles of the state-rights doctrine. It is also a splendid legal argument, closely reasoned, and confined to the question before the court, whether an action of assumpsit could lie against a state . . . . Recalling that such an action could not lie against the Crown of England, he argued that it could lie against a state only by authority of the Constitution and declared that in his judgment it could not be found there . . . . The opinion gives an excellent idea of Iredell's political views as a state-rights Federalist. His dissent not only met with the people's approval, as evidenced by the passage of the Eleventh Amendment, but received the almost unanimous indorsement of the Supreme Court in the case of *Hans vs. Louisiana* nearly a century later . . . .

The truth about Iredell's dissent is otherwise and more interesting. In an opinion spread over twenty-one pages of small print in Alexander Dallas's report, the constitutional question was addressed only in the concluding paragraph. *Everything* that Iredell said on the subject in *Chisholm* is in the following hesitant passage:

So far as this great question affects the Constitution itself, if the present afforded, consistently with the particular grounds of my opinion, a proper occasion for a decision upon it, I would not shrink from its discussion. But it is of extreme moment that no Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opin-

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32. J.G. deR. Hamilton, *Iredell, James*, in 5 *Dictionary of American Biography* Part 1 at 492, 493 (Dumas Malone ed., 2d ed. 1961). Even as Hamilton wrote, the "official" version of *Chisholm* was undergoing revision. In his 1927 lectures at Columbia University, Charles Evans Hughes, citing the Supreme Court's opinion in South Dakota v. North Carolina, 192 U.S. 286, 318 (1904), observed: "Justice Bradley in delivering the opinion in [Hans v. Louisiana] took the view that the decision in *Chisholm v. Georgia* was wrong, but this was afterwards said to be an expression *obiter* and not binding upon the Court." *Charles Evans Hughes, The Supreme Court of the United States* 120 (1928).
ion is 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, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial.\textsuperscript{33}

In an opinion said to have required an hour and a quarter to deliver,\textsuperscript{34} the comments on the constitutional question (two sentences) must have taken barely a minute.

The truth is that Justice Iredell’s dissent rested solely, as he himself was repeatedly at pains to point out, on his interpretation of the Federal Judiciary Act of 1789.\textsuperscript{35} With a care that could be mistaken for pedantry, Justice Iredell framed the question: “Will an action of assumpsit lie against a State?”\textsuperscript{36}—by which he meant literally to confine the case to the narrow question of whether a state could be sued in that particular form of action, not whether a state could be sued generally. For the Court to hold that a state could be sued in assumpsit, Iredell methodically reasoned that “it must be in virtue of the Constitution of the United States, and of some law of Congress conformable thereto.”\textsuperscript{37} The Constitution indeed said that the “judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State,”\textsuperscript{38} and the Judiciary Act provided that “the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party . . . .”\textsuperscript{39}

When the constitutional and statutory texts were so similar, it may be asked why Justice Iredell remained insistent that his opinion rested only on the latter, rather than on the former (or both). The answer is that he had grasped rather earlier than most of his countrymen (even those of the Federalist persuasion) that constitutions and statutes are essentially different—and that the difference inevitably entails the doctrine of judicial review. A few years earlier, reflecting

\textsuperscript{33} Chisholm, 2 U.S. (2 Dall.) at 449-50.
\textsuperscript{34} Fred L. Israel, James Iredell, in 1 The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions 121, 130 (Leon Friedman & Fred L. Israel eds., 1969).
\textsuperscript{35} Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.
\textsuperscript{36} Chisholm, 2 U.S. (2 Dall.) at 430.
\textsuperscript{37} Id.
\textsuperscript{38} U.S. Const. art. III, § 2.
\textsuperscript{39} Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80.
on North Carolina’s Constitution, Iredell had announced in an address to the public: “I have . . . no doubt, but that the power of the [General] Assembly is limited and defined by the constitution. It is a creature of the constitution.”40 In practice this meant that the General Assembly could not by a simple statute deny a right reserved in the Constitution, as Iredell on behalf of an aggrieved client convinced a reluctant state court in the celebrated case of Bayard v. Singleton.41 In a private letter to one of North Carolina’s delegates to the Constitutional Convention in 1787, Iredell was even clearer:

[I] confess it has ever been my opinion, that an act inconsistent with the Constitution was void; and that the judges, consistently with their duties, could not carry it into effect. The Constitution appears to me to be a fundamental law, limiting the powers of the Legislature, and with which every exercise of those powers must, necessarily, be compared.42

