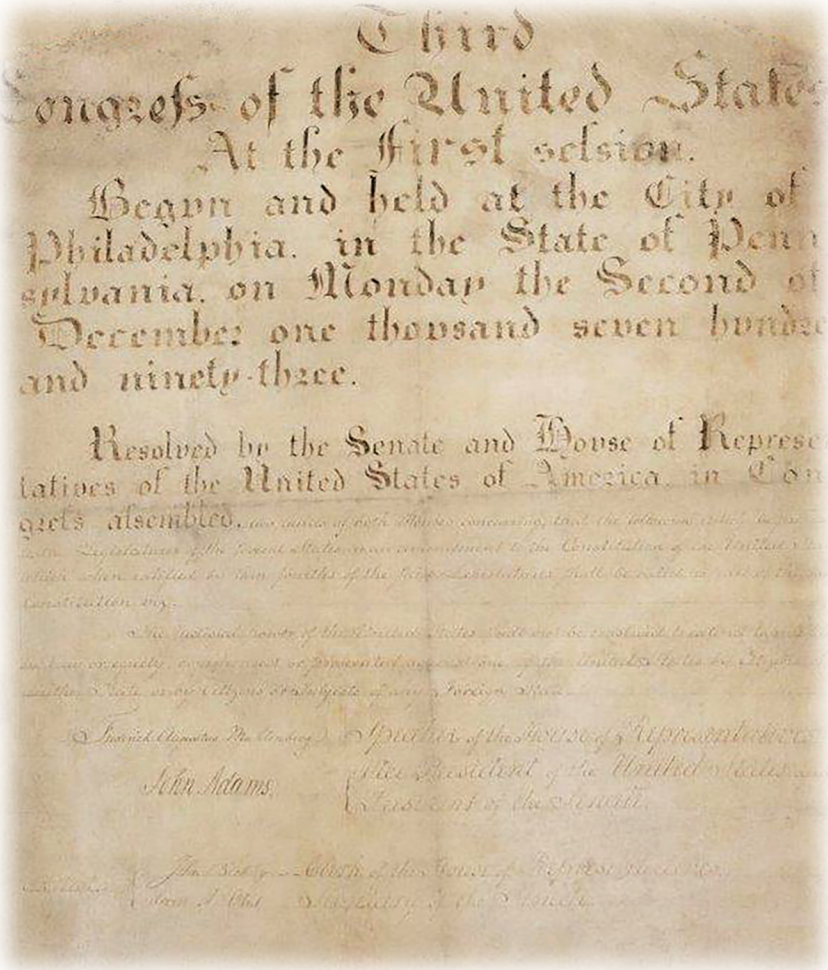
Chisholm v. Georgia

1793


Third
Congress of the United States
At the first session.
Begun and held at the City of
Philadelphia, in the State of Penn
sylvania, on Monday the Second of
December one thousand seven hundr
and ninety-three.

Resolved by the Senate and House of Repres
tatives of the United States of America, in Con
gress assembled,

John Adams

Federal Judicial Center
2020

Central Question

Could states be sued in federal court by individual citizens of another state?

Historical Context

Among the many issues debated at the time of the nation's founding was the appropriate balance of power between the national government and the states. Federalists, who supported the ratification of the Constitution, advocated a strong central government that would bind the states together as one nation. Anti-Federalists were concerned that an excessively powerful federal government would overwhelm the states and undermine their existence as independent political units.

The debate over federalism took place in several different contexts, including discussions about the plan for the federal judiciary laid out in Article III of the Constitution. The drafters of the Constitution defined the judicial power of the United States in a way that troubled the Anti-Federalists. Article III included within the judicial power suits between states, between a state and citizens of another state, and between a state and foreign states, citizens, or subjects. During debates over ratification, three states proposed placing explicit limits on suits against states, to no avail.

Those who opposed allowing states to be sued in federal court had several concerns. The states had run up significant debts in the course of fighting the Revolutionary War. Although many of these debts had been assumed by the federal government under Alexander Hamilton's economic plan of 1790, state officials felt threatened by the possibility of being inundated with further claims by citizens of other states. They also feared being brought into federal court by frequent challenges to state land grants. A less concrete but equally important apprehension was based on the concept of state sovereignty. If states could be sued in federal court, many believed, they would cease to be sovereign and independent political units and be left entirely at the mercy of the federal government. All of these concerns came to a head when the Supreme Court decided *Chisholm v. Georgia*.

