The Federalism of James Iredell in Historical Context

Christopher T. Graebe

THE FEDERALISM OF JAMES IREDELL IN HISTORICAL CONTEXT

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James Iredell's tenure on the United States Supreme Court presents a paradox. George Washington appointed Iredell to the Court in part because of Iredell's well-known Federalist politics. Yet in his landmark dissent to Chisholm v. Georgia, *Iredell was the sole justice to assert that state sovereignty foreclosed federal court jurisdiction over suits filed against states by citizens of other states. In this Article published in the bicentennial year of Iredell's appointment to the Supreme Court, Mr. Graebe resolves the paradox of the Justice's beliefs by demonstrating that Iredell's* Chisholm *dissent sprung from a pragmatic understanding of the new Union's needs. Justice Iredell argued to limit federal judicial power over states so that states would more freely accept the burdens, and thus enjoy the benefits, of federal government.*

On February 10, 1790, James Iredell became the first North Carolinian appointed to the United States Supreme Court.[1] In the years preceding his nine-year tenure on the Court, Iredell had become very familiar with the workings of state government[2] and with the animosity of North Carolinians toward an increasingly powerful federal government.[3] His name had become known to President Washington and others outside the state because of his strong and vocal, if initially unsuccessful, advocacy on behalf of ratification of the United States Constitution.[4] Moreover, there is little doubt that President Washington chose Iredell to serve on the Court not only because of his experience and ability, but

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1. The only other North Carolinian to serve on the Court was Alfred Moore, who was appointed by John Adams in 1799. Moore served on the Court for five years and produced only one written effort, a brief opinion in Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800) (construing a navy regulation regarding the capture of goods from enemy ships); *see* 1 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 269-81 (1969).

2. In the decade and a half before his appointment to the Court, Iredell had worked as a private lawyer, a collector at the port of Edenton, a political essayist, a state district judge, state attorney general, and "lobbyist" for the ratification of the federal constitution. A concise and informative biography of Iredell may be found in 1 L. FRIEDMAN & F. ISRAEL, *supra* note 1, at 121-32. For an equally brief but more sentimental rendering of Iredell's life, see Connor, *James Iredell: Lawyer, Statesman, Judge*, 60 U. PA. L. REV. 225 (1912).

3. North Carolina's opposition to the United States Constitution and its suspicion of a strong national government are outlined in H. LEFLER & A. NEWSOME, NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE 272-98 (3d ed. 1973).

4. Iredell first received national attention for his Federalist views and support of the Constitution through a political tract published in 1788. Written under the pseudonym "Marcus," his "Answers to Mr. [George] Mason's Objections to a New Constitution Recommended by the Late Convention at Philadelphia" was published at the same time the earliest issues of *The Federalist*

also because of his politics.[5] One might have expected that a man of such staunch and unwavering Federalist views would vote for a strong national government in every situation. Indeed, Iredell did support Washington's policies, both publicly and privately, in contexts ranging from the Neutrality Proclamation to Jay's Treaty to the suppression of the Whiskey Rebellion.[6] In spite of the probable hopes of the extreme Federalists and fears of his opponents in North Carolina, however, Iredell's Federalist position was tempered with a respect for state sovereignty and a pragmatic approach to meeting the needs of a Union in its infancy.

This essay will examine the Federalist views of James Iredell in a particular historical context, namely, the debate over the sovereign immunity of the states. It will first set the stage for discussing Iredell's federalism by discussing several main players in the post-Revolution constitutional arena. It will then address the development of Iredell's views from his early speeches and debates in North Carolina to his landmark dissent in *Chisholm v. Georgia*.[7] The paper then analyzes Iredell's *Chisholm* dissent and concludes that Iredell's strong advocacy of state sovereignty was grounded in a sincerely Federalist position, but one molded in the political turbulence of post revolutionary North Carolina.

The Articles of Confederation[8] provided for no permanent national judiciary. Article IX, which granted certain powers to Congress, was the only provision that addressed the creation of federal courts. This provision empowered Congress to appoint "courts for the trial of piracies and felonies committed on the high seas and establish[] courts for receiving and determining appeals in all cases of captures, provid[ed] that no member of Congress shall be appointed a Judge of said courts."[9] No court was ever established under this provision; Congress delegated the trials of such offenses to designated state judges.[10] In Janu-

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appeared and was well received by national Federalist leaders. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 1, at 127.

His fame expanded after northern Federalists learned of his vigorous support of the Constitution at the Hillsboro Convention of 1788, the first of North Carolina's two ratification conventions. *See generally* W. MURPHY, THE TRIUMPH OF NATIONALISM 386-99 (1967) (describing North Carolina constitutional debates). In 1789 Hugh Williamson, who had signed the federal constitution for North Carolina, wrote from New York: "The North Carolina debates are considerably read in this State especially by Congress members; some of whom, who formerly had little knowledge of the citizens of North Carolina, have lately been very minute in their inquiries concerning Mr. Iredell." L. FRIEDMAN & F. ISRAEL, *supra* note 1, at 127 (quoting Williamson letter).

The delegates of the Hillsboro Convention soundly rejected ratification of the Constitution. In 1789 a huge swing in public sentiment, chiefly brought about by a public education campaign conducted by Iredell and William Davie, resulted in a sweeping victory for the Federalists in the legislature. A new convention was called in Fayetteville, and North Carolina ultimately ratified the Constitution on November 21, 1789. *See* H. LEFLER & A. NEWSOME, *supra* note 3, at 284-85.

5. Washington's concern with the political views of his appointees is demonstrated in a 1789 letter expressing doubt with regard to William Paca's appointment to the Maryland District Court: "[H]is sentiments have not been altogether in favor of the General Government." 30 THE WRITINGS OF GEORGE WASHINGTON 471 (J. Fitzpatrick ed. 1944), *cited in* 1 J. GOEBEL, JR., THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 553 n.7 (1971).

6. *See* L. FRIEDMAN & F. ISRAEL, *supra* note 1, at 131.

7. 2 U.S. (2 Dall.) 419, 429-50 (1793).

8. The Articles of Confederation were approved by Congress in November 1777.

9. ARTICLES OF CONFEDERATION art. IX.

10. *See* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE

ary 1780 Congress established the first national court, The Court of Appeals in Cases of Capture, and authorized it to hear appeals from state admiralty cases.[11] The court's tenure was short-lived. By 1787 it had closed its doors, but in the seven years since its inception it had adjudicated 118 cases and had fixed in the minds of national policymakers that admiralty and maritime cases were proper areas of federal jurisdiction.[12]

Article IX also granted Congress the power to create temporary federal tribunals for resolution of disputes between states.[13] The cumbersome procedure incident to the creation of these courts, however, contributed to their irrelevance. Only one dispute was ever heard by such a court, and the case ultimately was settled.[14] By May 1787, when the constitutional convention debates began, it was clear that the new Union needed a permanent federal judiciary.