In Chisholm Justice Iredell had his first opportunity to write this opinion, if not into law, at least into unequivocal dictum. The federal legislature could, in the Judiciary Act, direct the manner of the Supreme Court’s proceedings with 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.43

Having reviewed the relevant texts, constitutional and statutory, and enunciated the doctrine of judicial review by way of establishing the priority of the former over the latter, Iredell then turned to the central concern of his long dissent, the manner of proceeding in assumpsit against a state. “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

40. James Iredell, To the Public, in 2 McRee, supra note 29, at 146 (address dated Aug. 17, 1786). Iredell added parenthetically: “I hope this is an expression not prosecutable.” Id.
41. 1 Mart. 48, 1 N.C. 42 (1787). Bayard was one of the first reported cases supporting judicial review. 1 Alfred H. Kelly, et al., The American Constitution: Its Origin and Development 86 (7th ed. 1991).
43. Chisholm, 2 U.S. (2 Dall.) at 433.
directions from the Legislature in this particular . . . ." That brought him to the All Writs section of the Judiciary Act:

[A]ll 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.\footnote{Id.}

The "principles and usages of law" must, Justice Iredell concluded, refer to the common law, which led him to reformulate his question: Could a state be sued in assumpsit at common law? Here Justice Iredell mentioned what must have seemed to him a commonplace of middle-of-the-road Federalism but what in after years was to endear him to the states rights school, the concept of divided sovereignty:

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 surrendered must remain as it did before.\footnote{Chisholm, 2 U.S. (2 Dall.) at 435.}

At last, Iredell was ready for the final restatement of his question: Did an action of assumpsit lie at common law against the sovereign? Although the answer was a foregone conclusion, Justice Iredell filled page after page with a detailed (and tedious) summary of English law on the question,\footnote{Chisholm, 2 U.S. (2 Dall.) at 437-45.} much of it quoted from Lord Somers's judgment in the Bankers' Case,\footnote{14 Howell's State Trials 1 (1700).} which to this day is regarded as "a classic on the subject of the legal remedies available against the Crown."\footnote{David M. Walker, The Oxford Companion to Law 1156 (1980).} At the end Iredell was able to pronounce the unremarkable conclusion that at common law the only remedy in such cases was by petition of right.\footnote{Chisholm, 2 U.S. (2 Dall.) at 445.}

\begin{footnotes}
\item[44] Id.
\item[45] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.
\item[47] Chisholm, 2 U.S. (2 Dall.) at 437-45.
\item[48] 14 Howell's State Trials 1 (1700).
\item[50] Chisholm, 2 U.S. (2 Dall.) at 445.
\end{footnotes}
tions to negate the notion that states are in any sense corporations deriving their legal existence from the national government,\(^5^1\) he was ready to sum up:

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. 2d. That Congress has provided no new law in regard to this case, but expressly referred us to the old. 3d. That 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 . . . \(^5^2\)

What makes the truth about Justice Iredell's dissent in *Chisholm* more interesting than the official version—let alone the states rights falsification—is that it reveals a subtle legal mind at work, and a determinedly Federalist mind at that! Among history's many ironies is the fact that Justice Iredell, himself so scrupulous about the distinction between statutes and constitutions, should be known today chiefly through commentaries by those who refused to see the difference. In consequence, his reputation has suffered from the need to incorporate a supposedly restrictive reading of the Constitution in *Chisholm* into a life story otherwise plainly Federalist. To summarize the supposed inconsistency, the label "a states rights Federalist" (whatever that means) was invented and has been frequently repeated.\(^5^3\) To rediscover the statutory basis of Iredell's dissent is to rediscover his consistency as a Federalist: one may dispense with the "states rights" qualifier.\(^5^4\) No one ever thought John Marshall any less a Federalist because he led the Supreme Court to decline jurisdiction over a suit for a writ of mandamus against James Madison. Reading Justice Iredell's dissent in *Chisholm* the way scholars have long read Marshall's

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\(^5^1\) Id. at 446-49.

\(^5^2\) Id. at 449.


\(^5^4\) Don Higginbotham, the editor of the Iredell papers, *see* 1 *The Papers of James Iredell*, *supra* note 29, observed that "there was a remarkable consistency to Iredell's political thinking throughout his life." Don Higginbotham, *Iredell, James, Sr.* in *3 Dictionary of North Carolina Biography* 253, 254 (William S. Powell ed., 1988).
opinion of the court in *Marbury v. Madison* shows that Iredell, like Chief Justice Marshall, is better described as a canny Federalist.