Legal Debates Before *Chisholm*

Sovereign immunity is a judicial doctrine that forbids bringing suit against a government without its consent. As Justice Oliver Wendell Holmes once explained the concept, an entity which makes law must be superior to that law. The origin of the doctrine is uncertain; many have attributed it to English common law based on a statement in Sir William Blackstone's *Commentaries on the Law of England*, a 1765 book upon which American lawyers relied during the founding period. Blackstone's assertion that "no suit or action can

be brought against the king, even in civil matters, because no court can have jurisdiction over him," was an overstatement, however.

The delegates to the Constitutional Convention did not debate the issue of state sovereign immunity, but Article III defined the judicial power in language suggesting that states would be subject to suits by individuals in the federal courts. This possibility became a point of contention during the debates over ratification of the Constitution. Anti-Federalist George Mason of Virginia asked, "Is the sovereignty of the State to be arraigned like a culprit, or private offender? Will the States undergo this mortification?" Patrick Henry complained that if states could be sued for debts, holders of the "immense quantity of depreciated Continental paper money in circulation at the conclusion of the war" would be able to demand repayment of the face value of these notes "shilling for shilling."

Federalists such as Alexander Hamilton, John Marshall, and James Madison tried to assuage such concerns by asserting that states would not be forced to stand as defendants in the federal courts, regardless of what the language of Article III might suggest. Hamilton wrote in *Federalist* no. 81, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." During ratification debates in Virginia, Madison argued that the states would have to sue in federal court in order to bring a claim against a citizen of another state, but that the states would enjoy immunity unless "a state shall condescend to be a party." Marshall echoed Madison, asserting, "It is not rational to suppose that the sovereign power shall be dragged before a Court. The intent is, to enable States to recover claims of individuals resident in other States." Patrick Henry scoffed at these assertions, pointing once again to the language of Article III providing for suits involving states "without discriminating between plaintiff and defendant."

The Case

Although not decided until 1793, the *Chisholm* case had its origins in the early years of the Revolutionary War. In 1777, American troops stationed near Savannah, Georgia, needed supplies. Two commissioners, authorized to act on behalf of the government of Georgia, purchased the necessary items from Robert Farquhar, a merchant from South Carolina. Although the commissioners were provided with funds from the state treasury in order to pay Farquhar, they failed to do so. Farquhar died in 1784, still not having been paid. The executor of his estate, Alexander Chisholm, petitioned the state of Georgia for payment but the legislature denied the petition in 1789.

Following the denial of his petition, Chisholm brought suit against the state in the U.S. Circuit Court for the District of Georgia. The governor and attorney general of Georgia took the position that the state possessed sovereign immunity and could not be forced to appear as a defendant. The case was heard by Supreme Court Justice James Iredell,

riding circuit, and U.S. District Judge Nathaniel Pendleton, both of whom agreed that Chisholm could not sue a sovereign state in federal court. In 1792, Chisholm instituted suit in the Supreme Court of the United States, where Georgia once again claimed sovereign immunity.

The Supreme Court's Ruling

The Supreme Court ruled 4–1 that Georgia did not possess sovereign immunity and was subject to suit by individual plaintiffs in federal court. Each justice wrote a separate opinion, with Chief Justice John Jay and Justices John Blair, Jr., James Wilson, and William Cushing in the majority, and Justice James Iredell in dissent. Chief Justice Jay pointed out that Georgia could not base its objection on the mere fact that it was made a defendant in federal court, because the Constitution provided for suits between states, in which states would inevitably be defendants. The objection, therefore, was premised on the fact that the plaintiffs were individual citizens of another state. "That rule is said to be a bad one," wrote Jay, "which does not work both ways." In other words, if Georgia maintained the right to sue citizens of other states in federal court, it would be unjust for those citizens to lack the ability to sue Georgia.

Jay then turned to the language of the Constitution, which extended the judicial power "to controversies between a state and citizens of another state." These words, he contended, were "express, positive, free from ambiguity, and without room" for implied exceptions. Had the drafters intended to limit this clause to suits in which a state was a plaintiff, they could have done so easily. To embrace such an exception would, Jay wrote, "contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: To the few against the many, as well as the many against the few."