The delegates to the convention readily accepted the idea of a national court system.[15] The delegates differed, however, over the proper jurisdiction of the proposed federal courts. The first resolution respecting federal jurisdiction was offered jointly by Edmund Randolph and James Madison: "that the jurisdiction of the National Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony."[16] After counterproposals and committee hearings, the final proposal on the jurisdiction of the federal courts was presented by John Rutledge, the chairman of the Committee of Detail. It provided in part:

> The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers, and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard territory or jurisdiction); between a state and citizens of another State; between citizens of different States; and between a state, or the citizens thereof, and foreign states, citizens, or subjects.[17]

The Committee's version of federal jurisdiction passed with little debate and

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FEDERAL COURTS AND THE FEDERAL SYSTEM 5 n.18 (3d ed. 1988) [hereinafter THE FEDERAL COURTS].

11. *Id.*

12. *See* HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES, 1776-1826, at 157 (1939).

13. ARTICLES OF CONFEDERATION art. IX.

14. For an outline of the procedural provisions of Article IX's authorization of Congress to create temporary courts, see THE FEDERAL COURTS, *supra* note 10, at 4 n.17.

15. *See* M. FARRAND, THE FRAMING OF THE CONSTITUTION 154 (1913). When Governor Randolph of Virginia proposed that " 'a national Judiciary be established,' it passed in the affirmative, *nem. con.* [no one opposed]." MADISON'S JOURNAL 108 (Scott ed. 1895), *cited in* THE FEDERAL COURTS, *supra* note 10, at 4 n.15.

16. Schulz, *Creation of the Federal Judiciary: A Review of the Debates in the Federal and State Constitutional Conventions; and Other Papers*, in 1 CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY, 1787-1977, at 11 (B. Reams & C. Haworth eds. 1978) (excerpts from debates concerning the judiciary).

17. *Id.* at 29.

only a few changes.[18]

There was little debate on the provisions providing for federal jurisdiction in controversies between different states.[19] The ease with which this radical modification of the unworkable procedure under the Articles passed is attributable to the fear of the delegates that the Union would dissolve without a national referee for disputes between states. Indeed, Edmund Randolph, in his speech introducing the first resolutions to the Convention, said: "Are we not on the eve of war, which is only prevented by the hopes from the convention?"[20] Elbridge Gerry added: "We should be without an Umpire to decide controversies and must be at the mercy of events"[21] absent a national court to decide controversies between states. Concern remained, however, whether the Committee of Detail's proposal for federal jurisdiction of cases between states would avert interstate conflict. Two delegates expressed doubt about the impartiality of federal judges if one were from a state that was a party in a particular case.[22] Their fears were quickly dismissed, and the delegates voted to delete the judiciary provision in the Articles of Confederation, with only Georgia and North Carolina dissenting.[23]

Although necessity and desire for peace might have brought about federal jurisdiction in controversies between states, those concerns did not support the grant of federal jurisdiction over cases between a state and citizens of another state. None of the five constitutional plans prepared prior to the Convention mentioned the latter form of jurisdiction.[24] Remarkably, there was no discussion of it in any of the convention debates. It was first mentioned in the Committee proposal and passed without comment.[25]

Why did the grant of jurisdiction over cases between states and citizens of different states pass so easily? One commentator suggests that this jurisdiction follows a fortiori from diversity jurisdiction; if diversity jurisdiction was created to protect out-of-state litigants from the bias of local tribunals, the need is even greater when one of those litigants is the state in which the tribunal sits.[26] This explanation seems too simplistic. Although the delegates were certainly con-

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18. Article III, § 2 as passed by the members of the Convention read:

> 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.

Id. at 39.

19. *See id.* at 34-35 (recounting the debates on the issue of federal jurisdiction over controversies between states).

20. THE FEDERAL COURTS, *supra* note 10, at 16 (quoting Randolph).

21. *Id.* (quoting Gerry).

22. Schulz, *supra* note 16, at 34-35 (reciting the only recorded objections to the Committee plan, from delegates Gorham and Williamson, of Massachusetts and North Carolina respectively).

23. *Id.* at 35.

24. THE FEDERAL COURTS, *supra* note 10, at 17.

25. *Id.*

26. *Id.* at 17-18.

cerned with ensuring impartial tribunals in general, diversity jurisdiction posed no possibility of sacrificing state sovereignty by submitting the states themselves to suits by out-of-state citizens. If the framers of Article III intended the grant of jurisdiction over disputes between states and citizens of different states to entail a sacrifice of sovereign immunity, then that provision is quite different from diversity jurisdiction.

At least one of the main speakers at the Convention understood Article III to mean that states were amenable to suit in federal court by citizens of different states. Edmund Randolph, who had presented the final draft of the Committee on Detail's proposal, where the provision first appeared, argued in the Virginia ratification debates that the judiciary article subjected states to suit by citizens of different states.[27] Randolph's view was logically distinct from diversity jurisdiction; he stated in the Virginia debates that he did not "see any absolute necessity for vesting [federal courts] with jurisdiction in [diversity] cases."[28]

Randolph explained his understanding of the extent of federal jurisdiction more fully in his arguments to the Supreme Court in *Chisholm v. Georgia*[29] as counsel for Chisholm. In addressing the propriety of a South Carolina citizen's making Georgia a defendant in an action on a Revolutionary War debt, Randolph made clear that both the letter and the spirit of Article III and the Judiciary Act of 1789[30] passed pursuant thereto made states subject to such suits in federal court. He noted that the language of Article III and the Judiciary Act did not limit federal jurisdiction over cases in which a state was a party only to cases in which a state was a plaintiff. Or, in his words, "it is said, that in cases, in which a State shall be *a party*, the Supreme Court shall have original jurisdiction. Is not a defendant *a party* as well as a plaintiff?"[31] Although Randolph found support in the words of the jurisdictional grants, the heart of his argument lay in the more general meaning of the Constitution. He observed that the Constitution imposed several restrictions on the sovereignty of the states; the clearest examples were the prohibition of ex post facto laws, bills of attainder, laws impairing contractual obligations, and the emission of bills of credit.[32] Randolph maintained that there were no adequate state remedies to enforce these prohibitions; therefore, aggrieved plaintiffs must be able to sue in federal court.[33] Moreover, the very act of the people in combining themselves in a "government for their own happiness"[34] implied a diminution of state sovereignty. That is, if the people individually made themselves subject to restraints by the federal government, then the states, as assemblages of people, were likewise subject to re-

27. *See* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 48 (1972).

28. Schulz, *supra* note 16, at 91.

29. 2 U.S. (2 Dall.) 419 (1793).

30. 1 Stat. 73 (1789). The Judiciary Act of 1789 granted the Supreme Court, *inter alia*, original jurisdiction over suits against states by citizens of different states. *Id.* § 13.

31. *Chisholm*, 2 U.S. (2 Dall.) at 420 (argument of Randolph).

32. *Id.* at 421-22; *see* C. JACOBS, *supra* note 27, at 48-49 (summarizing Randolph's arguments in *Chisholm*).

33. *Chisholm*, 2 U.S. (2 Dall.) at 422.

