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Cover Page Footnote

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Chisholm v. Georgia (1793): Laying the Foundation for Supreme Court Precedent

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According to the Administrative Office of the United States Courts, the earliest landmark case decided by the Supreme Court of the United States occurred in 1803—*Marbury v. Madison*.¹ In fact, when discussing the casebooks through which students are introduced to constitutional law, Carlton Larson refers to the period between the ratification of the Constitution and the *Marbury* decision being depicted as “a vast wasteland in which no constitutional interpretation of any significance took place.”² The decision of the Court and the opinion of Chief Justice John Marshall granted federal courts the right and duty to declare executive and legislative actions as unconstitutional, a concept modernly referred to as judicial review.³ Judicial review was the first critical precedent set by the Supreme Court as it expanded the power of federal courts while checking the powers of the executive and legislative branches, serving as a point of reference in numerous landmark cases to follow.⁴ While many consider the constitutional history preceding *Marbury* to lack significant rulings, this notion disregards one important legal decision; this essay will explain the significance of this omission.

However, Larson’s statement without context was simply incorrect; the history of the court system in the United States began long before the ratification of the Constitution, and the era between ratification and the *Marbury* decision served as the official beginning of the

federal judicial system. Preceding the establishment of the judicial branch of the United States government by the Constitution, the colonial courts consisted of Justice of the Peace courts, which handled more trivial disputes, and the quarter session courts. The quarter session courts had juries of which the members must have a stake in property.⁵ These local courts settled disputes on the basis of English Common Law and applied it in their deliberations.

The United States Supreme Court was established with the ratification of the Constitution in 1788; Article III granted the Court jurisdiction over all laws which questioned constitutionality.⁶ The United States Congress passed the Judiciary Act of 1789, establishing the highest court in which George Washington nominated five justices to serve on the bench until death or retirement—Associate Justices John Rutledge, William Cushing, John Blair, James Wilson, and Robert Harrison alongside Chief Justice John Jay. The United States Senate confirmed all six justices.⁷

In 1791, the United States Supreme Court handed down its first decision in the case *West v. Barnes*, in which the bench strictly interpreted procedural filing requirements mandated by statute.⁸ In *Georgia v. Brailsford* (1792), the Court ruled that a state may sue in federal court to enjoin payment of a judgment on foreign debt until it can be ascertained to whom the money

¹ Administrative Office of the United States Courts. “Supreme Court Landmarks” *United States Courts Educational Resources*, 2021.

² Carlton Larson. “Recovering the Congresses’ Constitution.” *Yale Journal of Law and the Humanities* 10, 1998. 647.

³ Melvin I. Urofsky. *Supreme Decisions: Great Constitutional Cases and Their Impact*. New York: Routledge, 15.

⁴ *Ibid.*, 17.

⁵ Maeva Marcus, James R. Perry. *The Documentary History of the Supreme Court of the United States, 1789-1800*. New York: Columbia University Press, 1985.

⁶ U.S. Const., art. III, § 1.

⁷ Richard B. Morris. “The John Jay Court: An Intimate Profile.” *J. Contemp. L.* 5 (1978): 163.

⁸ Schwartz, Bernard. *A History of the Supreme Court*. Oxford University Press, 1993. 16

belongs.⁹ Although these cases served as the first decisions of the highest Court, the first case to thoroughly deliberate an issue of constitutionality faced decision in 1793.¹⁰