Whereas most of the justices based their decision on the text of the Constitution, James Wilson—one of the primary drafters of the Constitution—took a different approach. In his view, the case depended on the answer to the question, "do the people of the United States form a Nation?" True sovereignty, Wilson reasoned, belonged to the people, who by ratifying the Constitution had bound themselves to the nation's laws. States, like the individuals composing them, must not be exempt from enforcement of those laws.

In his dissent, Justice Iredell asserted that every state was "completely sovereign" other than where its powers had been delegated to the federal government. According to Iredell, no suit by private citizens against a state could proceed without the state's consent unless there was English common-law precedent to support such an action. Finding an English case allowing a claim against the Crown to proceed inapplicable to the present case, Iredell believed that the Supreme Court lacked jurisdiction over the plaintiffs' claim against Georgia.

Aftermath and Legacy

The *Chisholm* ruling provoked immediate shock and outrage among government officials in Georgia and other states. The governor of Georgia, Edward Telfair, gave an address to the General Assembly in which he proclaimed that "an annihilation of [the state's] political existence must follow," if more suits like Chisholm's were filed. The Georgia House of Representatives passed a resolution providing for the death penalty to be imposed on anyone attempting to enforce a judgment against the state (the state senate took no action on the resolution, however).

Less than a year later, Congress passed the Eleventh Amendment, which was ratified by the states on February 7, 1795, but did not go into effect until 1798. The amendment provided that "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." In later decades, the Supreme Court interpreted the Eleventh Amendment broadly, holding that it precluded federal court lawsuits against states in contexts other than those specified, including suits against a state by its own citizens.

The Supreme Court had issued a judgment in favor of Chisholm in 1794, but the judgment was never enforced. After ordering an inquiry to determine the amount of damages Georgia should pay, the Court granted several continuances of the case. In 1798, after the Eleventh Amendment took effect, the Court removed all suits against states by individual plaintiffs, including *Chisholm*, from its docket.

Discussion Questions

- What is the reasoning behind sovereign immunity? Do you find it persuasive?
- Under what circumstances, if any, should individuals be able to sue a state government?
- What do the *Chisholm* case and its immediate aftermath tell us about the relationship between Congress and the Supreme Court in the early republic?
- Would the *Chisholm* decision have been correct if the justices had believed the plain language of Article III to provide for suits against states, but also believed that the drafters of the Constitution had not intended to allow such suits?

Documents

Justice James Wilson, Opinion in *Chisholm v. Georgia*, February 19, 1793

Each of the justices of the Supreme Court wrote a separate opinion to explain their vote in Chisholm. *While the other justices in the majority focused their opinions on the plain text of Article III of the Constitution—which appeared to permit suits against states—James Wilson took a more philosophical approach. With respect to the United States, he posited, it was the people, and not the states, who were sovereign.*

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

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

Is the foregoing description of a State a true description? It will not be questioned but it is. Is there any part of this description, which intimates, in the remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfill engagements? It will not be pretended that there is. If justice is not done; if engagements are not fulfilled; is it upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that, which will not be voluntarily performed? Less proper it surely cannot be. The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws. If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, willfully refuses to discharge it: The latter is amenable to a Court of

Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a Sovereign State? Surely not.…

As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the "People of the United States," did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.

Document Source: *Chisholm v. Georgia*, 2 U.S. 419, 453–57 (1793).

Report of a Joint Committee of the Massachusetts General Court, Independent Chronicle, June 20, 1793

State government officials were alarmed by the potential for treasury funds to be drained by federal court lawsuits in the wake of the Chisholm *decision. The Massachusetts legislature issued a formal resolution asking the state's congressional delegation to press for a constitutional amendment removing suits against states from the judicial power of the United States. The Eleventh Amendment, ratified in 1795, accomplished this purpose.*

1. *Resolved*, That the same principles of the Constitution, which apply to the State of Georgia, apply equally to all the States which compose the Government of the United States.
2. *Resolved*, That it hath ever been the sense of the Citizens of this Commonwealth, that the Government of the United States is a *Federal Government*.
3. *Resolved*, That the idea of a *Federal Government* necessarily involves the idea of component parts, consisting of *distinct and separate Governments*.
4. *Resolved*, That a *Government* being liable to be sued by an individual Citizen, either of that, [or] of any other Government, is inconsistent with that sovereignty which is essential to all Governments, and by which alone any Government can be enabled, either to preserve itself, or to protect its own members, whether Citizens or Subjects.
5. *Resolved*, That the article in the Constitution which extends the Judicial Power to *controversies between a State and the Citizens of another State* as applied by the Judges of the Supreme Judicial Court in the case aforesaid, is in its principle subversive of the State Governments, inconsistent with the [ease] and safety of the body of Free Citizens; and repugnant to every idea of a *Federal Government*, and therefore it is