34. *Id.* at 423.

straints and the corresponding legal process.[35] The consequence of exalting the states to individual sovereignty, according to Randolph, not only would be inconsistent with the act of combination represented by the Constitution, but also would disrupt the national peace and harmony the Constitution sought to ensure.[36]

Judging from the speeches of other prominent framers at their state ratifying conventions, few shared Randolph's view. The debates in the Virginia convention illustrate the understandings held by some of the main actors in the ratification process. James Madison rejected the notion that Article III subjected states to suit by citizens of other states. He said:

> [The Supreme Court's] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.
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> . . . .
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> It appears to me that this can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.[37]

John Marshall agreed:

> I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states.[38]

Patrick Henry, in one of his many fiery speeches to the delegates, strongly rejected the views of Madison and Marshall:

> If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant.[39]

Whatever the framers' understanding of Article III, there seems to have been general agreement that the states had enjoyed sovereign immunity under the Articles. Alexander Hamilton wrote in *The Federalist* that

> [i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every

35. *Id.*; *see* C. JACOBS, *supra* note 27, at 49.

36. *Chisholm*, 2 U.S. (2 Dall.) at 424-25. Iredell shared the same fear of disruption, but thought that preserving sovereign immunity, not rejecting it, would prevent disunity and dissatisfaction. *See infra* notes 137-53 and accompanying text.

37. Schulz, *supra* note 16, at 69 (record of the Virginia ratification debates).

38. *Id.* at 81-82.

39. *Id.* at 75.

state in the union.[40]

That Hamilton and the Virginia delegates presupposed the sovereign immunity of the states prior to the Constitution is remarkable in light of the scant historical justification for such a belief. The research of Judge Gibbons and Professor Jaffe on the history of sovereign immunity reveals that the sort of immunity supposed by the framers had little if any precedent in England or the colonies.[41] In England, although the monarch had a theoretical personal immunity from suit in the common law courts, this immunity had no real relevance to the legal accountability of the government to aggrieved individuals.[42] All government officers were personally subject to process, as were governmental corporate bodies.[43] More significantly, as early as the reign of Edward I, British subjects could sue the crown directly through the "petition of right."[44] When a person had a complaint against the government, he presented a petition of right to the Chancellor.[45] The Chancellor then screened the petition to determine whether it contained a factual and legal basis for adjudication, that is, to see whether a "right" existed. If the Chancellor concluded that the petition presented a cognizable claim, the petition was tried as to the facts by a governmental commission and then sent to one of the courts for ultimate disposition.[46] Jaffe notes that there is no evidence that the English sovereign ever rejected a petition of right by a claim of immunity based on expediency. The "immunity" was the practice of screening claims to insulate the crown from baseless suits.[47] Therefore, the true meaning of the expression "the king can do no wrong" was that the king *would* do no wrong without setting things right.[48]

During the reigns of Edward III and Edward IV, statutes were passed allowing citizens to secure relief in some land title cases without securing the consent of the king. These *monstrans de droit* actions, as they were called, became quite common and effectively took the place of the comparatively more cumbersome petition of right.[49] Finally, as early as the seventeenth century, the Exchequer adjudicated property claims against the government in equity.[50] In 1668 the Exchequer granted relief to a certain Pawlett, stating that the king is the "fountain and head of justice and equity; and it shall not be presumed, that

40. THE FEDERALIST No. 81 (A. Hamilton), *reprinted in* Schulz, *supra* note 16, at 114 (emphasis in original).

41. *See* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

42. Jaffe, *supra* note 41, at 1-2.

43. *Id.* at 3, 9-16.

44. *Id.* at 5.

45. *Id.* British subjects also could present petitions to a special commission or to the Privy Council for screening.

46. *Id.*

47. *See id.*

48. *See* Gibbons, *supra* note 41, at 1896.

49. Jaffe, *supra* note 41, at 6 n.10 (citing 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 8 (3d ed. 1944)).

50. *Id.* at 6.

he will be defective in either."[51]

Blackstone, the main source of English law for American lawyers in the post-Revolutionary period, reflected this understanding of sovereign "immunity." He summarized the matter in his *Commentaries*: "The king hath a prerogative in all things, that are not injurious to the subject; for in them all it must be remembered, that the king's prerogative stretcheth not to the doing of any wrong."[52]

The original charters granted to the American colonies contain no instance of sovereign immunity; indeed, many of them specifically subjected the governing corporate body to suit.[53] The first charter of Massachusetts, the 1620 Charter of New England, established a governing council as a political and corporate body with "full Power and lawful authority . . . to sue, and be sued . . . in all Manner of Suits and Matters whatsoever, and of what Nature or Kinde soever such Suite or Action be or shall be."[54] The First Charter of Massachusetts Bay, Connecticut's Charter of 1662, and the Charter of Rhode Island and Providence Plantations of 1663 all contained similar provisions.[55] Grants creating the proprietary colonies, such as New York, Maryland, and Pennsylvania, made no mention of sovereign immunity. Because these grants were to individuals, however, the individual proprietor was no more immune than any other individual.[56] As Professor Gibbons points out, the adjudication of a boundary dispute between Maryland and Pennsylvania in Chancery in 1750 demonstrates that proprietors enjoyed no general sovereign immunity.[57]

After the Declaration of Independence, not a single state constitution provided for immunity. In fact, Connecticut and Rhode Island adopted their existing charters as constitutions, thus continuing their amenability to suit as it existed prior to independence.[58] Moreover, most state constitutions included bills of rights to secure to individuals basic rights against the government. Most of the bills of rights guaranteed that every man should have a judicial remedy for every injury done to him.[59] Gibbons notes that the probable impetus for the inclusion of a guaranteed remedy provision was Parliament's effort to immunize English revenue officers from suit in the colonial common-law courts.[60] The right was inserted, therefore, to ensure governmental accountability in the courts.

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51. Pawlett v. Attorney General, Hardres 465, 145 Eng. Rep. 550 (Ex. 1668), *quoted in* Jaffe, *supra* note 41, at 6. Iredell cited this development in the Exchequer in *Chisholm*. He claimed, however, that because there is no Exchequer-like court in America with the combined power of adjudication and payment from the government treasury, the British procedure could not work in America. *See infra* notes 115-17 and accompanying text.

52. 1 W. BLACKSTONE, COMMENTARIES *238.

53. *See* Gibbons, *supra* note 41, at 1896-97.

54. The Charter of New England—1620, *quoted in* Gibbons, *supra* note 41, at 1896.

55. *See* Gibbons, *supra* note 41, at 1896.

56. *Id.* at 1897.

57. *Id.*

58. *Id.* at 1897-98.

59. *Id.* at 1898.

60. *Id.*

Professor Gibbons concluded, over against the statements of Madison, Hamilton, Marshall, and others, that the general American understanding of sovereign immunity before the Constitutional Convention was that it simply did not exist.[61] Some states clearly at least doubted sovereign immunity's protection. Of those states that discussed sovereign immunity in their ratifying conventions, four proposed amendments that would have prohibited suits against states by citizens of another state.[62] These amendments would have been unnecessary had the delegates assumed that immunity was an inherent part of state sovereignty.