Iredell had labored tirelessly in the Federalist cause in North Carolina. Although the proponents of the Constitution were hopelessly outnumbered at the Hillsborough Convention in 1788, Iredell led them in an exhaustive section-by-section analysis of the text, an application of Roger Sherman's sage advice, "When you are in a minority, talk; when you are in a majority, vote." Because the Anti-Federalists refused to cooperate, the Federalists had to "provide[] both point and counterpoint . . . ." The inevitable defeat was not the end, as Iredell (and another Federalist, William R. Davie) arranged to have the debates published, and their wide circulation helped to turn the tide. Iredell and other Federalists then skillfully engineered a second, successful convention at Fayetteville in 1789.

Rewarded by President Washington with a Supreme Court appointment in 1790, Iredell rode the Southern Circuit and was acutely aware of the continuing strength of anti-national feeling. Advance warning of the specific problems posed by *Chisholm* came when he presided over the federal circuit court in which an initial phase of that case was heard. Rejected by Justice Iredell and his coadjutor on circuit, Chisholm's claim was commenced anew as a case within the Supreme Court's original jurisdiction, the case in which Justice Iredell filed his now famous dissent.

Alert to the risks the Court ran by deciding against Georgia (or any other recalcitrant state), Justice Iredell struggled mightily to point his colleagues in a safer direction. If the Judiciary Act could be read as not authorizing suits against states for the recovery of money, even for the picayune reason that it failed to provide for the manner of proceeding in actions of *assumpsit*, then the Court could honorably

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58. BLACKWELL P. ROBINSON, WILLIAM R. DAVIE 208-10 (1957).

59. Id. at 210-18.

retreat from the field by finding no jurisdiction. The early Federalist
historian, Richard Hildreth, came closer to the mark than McRee and
others, their eyes blinded by the glare of states rights: "Judge Iredell,
who seemed to lean against the jurisdiction, wished to escape a deci-
sion on an objection to the form of the action." Hildreth's insight,
unsuited to the needs of the time, was not, however, destined for in-
clusion in the official version of the case.

Had Iredell been able to pick up two votes from among his col-
leagues in Chisholm, the Court would have avoided the explosive is-
sue of suits against states for the recovery of money, and the
Constitution would have been spared amendment. The plaintiff in
Chisholm would have been no worse off, since (as it turned out) he
lost his legal remedy anyway. Yet Justice Iredell's ingenious solution
would have saved federal jurisdiction over such suits as a sort of
"sleeping thunder," ready to be awakened at the command of Con-
gress. Even with such encouragement, the Court would be danger-
ously exposed; politicians have an alarming way of abandoning their

61. Hildreth's full account of Chisholm v. Georgia is as follows:
Shortly before the termination of the [Feb. 1793] session, the Supreme Court of
the United States decided the first great constitutional question brought before it.
One Chisholm, being a citizen of another state, had brought an action against the
State of Georgia to recover a sum of money alleged to be due to him from the
state. Though the Governor of Georgia had been duly served with a copy of the
writ, no appearances had been entered to the action, whereupon the counsel for
the plaintiff moved for a judgment by default. This raised the question whether
the states were liable to be sued by individual citizens of other states. The affirm-
ative was maintained by Randolph, the attorney general, who appeared for the
plaintiff. Instead of making an argument in reply, the counsel retained for the
State of Georgia put in a written protest denying the jurisdiction of the court.
The case seemed to be plain enough, since, by the terms of the Constitution, the
jurisdiction was given in so many express words. The idea, however, of being
sued by individuals had excited a great fluttering in many of the states, none of
which had been remarkably prompt in paying their debts. The objection had
been started that, as the states were sovereign, they could not be sued. Judge
Iredell, who seemed to lean against the jurisdiction, wished to escape a decision
on an objection to the form of the action. The other judges held that the form of
the action was well enough; and that, as the United States constituted one nation,
the alleged sovereignty of the separate states must be considered to be so far
modified thereby as to subject them, under the terms of the Constitution, to suits
in the national courts.