6. *Resolved*, That the Senators of this Commonwealth in the Congress of the United States, be, and they hereby are instructed, and the Representatives requested, to use their utmost influence that the article in the Federal Constitution, which refers to controversies between a State and the Citizens of other States, be either wholly expunged from the Constitution, or so far modified and explained as to give the fullest security to the States respectively against the evils complained of, and to remove their apprehensions on this highly interesting and important subject; more especially as this Legislature have the fullest assurance, that the late decision of the Supreme Judicial Court of the United States, hath given a construction to the Constitution, very different from the ideas which the Citizens of this Commonwealth en[tertained of it at the time it was adopted.]

Document Source: Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789–1800: Volume Five, Suits Against States* (New York: Columbia University Press, 1994), 230–31.

Proceedings of the Georgia House of Representatives, *Augusta Chronicle*, November 19, 1793

The response of the Georgia House of Representatives to the Chisholm *decision reflected the anger many felt toward what they perceived as an assault on state sovereignty. The House passed a resolution providing for the death penalty to be imposed on any person attempting to execute a court judgment against the state. A motion to strike this portion of the resolution failed by a vote of 19 to 8. The state senate took no action on the resolution, however.*

The House proceeded to resolve itself into a committee of the whole, to take under consideration a bill to be entitled, an act declaratory of certain parts of the retained sovereignty of the state of Georgia.…

A motion was made by Mr. Waldburger, to strike out the following section therein:

And be it further enacted, That any Federal Marshal, or any other person or persons levying or attempting to levy on the territory of this state or any part thereof, or on the treasury or any other property belonging to the said state, or on the property of the Governor or Attorney-General, or any of the people thereof, under and by virtue of any execution or other compulsory process issuing out of, or by authority of the supreme court of the United States, or any other court having jurisdiction under their authority, or which may at any period hereafter under the constitution of the said United States, as it now stands, be constituted; for, or in behalf of the before-mentioned Alexander Chisolm, executor of Robert Farquhar, or for, or in behalf of any other person or persons whatsoever, for the payment or recovery of any debt or pretended debt, or claim against the said state

of Georgia; shall be, and he or they attempting to levy as aforesaid, are hereby declared to be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged.

And on the question of striking out as aforesaid, the yeas and nays being required, are as follow:

Yeas.... 8.

Nays.... 19. So the motion was lost.

Document Source: Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789–1800: Volume Five, Suits Against States* (New York: Columbia University Press, 1994), 236–37.

Editorial, *American Minerva*, New York, N.Y., January 15, 1794

The resolution passed by the Georgia House of Representatives—providing for the death penalty for anyone attempting to execute a judgment against the state—became the subject of national controversy. An editorial in the New York newspaper American Minerva *asserted that the Georgia legislators had violated their oaths of office by failing to support the national Constitution. States like Massachusetts, the writer asserted, had followed the better course by seeking a constitutional amendment immunizing states from suits by individuals in federal court.*

An Intemperate Resolution of Georgia

In the House of Representatives of that State, a clause of a bill passed on the 19th of November, which declares any person attempting to levy a process issuing from any Court of the United States, upon the lands or treasury of that State, or upon the property of the Attorney General or of any inhabitant of the State, to be *guilty of felony, to suffer death by being hanged, without benefit of clergy*. It is to be observed, that the members of the Legislature of Georgia are all *sworn to support the constitution of the United States*, this is taken for granted, because the constitution, Art. 6, requires it. Now the constitution expressly declares that the judicial power of the United States shall extend '*to all cases between a State and citizens of another State*,' which, the Supreme Court has deliberately decided, extends to enable a person to sue a State. This decision is then a law of the United States, or rather a part of the constitution, and binding on every citizen, until altered. If the suit is *constitutional*, the executive process must be so too—then the result is that the House of Representatives in Georgia, have made it *felony* for a man to *support that constitution*, which *they* have *solemnly sworn to support*.