What was James Iredell's familiarity with the doctrine of sovereign immunity as it existed in England and the colonies, and as it was perceived by his contemporaries? Clearly, he was well acquainted with the English sources on the subject. In *Chisholm* Iredell extensively discussed the English cases on the amenability of the crown to suit.[63] Iredell concluded from his examination of English law, in contradistinction to the research of Professor Jaffe, that sovereign immunity was alive and well in England.[64]

Apparently Iredell also was acquainted with the thought of the great Federalists of his time. Unfortunately there are no extant sources from Iredell himself to indicate the breadth of his knowledge. One can discern from his correspondence, however, that he had a copy of *The Federalist*[65] and that he knew of the debates at the Philadelphia Convention.[66]

The debate over ratification of the Constitution in North Carolina, in which Iredell was a main figure, focused on sovereign immunity in the context of the state's liability for debts under the Peace Treaty of 1783. Under the terms of the treaty, the British were to evacuate all military posts in America and to leave behind all slaves.[67] Both America and England agreed that creditors on either side would not be impeded legally from recovering debts contracted before the treaty.[68] This provision operated heavily in favor of the British, because the overwhelming balance of indebtedness lay with the Americans. Before the war American debtors, mainly large planters in the South, owed about twenty-eight million dollars to British merchants, none of which had been paid when the

61. *Id.* at 1898-99.

62. New York and Rhode Island proposed that the Constitution be changed specifically to prohibit suits by an individual against a state. Virginia and North Carolina requested a revision of the grant of judicial power, including the deletion of "between a State and citizens of another State." *See* Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 214 n.26 (1968).

63. *See Chisholm*, 2 U.S. (Dall.) at 437-45.

64. *Id.* at 439, 445.

65. *See* 2 G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 230 (1858) (letter of William Davie to Iredell).

66. Two of North Carolina's delegates to the federal convention, Hugh Williamson and Richard Spaight, corresponded with Iredell during the convention proceedings. *See id.* at 167, 168-70, 172-76.

67. *See* Treaty of Paris, art. VII, 8 Stat. 80, 83 (1783). For a general outline of the treaty obligations, see Gibbons, *supra* note 41, at 1900-01.

68. Treaty of Paris, art. IV, 8 Stat. at 82.

treaty was signed.[69] Indeed, many states, especially those in the South, had passed various laws to deal with the enormous debt to the British, including state expropriation of debt due British creditors and establishment of state bills of credit as legal tender.[70] Article IV of the treaty prohibited both types of legislation.[71] Finally, the treaty encouraged voluntary restitution by state legislatures of land confiscated by or escheated to the states; future confiscation or escheat of British or Loyalist property, however, was flatly prohibited.[72]

Many North Carolinians feared that the treaty would subject them and the state to suits to recover confiscated property. North Carolina had passed two Confiscation Acts, one in 1777 and one in 1779. By the time the second North Carolina ratifying convention met in 1789, the State had realized around 800,000 pounds from the sale of confiscated property.[73] The "Act of Pardon and Oblivion" of 1783 had extended criminal leniency to certain Tories,[74] but petitions of Tories for restitution of property were still rejected. Even after the Treaty of Paris, the state continued to sell Tory property.[75] As insurance against suits based on the treaty, the legislature in 1785 passed a statute prohibiting state courts from recognizing any actions for the recovery of property, the title to which was based on the Confiscation Acts.[76]

Because of the great financial investment the state had in confiscated property, delegates to the North Carolina ratifying convention were understandably worried about federal courts gaining jurisdiction over suits the General Assembly had barred from state courts. Members of the convention were also deeply troubled by the prospect of out-of-state creditors suing on the notes North Carolina had issued to finance the Revolutionary War effort. There is no suggestion in the ratification debates that the delegates assumed that North Carolina would be immune from suits on property or debt. Although Iredell did not speak directly to the issue of immunity from suits by out-of-state citizens to recover confiscated property,[77] during the debates he heartily supported the federal

69. *See* M. MYERS, A FINANCIAL HISTORY OF THE UNITED STATES 23 (1970), *cited in* Gibbons, *supra* note 41, at 1900-01.

70. *See* Gibbons, *supra* note 41, at 1901.

71. *Id.*

72. Treaty of Paris, arts. V-VI, 8 Stat. at 82-83; *see* Gibbons, *supra* note 41, at 1901.

73. H. LEFLER & A. NEWSOME, *supra* note 3, at 257-58.

74. *Id.* at 257.

75. *Id.*

76. *Id.* at 258. In 1786 Archibald MacLaine, a prominent North Carolina Federalist and supporter of the treaty, wrote Iredell about the passage and operation of the 1785 statute:

> The Assembly and the Judges have indeed found an easy way to evade the treaty. The former refuse to point out any method to ascertain what is confiscated, (for they know they cannot,) and the Judges refuse to let any person, whose property may be taken by a rapacious Commissioner, maintain a suit; so that we seem to be at the mercy of a set of needy adventurers, whose interest it is to pillage us; and that no loophole may be left unguarded, an act was passed last session, intended to give a sanction to every thing that has been done, and may be done for the future.

2 G. MCREE, *supra* note 65, at 137. The "Commissioners" mentioned by MacLaine were former American officers appointed by the General Assembly to sell lands confiscated by the state. *Id.* at 137-38.

77. Other than his opinion in *Chisholm*, there is no written evidence that Iredell ever specifically considered the state-citizen of another state clause at all. No mention of it by him appears in

courts' power to enforce the treaty. Without a grant of federal jurisdiction over suits under federal treaties, he argued, Congress could "enter into negotiations with foreign nations, but [could not] compel the observance of the treaties they make."[78] Professor Gibbons intimates that this statement indicates that Iredell believed states were amenable to suit in federal court under the treaty.[79] Although Iredell's strong desire for peace with foreign nations may point to this conclusion, Iredell could as readily have meant only that federal courts must be able to coerce individuals to observe the treaty. Especially in light of Iredell's opinions in *Chisholm* and *Ware v. Hylton*,[80] it is probable that, at least by 1793, he held the latter view.

Apparently, other North Carolina delegates did assume that states would be suable in federal court in general. These men nevertheless supported ratification of the judiciary article because they believed the state had an affirmative defense to suits, at least on promissory notes issued to finance the war.[81]

North Carolina ultimately voted to protect both individuals and the state from suits in federal court. The convention's proposed amendments to the judiciary article included deletion of diversity and state-citizen of another state jurisdiction; express limitation of the judicial power to causes of action arising after ratification, except in certain limited cases; and a prohibition of Congress's and the courts' interfering in any state's liquidation or discharge of public securities.[82] However strong Iredell's support of the treaty might have been, he was acutely aware by the end of the ratification debates that citizens of North Carolina were vehemently opposed to federal courts' meddling in the state's handling of its own debts and confiscated property.

Finally, before examining Iredell's *Chisholm* opinion, it is useful to discuss briefly attitudes of North Carolinians toward the federal government between ratification in 1789 and 1793, when *Chisholm* was decided. One historian has reported that North Carolinians generally regarded the federal government with

McRee's collection of his correspondence and papers. *See* 2 G. MCREE, *supra* note 65; Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1051 n.73 (1983).

78. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 146 (J. Elliot ed. 1866), *quoted in* Gibbons, *supra* note 41, at 1913. Iredell's support of the treaty was well known before the ratification debates in North Carolina. *See* 2 G. MCREE, *supra* note 65, at 181-83 (Iredell's 1787 charge to the grand jury at Edenton); *id.* at 203 (Iredell's "Answers to Mr. [George] Mason's Objections to the New Constitution Recommended by the Late Convention").

79. *See* Gibbons, *supra* note 41, at 1913.