62. The subsequent history of the Chisholm claim, voluntarily satisfied by Georgia in
1847, is detailed in Mathis, supra note 3, at 27-29. See also Christine Desan, Legal Immuni-
ty and Legislative Obligation: Institutional Understandings of Remedy in the Early Re-
public, Address Before the American Society for Legal History (1993) (arguing that
Chisholm and the Eleventh Amendment should be understood in terms of a late eigh-
teenth century "legislatively centered" notion of popular sovereignty).
ally in time of greatest need. So Iredell astutely added at the end of his long disquisition on the Judiciary Act the brief qualification that even with appropriate legislative authorization the Court would still have the last word: if it took jurisdiction, it would leave to the politicians to provide for the enforcement of any judgments; if it refused jurisdiction on constitutional grounds, it would make its consolation prize a clear exercise of judicial review. In an uncanny premonition of Chief Justice John Marshall's reasoning in *Marbury v. Madison* a decade later, Justice Iredell observed that Congress could not confer upon the Court a jurisdiction that exceeded constitutional bounds.

After *Chisholm*, Justice Iredell's career as a Federalist continued unabated. On the Supreme Court his opinions in *Penhallow v. Doane's Administrators* and *Hylton v. United States* were strongly nationalist, and in *Calder v. Bull* he reiterated his belief in judicial review and warned again against the risks of too aggressive a judicial approach. On circuit he followed the orthodox Federalist line, supporting the Neutrality Proclamation (1793) and suppression of the Whiskey Rebellion (1794). In Spring Term 1799, in what was to be his last public judicial act, a charge to the grand jury in Philadelphia, he upheld the constitutionality of the Alien and Sedition Acts.

It is a matter of history that Justice Iredell's cautions did not restrain his headstrong Federalist colleagues in *Chisholm* and that he failed to save the Court from itself. Consequently, the Constitution suffered the addition of the Eleventh Amendment, and future generations of justices have labored to develop a consistent jurisprudence

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64. 5 U.S. (1 Cranch) 137 (1803).
65. 3 U.S. (3 Dall.) 54, 89-108 (1795) (Iredell, J., concurring).
66. 3 U.S. (3 Dall.) 171, 181-83 (1796) (Iredell, J., concurring).
67. 3 U.S. (3 Dall.) 386, 398-400 (1798) (Iredell, J., concurring).
68. Id. at 400 (Iredell, J., concurring).
70. IREDELL (Apr. 12, 1796), reprinted in 3 DOCUMENTARY HISTORY, supra note 69, at 106, 108-09.
71. IREDELL (Apr. 11, 1799), reprinted in 3 DOCUMENTARY HISTORY, supra note 69, at 332-51.
concerning suits against states, with only limited success.\textsuperscript{72} In the end, Iredell was the prophet of the Eleventh Amendment, not (as Justice Bradley would have it in the official version) because Justice Iredell confidently predicted the restoration of the original understanding, but because Iredell foresaw in sorrow the consequences of impractical judicial Federalism.\textsuperscript{73}

Justice Iredell's Federalism, nuanced to take account of contemporary realities, was in fact to triumph over Anti-Federalism (and prophetically over states rights), but he did not live to see it. His career cut short by untimely death on October 20, 1799, barely forty-eight years old, Iredell was denied the opportunity to guide his beloved cause to its ultimate victory. Deprived of his acute intelligence, Federalism might indeed have gone to grief had it not promptly found a new and far-sighted leader in John Marshall. Also tempered in the fire surrounding Southern Federalism, Marshall was, as Chief Justice, better positioned than Justice Iredell, sustained by more realistic colleagues, and also longer lived. It was he, rather than Justice Iredell, who found the correct responses to the challenges that were to come.\textsuperscript{74} The rest, as they say, is history.

\textsuperscript{72} For a description of "the theoretical incoherence of eleventh amendment jurisprudence," see Howard P. Fink & Mark V. Tushnet, Federal Jurisdiction: Policy and Practice 137-40 (1984).

\textsuperscript{73} In an ambiguous sentence in Hans v. Louisiana, 134 U.S. 1 (1890), Justice Bradley admitted the statutory basis of Justice Iredell's dissent:

Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, \textit{by proper legislation}, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

\textit{Id.} at 12 (1890) (emphasis added).

\textsuperscript{74} I cannot agree with the suggestion by Ireland, supra note 53, at 441, that had Justice Iredell "lived a longer life and continued to serve on the Court during the period of John Marshall, his brilliant legal mind, states rights federalism, and penchant for dissent might have undermined the chief justice's campaign for judicial unanimity and constitutional nationalism." Quite the contrary!