This resolution will very well go along with the resolves of the Kentucky Democratic Society. Do these people suppose that *passion* and *fury* will frighten three or four millions of *steady independent people*, who *reason* before they *act*? Such intemperate resolutions can

come only from men who are accustomed to brandish a whip over slaves; men who are *tyrants* in *domestic life*, and *levellers* in *political*; men of the most *delicate* honor, who, for a wink of the eye or a jog of the elbow, will be exasperated with the insult, invite you into the field, and there very *honorably* blow your brains out. How much more pacific and conciliating have been the resolutions of several other Legislatures, who, with the same wishes as the people of Georgia, have instructed their Representatives in Congress to endeavor to procure an amendment of that offensive article in the national constitution!

Document Source: Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789–1800: Volume Five, Suits Against States* (New York: Columbia University Press, 1994), 237–38.

Anonymous Essay, *American Minerva*, New York, N.Y., February 3, 1794

Supporters of the Chisholm *decision believed that states had as much of an obligation as did individuals to abide by the judicial process. Justice could not be carried out, asserted the author of an editorial in the New York newspaper* American Minerva*, if the states and the people did not possess reciprocal rights and obligations.*

What can be more surprising than the opposition made to this decision of the Supreme Court of the U. States! It is said the *sovereignty* and *independence* of a state is endangered by it. Just as well may an individual say, *I must not be liable to suits*—it will *abridge my liberty*. Is it then an abridgement of independence to be compellable to do justice? to be answerable for our moral conduct to an impartial tribunal? Is it a *rightful sovereignty* which puts an individual or a political body beyond the arm of legal and moral justice? Is it not rather a *false pride* and ideas derived from *regal prerogatives* and *despotism*, that now call up an opposition to one of those articles in the Constitution of the United States, which does honor to the Convention that framed it, and if carried into effect, would be the *glory of the country*. It is an honor perhaps reserved for some future republic, more enlightened and more virtuous than our own, to make complete provision for submitting itself to the ordinary course of justice. Instead of clamoring for an amendment of our constitution, *true liberty* requires that provision be made for carrying into effect the judgements rendered against States. Men can never be fully possessed of *legal freedom* and *right*, until *sovereign states* are as compellable to do justice, as individuals; until the rights of states and of individuals are *reciprocal*.

Document Source: Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789–1800: Volume Five, Suits Against States* (New York: Columbia University Press, 1994), 250–51.

Susan Randall, *Nebraska Law Review*, 2002

Susan Randall, a professor at the University of Alabama School of Law, argued that the theory of sovereign immunity underlying the Eleventh Amendment was fundamentally flawed. The founders, she asserted, had never intended to import this concept from English law into American common law. Moreover, many founders had believed that the states' ratification of the Constitution represented their consent to be subject to suits in federal court as provided by Article III. Going forward, she suggested that courts treat sovereign immunity as a discretionary matter to be applied on a case-by-case basis, rather than a complete bar to federal jurisdiction over suits against states.

The history of sovereign immunity in the United States is a history of mistakes. One mistake has engendered another, with the result that many federal laws are not enforced against the states, either in state or federal courts or federal administrative courts, and citizens have limited (or in some instances, no) recourse against their federal, state, and local governments—and all of this seems reasonable, normal, and even inevitable.…

This Article concludes that the founding generation did not intend state sovereign immunity and instead viewed the ratification of the Constitution as consent to Article III suits by the states individually and collectively for the United States.…

Briefly, the errors that account for sovereign immunity in its modern form are these. First, sovereign immunity is based on a modern misunderstanding of eighteenth century English law as prohibiting any form of recovery against the sovereign. Despite this popular misconception, English procedure permitted several forms of action against the Crown as a matter of course. Second, modern observers have assumed, based on scant historical evidence, that the English law of sovereign immunity was received into the law of the newly formed United States, despite its inconsistencies with the structures and governing philosophies of the Union. This reception by Revolutionaries, whose actions constituted treason under English law and whose aim was the overthrow of the sovereign and institution of a representative government, has been repeatedly described as "one of the mysteries of legal evolution." This Article argues that there was no such "reception," and that the founding generation did not accept or adopt sovereign immunity. The constitutional language and structure, debate in the Convention and in the press, and ratification debates in the states support this theory.…

Third, modern justifications for sovereign immunity, such as promotion of government efficiency and protection of public funds, are tainted by these errors. Non-historical rationales for sovereign immunity derive much of their force from the simple fact that we believe sovereign immunity has been part of our history from the beginning.