80. 3 U.S. (3 Dall.) 199, 256-80 (1796); *see infra* notes 130-32, 147-55 and accompanying texts.

81. Archibald MacLaine argued that the impairment of contracts clause, under which he assumed suits on the notes would be brought, had no retrospective application. *See* Gibbons, *supra* note 41, at 1913 n.117 (quoting MacLaine). Richard Spaight contended that the nature of the notes themselves made suit impossible. The notes were issued only to North Carolina citizens and were non-negotiable. Thus, according to Spaight, suit could only be brought in the name of the in-state purchaser, removing the case from the scope of federal jurisdiction. *See id.* (quoting Spaight).

82. *See* Schulz, *supra* note 16, at 95 (reprinting North Carolina's proposed amendments). Of course, none of these amendments were ultimately included in the Constitution.

favor at the time of the Fayetteville Convention in 1789.[83] The orderly establishment and efficiency of President Washington's government, the passage of statutes designed to enhance commerce and manufacture, and the economic recovery from the depression of 1785-86 all contributed to the attitude of North Carolinians.[84] Whatever their attitude might have been at the time of ratification, North Carolinians' opinions of the federal government began to decline quickly. No branch of the federal government escaped derision. When President Washington traveled to North Carolina in 1791, his reception was "mixed."[85] Willie Jones, one of Washington's hosts and a prominent Anti-Federalist, said that he would not greet Washington as President but that he would welcome him as a soldier and a man.[86] Thomas Person, one of the most vehement Anti-Federalists, had denounced the President as "a damned rascal."[87] Although the extant sources do not reveal specific objections to Washington's policies, North Carolina's general attitude toward the President is exemplified by the vote in Congress to adopt a laudatory reply to Washington's Farewell Address; four of the state's representatives voted against it as "too adulatory."[88]

Iredell's correspondence relates one instance of North Carolina's unwillingness to cooperate with the federal judiciary. In a letter to Chief Justice Jay, Iredell described a case in which one of the Courts of Equity of North Carolina had denied a plaintiff's suit for an injunction against a certain Mr. Blair.[89] The plaintiff then petitioned for certiorari in the Supreme Court of the United States. One of the two Justices present voted to review the case, and the writ issued.[90] Iredell was concerned whether the writ issued erroneously, but more importantly, he pointed out to Jay that, regardless of the writ's correctness, the state court had disobeyed the writ. Moreover, "the General Assembly of North Carolina in their session last Winter *thanked the State Judges* for their conduct in disobeying the Writ."[91] Although this was an isolated occurrence, it likely indicates the general attitude of North Carolina courts toward federal encroachments on their power.

Congress was soundly ridiculed on several fronts. The greatest criticism from North Carolina was directed at Congress's plan for the federal assumption of state debts. In 1790 Congress passed a measure that assigned the war debt of all the states to the federal government. The measure outraged citizens of North Carolina, because the State had little debt in specie and had imposed its own state taxes to pay its war debts.[92] Congressman Hugh Williamson, a friend of

83. *See* Newsome, *North Carolina's Ratification of the Federal Constitution*, 17 N.C. HIST. REV. 287, 296-97 (1940).

84. *Id.*

85. W. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 231 (1989).

86. *Id.*

87. *Id.* at 232.

88. *Id.* at 234.

89. *See* 2 G. MCREE, *supra* note 65, at 337 (letter from Iredell to Jay). The letter does not detail the circumstances or facts of the case beyond those described here.

90. *Id.* at 337-38.

91. *Id.* at 338.

92. *See* H. LEFLER & A. NEWSOME, *supra* note 3, at 291.

Iredell and a Federalist, voted against the bill.[93] The General Assembly even attempted to avoid assumption, but apparently was unsuccessful.[94] Iredell's support of assumption was half-hearted at best. In a pseudonymous public letter, Iredell said of the policy:

> This measure has occasioned perhaps more discontent than any of the other measures which Congress has adopted. It may still remain a questionable point of policy. But I hope to show you that if the reasons for it are not perfectly convincing to you all, they are at least very weighty ones . . . .[95]

North Carolina also opposed the excise tax on liquor, which became federal law in 1791. Whiskey was a "staple crop" in western North Carolina,[96] and the opposition of farmers to the tax spread. The measure spawned protests and threats of defiance in the state.[97] The outcry was so great that Iredell was prompted to write in response:

> For what purpose . . . was that power [to tax] given in the constitution? Does North Carolina trifle in such a manner with the other states, as to say a power they have solemnly consented to shall never be exercised? What! is the safety of our country to be endangered—the honor of it to be sullied—its public faith broken—and the Government of the United States to become a mere mockery, merely to gratify the wishes of North Carolina . . . ?[98]

Iredell strongly supported the excise tax. He believed that without it the federal government would be in severe financial trouble, and it was the least oppressive means of securing the needed revenue.[99]

North Carolina citizens also opposed other acts of the federal government, including the Judiciary Act of 1789[100] and the Neutrality Proclamation of 1793.[101] All of the resistance against federal policies occasioned a shift in North Carolina politics. After the Federalist landslide in 1788 and the subsequent rati-

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93. *Id.*

94. *See* 2 G. MCREE, *supra* note 65, at 301 (letter from Archibald MacLaine to Iredell). MacLaine wrote Iredell that the General Assembly was "running riot" over the assumption statute. He said:

> [T]hey are now actually laying their heads together to defeat that measure, so far as it regards this State. The project is to subscribe . . . all our paper credits, now in the hands of the Treasurer and Comptroller, and which have been not actually charged to the United States.

Id. There is no record that this avoidance was accomplished.

It is interesting that the probable profit-takers from the assumption scheme were northern speculators who had bought southern securities at prices deflated by the prospect of state default. *See id.* (letter from John Hay to Iredell).

95. *Id.* at 314 (Iredell's "To the Citizens of the United States," published in 1791 in the *Federal Gazette*). Iredell then appealed to the hearts of his readers, arguing that because the debt had been incurred in the common defense of the Union, it should be borne by all the states, not only the most besieged.

96. H. LEFLER & A. NEWSOME, *supra* note 3, at 292.

97. *Id.*

98. 2 G. MCREE, *supra* note 65, at 329 (letter from Iredell to John Hay).

99. *Id.* at 318-19 (Iredell's "To the Citizens of the United States").

100. *Id.* at 335 (letter from William Davie to Iredell).

101. *See* H. LEFLER & A. NEWSOME, *supra* note 3, at 293.

fication of the Constitution, North Carolinians became disenchanted with Federalism. After the 1789 ratifying convention, the state chose two Federalist senators and a majority of Federalists for the House.[102] By 1794 North Carolina had two Republican senators, and nine out of ten representatives were Republican.[103] This was the tenor of the times in North Carolina when *Chisholm* came before Iredell and the Supreme Court.

The facts of *Chisholm* are straightforward. Alexander Chisholm was the executor of the estate of Robert Farquhar, a South Carolina citizen from whom Georgia had purchased supplies during the war. After Farquhar died never having received payment for the supplies, Chisholm sued the state in 1790 in the United States Circuit Court for the Georgia District for the amount due, interest, and damages.[104] In 1791 Iredell, sitting as a Circuit Justice, and Nathaniel Pendleton, a district judge, dismissed the suit.[105]

Chisholm proceeded to file an original bill in the Supreme Court. Because of Georgia's resistance to federal process, the case was not heard until February 1793. Georgia ultimately failed to enter an appearance at all,[106] and the Court heard only the argument of Edmund Randolph, counsel for Chisholm. The Court held in favor of Chisholm, four to one, with Iredell the lone dissenter.

The basis of Iredell's holding is well known.[107] Whatever the Constitution might say about the permissible scope of federal jurisdiction, Congress in the Judiciary Act of 1789 had authorized the federal courts to issue only all writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[108] Iredell interpreted "principles and usages of law" to mean the common law of the several states.[109] That common law, according to Iredell, represented the common law as it existed in England when America was first settled,[110] and more specifically was the English common law at that time as it related to sovereign immunity.[111] After establishing the premise that the states are "compleatly sovereign" in every matter "where [their]

102. *Id.* at 288.

103. *Id.*

104. *See* C. JACOBS, *supra* note 27, at 47. Chisholm originally petitioned the Georgia legislature for relief. The legislature directed him to sue the commissioners who negotiated the contract. When Chisholm discovered they were insolvent, he filed the action against the state. *Id.*

105. *Id.*

106. *Id.* at 48. When Georgia did not enter an appearance, the Court invited any attorney present to argue on its behalf:

> [N]o appearance had been entered on the part of the state of Georgia and regarding the question involved in the suit as highly important suggest to the counsellors of the Court that if any are disposed to offer their sentiments on the subject now under consideration the Court are willing to hear them.

Id. at 50 (quoting Minutes of the Supreme Court, Feb. 5, 1793).

107. A brief summary of Iredell's opinion is found in Fordham, *Iredell's Dissent in* Chisholm v. Georgia*: Its Political Significance*, 8 N.C. HIST. REV. 155, 160-62 (1931).

108. Judiciary Act of 1789, § 14, *quoted in Chisholm*, 2 U.S. (2 Dall.) at 433-44 (opinion of Iredell, J.) [hereinafter all citations to *Chisholm* will be from Iredell's opinion unless otherwise indicated].

109. *Chisholm*, 2 U.S. (2 Dall.) at 434-35.

110. *Id.* at 435.

111. *Id.*

sovereignty has not been delegated to the *United States*,"[112] Iredell concluded that the states enjoyed the same sovereign immunity as the King at the time of the American settlement.

Iredell then entered upon a protracted discussion of the common law of sovereign immunity in England. He asserted that in England, even if the government consents to suit, if the relief sought is money from the public treasury, only the Exchequer could offer a remedy because the Exchequer is the only English court that has authority over the revenues of England.[113] Moreover, in cases of breaches of contracts entered into by the government of England, a court can grant a remedy, but it is at the discretion of Parliament whether to provide for the money in the annual budget.[114] Iredell concluded that no remedy dependent on issuing funds from the public treasury could "be allowed in any of the *American* States, in none of which it is presumed any Court of Justice hath any express authority over the revenues of the State such as has been attributed to the Court of Exchequer in England."[115]

In sum, Iredell's argument progressed as follows. The principles and usages of law that bind the court's jurisdiction comprise the common law of the states. The common law of the states, as received from England, is that the state is immune from suit without its consent and, even assuming a suit is possible, no remedy may be had. Congress has not intervened by passing a federal statute expressly overriding the common law. The suit, then, cannot be maintained.[116] Or, in Iredell's words: "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."[117]

One commentator has said of Iredell's opinion: "What he did was simply to state a legal opinion instead of writing a political tract."[118] Although Iredell based his dissent in *Chisholm* on a highly technical legal argument, there can be no question that it was influenced, if not motivated, by the politics of his time. In fact, Iredell said in dictum near the end of the opinion: "[M]y present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money."[119] And again, in the last sentence, Iredell warned:

> I pray to God, that if the Attorney General's[120] doctrine, as to the law, be established by the judgment of this Court, all the good he predicts from it may take place, and none of the evils with which, I have the

112. *Id.* (emphasis added).
113. *Id.* at 439.
114. *Id.* at 445.
115. *Id.* at 439.
116. *Id.* at 449.
117. *Id.*
118. Fordham, *supra* note 107, at 167.
119. *Chisholm*, 2 U.S. (2 Dall.) at 449.
120. The "Attorney General" was Edmund Randolph, Attorney General of the United States, who was counsel for Chisholm.

concern to say, it appears to me to be pregnant.[121]

The audience for Iredell's statements must have been Congress. It was not the other Justices of the Court, because after thirteen days of deliberation,[122] Iredell must have known where they stood and what the holding of the Court would be. As the holding of the Court was that the Constitution itself granted jurisdiction over Georgia in this case,[123] the ruling could be overridden only by constitutional amendment. Because Congress is the point of origination for constitutional amendments, Iredell must have been appealing to its members in his opinion.

Two factors point to this conclusion. First, the tone of Iredell's opinion focuses on *Congress* as the governing body of the country. He repeatedly stated that Congress, not the courts, is the sole maker of federal law.[124] After emphasizing the importance of the "great question"[125] of the suability of states in federal court, Iredell passed the policymaking function on to others: "With regard to the policy of maintaining such suits, that is not for this Court to consider, unless the point in all other respects was very doubtful. . . . I have therefore nothing to do with the policy."[126] The correct policymaker could be no one but Congress, which is responsible for making the national laws. That the warning of the evils of allowing suits against states follows immediately upon his self-removal from the role of policy points up the fact that Iredell intended to send a message to the only body capable of remedying the Court's dangerous precedent—the Congress.

Second, Iredell's veiled reference to the Peace Treaty of 1783 was probably intended to lobby Congress on the issue of state amenability to suit by foreign powers. He said: "The powers of the general Government, either of a Legislative or Executive nature, *or which particularly concern Treaties with Foreign Powers*, do for the most part (if not wholly) affect individuals, and not States . . . ."[127] Iredell was more aware than any other Justice of Southern hatred of the treaty. North Carolina would have to pay prewar debts with interest while the British continued to violate the treaty by refusing to pay for the slaves they had freed during and after the war.[128] By referring expressly to the operation of treaties against the states, which was absolutely unnecessary to his holding and irrelevant to the case, Iredell sent a message that it belonged to Congress to make policy regarding enforcement of the treaty against states, and that policy should be immunity.[129]

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121. *Chisholm*, 2 U.S. (2 Dall.) at 450.

122. *See* C. JACOBS, *supra* note 27, at 50.

123. *See Chisholm*, 2 U.S. (2 Dall.) at 479 (opinion of Jay, C.J.); *id.* at 466 (opinion of Wilson, J.).

124. *See, e.g., id.* at 448-49.

125. *Id.* at 449.

126. *Id.* at 450.

127. *Id.* at 435 (emphasis added).

128. *See* Gibbons, *supra* note 41, at 1923.