Central to the modern doctrine of sovereign immunity is an historical account of the founding which is deeply flawed. This flawed account of the founding relies almost exclusively on an isolated statement of Alexander Hamilton in a *Federalist* paper, later supported by one statement of James Madison and one statement of John Marshall during the Virginia ratification debates. These three statements, which address federal judicial power over the states, interpret the national judicial power afforded in the Constitution as being subject to common law sovereign immunities.

Instead, the Founders believed that the states' ratification of the Constitution supplied consent to suit by individual states and by the states collectively on behalf of the United States in Article III cases.… [T]he founding generation's interpretation of the Constitution with regard to sovereign immunity is at odds with the Supreme Court's long-standing view that the sovereign immunity is a constitutional doctrine, with the Eleventh Amendment standing for the broad "presupposition" of immunity implicitly embodied in Article III.…

Time and tradition have, of course, embedded the mistake of sovereign immunity in our legal culture. Completely excising this embedded mistake and other derivative mistakes, which are now firmly entrenched in constitutional, statutory, and common law, is extraordinarily unlikely, and perhaps even impossible. However, the mistake has thwarted the administration of justice in this country over the course of more than two centuries, depriving many claimants against the United States, states, counties, municipalities, and often their corporate and individual agents, of the protection of our law. In recognition of these many injustices, this Article suggests that a claim of sovereign immunity should be assessed on its merits, independent of the doctrine's invalid historical justifications, and applied accordingly. Sovereign immunity in such instances would be a prudential rather than a jurisdictional doctrine, in which concerns about the appropriate vertical allocation of authority between state and federal governments, and appropriate horizontal allocations among the legislative, executive, and judicial branches of both levels of government, would control.

Document Source: Susan Randall, "Sovereign Immunity and the Uses of History," *Nebraska Law Review* 81, no. 1 (2002): 2–6 (footnotes omitted).

Randy E. Barnett, *Virginia Law Review*, 2007

Randy Barnett, a law professor at Georgetown University, delivered an address in which he lamented the omission of Chisholm v. Georgia *from most classes on American constitutional law. Including* Chisholm *in the canon of important constitutional cases, he explained, would expose students to the notion that "sovereignty rests with the people, rather than with state*

governments," which is quite different from the modern conception of popular sovereignty. Barnett also pointed to Chisholm*'s significance in illustrating the possibility of using constitutional amendments to counteract problematic Supreme Court decisions, a practice that did not take hold despite the adoption of the Eleventh Amendment.*

Constitutional law professors know two things that their students often do not: John Marshall was not the first Chief Justice of the United States, and *Marbury v. Madison* was not the first great constitutional case decided by the Supreme Court. That honor goes to *Chisholm v. Georgia*, decided some ten years earlier when John Jay was Chief Justice.…

In *Chisholm*, the Justices of the Supreme Court rejected Georgia's claim to be sovereign. They concluded instead that, to the extent the term "sovereignty" is even appropriately applied to the newly adopted Constitution, sovereignty rests with the people, rather than with state governments. Their decision is inconsistent with both the modern concept of popular sovereignty that views democratically elected legislatures as exercising the sovereign will of the people and the modern claim that states are entitled to the same immunity as was enjoyed by the King of England. The Justices in *Chisholm* affirmed that, in America, the states are not kings, and their legislatures are not the supreme successors to the Crown.…

By omitting *Chisholm* from the canon, students learn none of this. They are left unexposed to the radical yet fundamental idea that if anyone is sovereign, it is "We the People" as individuals, in contrast with the modern view that locates popular sovereignty in Congress or state legislatures, which supposedly represent the will of the people.