129. *See id.* at 1924. The scope of federal jurisdiction in Article III, § 2 and § 13 of the Judiciary Act of 1789 was the same for suits against a state by citizens of another state and suits against a state by foreign citizens. Therefore, in Iredell's view, states must have been ipso facto immune from suits

That Iredell's opinion was primarily a political effort to protect state sovereign immunity is demonstrated by the strained interpretations in the opinion itself. Iredell knew the result that the country needed in light of growing Southern discontent with federal power, and he found the requisite law to achieve his political goal.[130] Iredell's interpretation of the phrase "principles and usages of law" in the Judiciary Act of 1789 was strained to apply to sovereign immunity. The more likely meaning of the phrase is that no writ could issue if it was not supported by a cognizable legal claim. That is, the expansive authority given to the federal courts by the Act to issue all writs "necessary for the exercise of their respective jurisdictions"[131] is limited in that only the *types* of writs agreeable to the principles and usages of law might issue, regardless of the party against whom they are directed. Inasmuch as Congress had in the preceding section given the Supreme Court jurisdiction over controversies between a state and another state, citizens of another state, and foreign citizens,[132] it would have been remarkable, if Congress had intended that no writs should issue against states, that it did not expressly say so instead of using the phrase "agreeable to the principles and usages of law."

Moreover, if Iredell's interpretation of the phrase is extended beyond state-citizen of another state cases to state-state actions, then the latter provision of the Constitution is rendered nugatory. That is, if Congress did not expressly authorize writs to issue against states, then, applying Iredell's view, no state may ever sue a state for damages in the Supreme Court, because one state must necessarily be a defendant. Randolph made this argument to the Court:

> Executions for one State against another, are writs not specially provided for by statute, and are necessary for the exercise of the jurisdiction of the Supreme Courts, in a contest between States; . . . yet is it agreeable to the principles and usages of law, that there should be a mode of carrying into force a jurisdiction, which is not denied. If then the Supreme Court may create a mode of execution, when a State is defeated at law by a *State*, why may not the same means be exerted where an *individual* is successful against a State?[133]

Iredell did not specifically address the apparently unassailable logic of Randolph's argument.

Even if Iredell could maintain that Congress meant by "principles and usages of law" in section 14 of the Judiciary Act to indicate the common law, it was unnecessary to conclude that the common law was the same as the colonies had inherited from England at the time of settlement.[134] Indeed, Justice Blair

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by foreigners. In any case, he intended to direct that policy judgment to Congress—with instructions.

130. This practice is, of course, neither uncommon nor necessarily out of keeping with the role of the Supreme Court. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

131. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 82.

132. *Id.* § 13.

133. *Chisholm*, 2 U.S. (2 Dall.) at 426 (argument of Randolph).

134. It is interesting to note that, although Iredell claimed that the common law relevant to this case was the common law of England at the time America was settled, he relied principally on cases

questioned the propriety of looking beyond the Constitution to English law at all:

> 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. . . .[135]

Even if one accepts that English law is the appropriate point of reference, Iredell had to turn actual English practice on its head to reach the analogical conclusion that federal courts could not issue a writ against a state if the writ required the state to pay money out of its treasury. Although the formal English law was that the sovereign could only be sued by consent, the practice was that consent was given virtually as a matter of course.[136] Justice Wilson called Iredell on this point:

> True it is, that now in *England* the King must be sued in his Courts by Petition; but even now, the difference is only in the *form*, not in the *thing*. The judgments or decrees of those Courts will substantially be the same upon a *precatory* as upon a *mandatory* process.[137]

Aside from the flimsiness of Iredell's consent argument, his notion, based on English law, that courts could not order payment of public monies, was simply illogical after the grant of jurisdiction over states generally. If a state sued another state for damages, then under Iredell's view the federal court could not hear the case for want of a remedy. If English practice as Iredell described it were strictly followed, then the Supreme Court of the United States would have to *request* a state legislature to pay the plaintiff state, all at the legislature's discretion.[138] By ignoring the logical flaws in his position exposed by the Court's need to fashion remedies against states if it were to hear damages actions against state defendants *at all*, Iredell was able to execute the transatlantic legal *non sequitur* of imposing the English formal law, but not its actual practice, on the federal courts.[139]

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from the late seventeenth and late eighteenth centuries. *See id.* at 438 (citing *The Bankers' Case*, 89 Eng. Rep. 246 (1691)), 444 (citing Macbeath v. Haldimand, 99 Eng. Rep. 1036 (1786)).

135. *Id.* at 450 (opinion of Blair, J.) (emphasis added). Although Iredell's opinion has been labeled one of "strict construction," 2 G. MCREE, *supra* note 65, at 379-80, it was Blair who was the strict constructionist. While Iredell was searching in the English law for a means of holding Georgia immune from suit, Blair simply interpreted the words: "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 . . . ." *Chisholm*, 2 U.S. (2 Dall.) at 451.

136. *See supra* notes 42-51 and accompanying text.

137. *Chisholm*, 2 U.S. (2 Dall.) at 460 (opinion of Wilson, J.).

138. *See id.* at 445.

139. Iredell's failure to address state-state jurisdiction as part of the constitutional context of *Chisholm* was probably intentional. It clearly undermined his argument. Moreover, Iredell was not one generally to ignore the context of constitutional provisions. Sitting as a Circuit Justice a few months after *Chisholm*, Iredell heard the case of United States v. Ravara, 2 U.S. (2 Dall.) 297 (1793). The defendant, a consul from Genoa, was indicted and tried in the Circuit Court of Pennsylvania.

The law did not mandate the result reached by Iredell in *Chisholm*. In fact, it is arguable that the very clear commands of Article III and sections 13 and 14 of the Judiciary Act of 1789 were that the Supreme Court had jurisdiction over cases like *Chisholm* and might fashion writs to effectuate that jurisdiction. At least that result was reached by the other four Justices. Why, then, did Iredell, a Federalist Justice, go to such lengths to dissent?

The probable answer is that Iredell understood the potential divisiveness of the result reached by the majority. As previously noted, he knew well the resentment against the federal government in North Carolina, especially as to matters having to do with state finances.[140] He may very well have known also of the tenuous financial situation of other states as well.[141] The prospect of a federal court's ordering payment from the state treasury to a private citizen, or worse, the possibility of ordering payment to a former Loyalist, was more than the states were willing to accept.[142] The decision that would keep the national fabric most whole without subjecting the federal government to any danger was to allow state immunity. Therefore, Iredell's approach should be seen as a pragmatic, cost-benefit analysis: granting states immunity from federal court intervention in suits by out-of-state citizens has the benefit of holding the Union together with no cost to the federal government.

Iredell's opinions of two policies of Congress point up this practical approach. Although he offered reasons in support of the assumption of debts by the federal government, he deemed the policy "questionable."[143] North Carolina deeply resented the measure and even tried to negate it by legislation.[144] This cost to unity was balanced against what benefit to the federal government? The only benefit was that certain heavily indebted states were aided, but the

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He argued that the court lacked jurisdiction on the ground that the Constitution had given the Supreme Court exclusive jurisdiction over suits against foreign ministers. In fact, the Constitution says nothing of exclusivity, but only that the Supreme Court has original jurisdiction of such cases. The majority dismissed Ravara's motion, but Iredell dissented:

> [F]or obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the Public Agents of Foreign Nations. . . . [T]he context of the judiciary article of the Constitution seems fairly to justify the interpretation, that the word *original*, means *exclusive*, jurisdiction.

Id. at 298-99 (1793) (Iredell, J., dissenting).