Another reason for teaching *Chisholm* is that it represents the "road not taken" with respect to constitutional amendments. Congress and the states chose to follow the advice of Justice Blair. "If the Constitution is found inconvenient in practice in this or any other particular," he wrote in his opinion, "it is well that a regular mode is pointed out for amendment." Precisely because its holding was reversed two years later by the ratification of the Eleventh Amendment, *Chisholm* represents an opportunity to consider how the practice of constitutional interpretation by courts might have been different if the tradition of correcting Supreme Court decisions by express amendment had taken hold.…

[I]f written amendments were socially accepted as a more normal reaction to an objectionable Supreme Court decision, the need perceived by some for the Supreme Court to engage in creative "interpretation" might be obviated. The rapid adoption of the Eleventh Amendment suggests that Article V constitutional amendments can be practical, provided the legal and political culture views amendments as a natural response either to a Supreme Court misinterpretation of the Constitution or to a correct interpretation of our imperfect Constitution with which there is widespread dissatisfaction. Today, lacking a culture of

written amendment, correct but objectionable interpretations of the Constitution have to be treated as misinterpretations to justify judicial intervention.

Document Source: Randy E. Barnett, "The People or the State?: *Chisholm v. Georgia* and Popular Sovereignty," *Virginia Law Review* 93, no. 7 (November 2007): 1729–31, 1737–38 (footnotes omitted).

Kurt T. Lash, *William & Mary Law Review*, 2009

In a 2009 piece, Professor Kurt Lash of Loyola Law School argued against the widespread conception of the Chisholm *decision as the driving force behind the adoption of the Eleventh Amendment. The issue of state sovereignty, he asserted, was already an issue of public debate based on earlier suits against states that did not result in Supreme Court decisions.*

Scholars and courts generally attribute the Eleventh Amendment to the "profound shock" caused by the [Supreme] Court's analysis of Article III in *Chisholm v. Georgia* and the need to reverse the results of that particular case. Although commentators differ in their choice of the most persuasive opinion in Chisholm, there is general agreement that the Eleventh Amendment reflects a public reaction to the issues discussed in that one particular case. In fact, even though the Supreme Court's Eleventh Amendment jurisprudence has long emphasized *Chisholm*, Eleventh Amendment scholars often criticize the modern Supreme Court for not emphasizing *Chisholm enough*.…

This Article contends that the modern emphasis on *Chisholm v. Georgia* as the generative source of the Eleventh Amendment is historically incorrect. Public debate regarding the key issues behind the Eleventh Amendment had been underway long before the Court handed down its decision in *Chisholm*. Although the decision added urgency to this debate, the actual opinions in the case had little impact due to their public unavailability for months after the decision was handed down. Nor was it Georgia that took the lead in protesting the perceived violation of state sovereignty and organizing support for a constitutional amendment. That role fell to Massachusetts, a New England state that had been engaged in a public debate on the issue of state sovereign immunity for over a year prior to *Chisholm* and whose legislature successfully spearheaded the effort to secure an amendment in reaction to the state being sued in *Vassal v. Massachusetts*.

Leaving behind the deeply rutted trail of *Chisholm*-based interpretations of the Eleventh Amendment allows for a much better view of the principles that informed the debate over state suability. When the first cases were filed against the states in federal court, critics immediately noticed that such suits called into question the very idea of retained state sovereignty. Because a sovereign could not be sued without its consent, compelled suits

against the states reduced those bodies to the level of nonsovereign corporations. Although it was possible to read Article III to allow such a result, doing so violated the promises made by Federalists in the state conventions that federal powers, including the powers granted under Article III, would be narrowly construed in order to preserve the independent sovereign character of the states. Alexander Hamilton, James Madison, James Iredell, Rufus King, John Marshall, and others all assured the conventions that delegated power would be strictly construed to avoid just such a result. Pressure to make these promises an express part of the Constitution ultimately led to the adoption of the Bill of Rights with the Ninth and Tenth Amendments, according to James Madison, preventing any "latitude of interpretation" of federal power. When federal courts accepted jurisdiction over individual suits against the states, this triggered both a sense of betrayal and a concern that these suits would serve as a precedent leading to the feared "consolidation" of the states. *Chisholm* was just one (and not the first) of a number of cases filed in federal court that fueled this debate. It was mere historical accident that *Chisholm* was the first to generate an actual decision by the Supreme Court, and the Court's discussion of the issue in *Chisholm* played a minor role at best in the movement to amend the Constitution.

Document Source: Kurt T. Lash, "Leaving the *Chisholm* Trail: The Eleventh Amendment and the Background Principle of Strict Construction," *William & Mary Law Review* 50, no. 5 (April 2009): 1583–86 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of "the judicial power," remedies, judicial review, the relationship between federal judicial power and states' rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn's Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter's Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court's jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?