140. *See supra* notes 82-99 and accompanying text.

141. In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts.

1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1922); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406-07 (1821) (opinion of Marshall, J.) (attributing eventual passage of eleventh amendment to crippling state indebtedness); Fletcher, *supra* note 77, at 1058 (describing reaction of states to *Chisholm*).

142. In the wake of the *Chisholm* case, the Georgia House of Representatives passed a bill providing capital punishment for any person attempting to levy on state property under the authority of a federal court. The bill ultimately failed in the state senate. Augusta (Ga.) Chronicle, Nov. 23, 1793, *cited in* J. ORTH, THE JUDICIAL POWER OF THE UNITED STATES 17-18 (1986).

143. *See supra* note 95 and accompanying text.

144. *See supra* note 94.

federal treasury was correspondingly burdened. Therefore, in Iredell's mind, the burden of assumption, both political and financial, outweighed the potential good.

The excise tax was a different matter. Although the prospect of a federal tax excited some protest and resentment toward Congress, an excise tax was the most efficient and equitable way to finance the needy federal government.[145] Moreover, its burden fell not on the states directly, but on individuals, mitigating any feelings of encroachment state governments might feel. Therefore, the benefit outweighed the cost.[146]

Finally, Iredell's dissent[147] in the landmark case of *Ware v. Hylton*[148] deserves mention as indicative of Iredell's pragmatism. In 1774 a Virginia citizen borrowed money from a British creditor. In 1777 Virginia passed a sequestration act, under which a state citizen who had a debt to a British creditor could discharge the debt by paying the state. In 1780 the debtor paid roughly one-third of the debt into the state loan office, thus discharging part of the debt. The Peace Treaty of 1783 removed all impediments to British creditors' collection of their debts. The question presented, then, was whether the creditor in *Ware* was due any or all of his debt, which required Iredell to interpret the operation of a federal treaty on a state sequestration act.[149]

Despite slight differences in detail, none of the other four Justices had any difficulty in concluding that the treaty negated the Virginia statute and that the British creditor was entitled to the entire amount due him.[150] Iredell disagreed. He concluded that the treaty provision invalidating legal impediments to recovery by British creditors was purely executory in nature.[151] Therefore, Virginia had every right until the treaty became operative to sequester the debt and thereby extinguish it.[152] Because the debt was extinguished, according to Iredell there was no longer a debt or a debtor, at least as to the sequestered portion, so the creditor had no one to sue.[153]

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145. *See* 2 G. MCREE, *supra* note 65, at 318-20 (Iredell's "To the Citizens of the United States").

146. The cost-benefit approach of Iredell is seen in his "To the Citizens of the United States," published in 1791. He said of the excise tax:

> It is undoubtedly to be lamented, that a necessity should at any time exist for passing a law, which is disagreeable to a great body of the people, nor do I believe that Congress would pass a bill creating any excise, if they could possibly avoid it. But the public credit must at all events be supported, or we must relapse into that state of weakness and disgrace from which the people have had the good sense and fortitude to emancipate themselves.

Id. at 318.

147. Iredell did not actually dissent. His opinion differed from the other Justices, but he delivered it only at the permission of the Court. He had ruled on the case as a Circuit Justice and therefore chose not to participate in the case in the Supreme Court. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 256 (1796).

148. 3 U.S. (3 Dall.) 199 (1796).

149. An excellent summary of the facts of *Ware* is found in 1 J. GOEBEL, JR., THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 748-50 (1971).

150. Justice Chase's opinion most thoroughly expressed this view. *See Ware*, 3 U.S. (3 Dall.) at 235-36 (opinion of Chase, J.).

151. *Id.* at 272 (opinion of Iredell, J.).

152. *Id.* at 268-70 (opinion of Iredell, J.).

153. *Id.* at 278 (opinion of Iredell, J.).

The argument resembles Iredell's *Chisholm* opinion in that it proceeds from a questionable assumption through strained logic in order to reach the desired result. The treaty of 1783 was almost certainly intended to operate retroactively. Most of the debt owing to British creditors at the time *Ware* was decided originated before the treaty; it would have been useless for the British to agree to a provision that was merely executory. Justice Chase pointed this out in his opinion.[154]

Justice Chase also exposed the sophistry of Iredell's "no debtor, no suit" argument.[155] The very legal impediments the treaty had sought to destroy were sequestration and confiscation acts, which had put property due British creditors in the hands of the states. Therefore, if the treaty did not extend to debt in the hands of the states by sequestration, it meant nothing.

In spite of its legal flaws, Iredell's holding would have produced a result favorable to the stability of the Union. It preserved the dignity of the state legislature and the inviolability of the state treasury in Virginia. It affirmed the supremacy of federal law, insofar as the treaty was considered by Iredell executorily operative on the states after its adoption. It allowed the creditor to recover the balance of his debt from the individual debtor. Moreover, in light of the 1794 treaty's provision that the United States could hear claims and award compensation when legal impediments prevented judicial resolution, English-American relations would not suffer. In other words, Iredell's dissent achieved all of the benefits important to preserve the peace, harmony, and prosperity of the Union without insulting a state or dipping into its treasury.

James Iredell was not the great champion of states' rights, as he has been labeled,[156] nor even a spokesman primarily for state sovereignty. He was a sincere and committed Federalist, but a Federalist reared in the turbulent and jealous political environment of post revolutionary North Carolina. In much the same way as John Marshall, with whom he never served on the Court, Iredell was a man politically in tune with his times. He believed, and rightfully so in light of his political context, that the Union's oneness depended on the federal government's supremacy, tempered by a healthy respect for the separate sovereignty of the states.[157] The adoption of the eleventh amendment on the heels of

154. *Id.* at 241-43 (opinion of Chase, J.).

155. *Id.* at 243-44 (opinion of Chase, J.). Chase stated:

> [I]f the treaty does not extend to debts paid into the state treasuries, or loan offices, it is very clear that *nothing* was done by the treaty as to those debts, not even so much as was stipulated *for Royalists*, and *Refugees*, to wit, a *recommendation of restitution*. Further, by this construction, nothing was done for *British creditors* . . . and they were deceived.

Id.

156. *See* 2 G. MCREE, *supra* note 65, at 381.

157. One can see Iredell's view in two charges to grand juries he gave during his tenure on the Supreme Court:

> The objects of this constitution being solely the preservation and security of the Union, it in no instance interferes with the internal regulations of any State, in cases which concern the interests of such State only. . . . Each of these governments deserves our equal confidence and respect. Each is calculated to promote, though in different ways, the security of those blessings we have here the happiness to enjoy.

Id. at 387 (charge to the grand jury at Annapolis in 1793).

Chisholm is some evidence that Iredell's political sensibilities were sound. From his efforts as a promoter of the Constitution in North Carolina to his years on the Supreme Court, Iredell pursued the goal of a peaceful, harmonious nation of states. If he was a champion of the states, he led their cause only insofar as it contributed to national unity.

> The happiness of our country certainly depends, not only on the preservation of the State Governments in their due sphere of authority, but on the firm union of the whole for the great purposes of the common welfare of the whole, which fatal experience hath long since told us cannot be secured without an energetic government to effect it.

Id. at 348 (charge to the grand jury in the federal district court in Georgia in 1792).