A decade prior to the decision of the *Marbury* case, and prior to a time of any Supreme Court precedent, the Court had reached a decision not only significant to the decision of the Marshall Court in 1803, but also foundational. This case, *Chisholm v. Georgia* (1793), first questioned whether state governments could be sued in federal court and raised a discussion of defining sovereignty as it relates to the states.¹¹ In *Chisholm*, the Jay Court decided that the federal courts held the affirmative power to hear disputes between private citizens and the states through Article III, Section II of the Constitution—an early glimpse of this concept of judicial review in the Supreme Court.¹² In addition to its introduction of a crucial Supreme Court precedent, the decision in *Chisholm* caused such controversy that it resulted in the passage of the Eleventh Amendment—the first individual addition to the Constitution following the Bill of Rights.¹³ Through its impact on future case law and the definition of state sovereignty, the 1793 Supreme Court case *Chisholm v. Georgia* served as the first landmark Supreme Court case and proved foundational to the *Marbury* case. The origins of the *Chisholm* case trace back to October 1777, when the Executive Council of Georgia authorized Thomas Stone and Edward Davies, both of Savannah, to purchase goods from a merchant of Charleston, South Carolina, Robert Farquhar.¹⁴ The state of Georgia paid the men in continental loan office certificates for the purpose of compensating Farquhar. Contracted in Savannah, the exchange provided American troops quartered near the city with a considerable sum of supplies, including cloth, silk, blankets, and coats in return for a payment of

\$169,613.33 to be made by December 1 of that year.¹⁵ According to the *Chisholm* case file, Farquhar delivered the supplies on November 3 and requested payment on December 2, but Stone and Davies refused him.¹⁶

Robert Farquhar died in January 1784, having failed to acquire compensation for the supplies he had sold, leaving his inheritance to his ten year old daughter Elizabeth.¹⁷ The executor of Farquhar’s will, Alexander Chisholm, sued in the United States Circuit Court for the District of Georgia against the state following a failed petition to settle the claim, which asked for payment and damages; the Georgia House of Representatives voted the suit down in December 1789.¹⁸ Georgia Governor Edward Telfair responded to the petition by referring to the state as “a free, sovereign and independent State, and that the said State of Georgia cannot be drawn or compelled... to answer, against the will of the said State of Georgia, before any Justices of the federal Circuit Court for the District of Georgia or before any Justices of any Court of Law or Equity whatsoever.”¹⁹

Telfair’s definition of Georgia as a sovereign body aligned with a point made by Alexander Hamilton in 1788—“It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*.”²⁰ From the perspective of Telfair—and the logic of Hamilton—the state could not be obligated to appear in court if, as a sovereign body, it did not agree to do so.

This idea of the consent of states to be sued was key to Justice James Iredell’s decision while presiding over the Circuit Court case at Augusta, *Farquhar v. Georgia*. Iredell shared the opinion with Nathaniel Pendleton of the United States District Court of Georgia—also presiding over the case—that Georgia could not be sued by a citizen of another state, in this case Alexander Chisholm was from South Carolina, in the Circuit Court.²¹ Following another failed attempt to collect damages and payment on behalf of Robert Farquhar, Chisholm presented a petition to the United States Supreme Court.

⁹ *Ibid.*, 18.

¹⁰ *Ibid.*, 20.

¹¹ Julius Goebel Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States. Volume 1, Antecedents and Beginnings to 1801*, New York: Macmillan, 1974.

¹² William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth*. United States: University of South Carolina Press, 2012.

¹³ John V. Orth, “Truth about Justice Iredell’s Dissent in *Chisholm v. Georgia* (1793).” *North Carolina Law Review*, 1994. 256.

¹⁴ Doyle Mathis, “*Chisholm v. Georgia*: Background and Settlement.” *The Journal of American History* 54, 1967. 20.

¹⁵ *Ibid.*, 21.

¹⁶ *Chisholm v. Georgia*, 2 Dall. 419 (1793) 439.

¹⁷ Mathis, 21.

¹⁸ *Ibid.*, 22.

¹⁹ *Ibid.*, 23.

²⁰ Alexander Hamilton, *The Federalist No. 81*. The Papers of Alexander Hamilton 4 (1788).

²¹ Mathis, 23.

The Supreme Court of the United States served a summons to the state of Georgia commanding it to appear on February 8, 1792; copies of this summons were sent on July 11 for the District of Georgia, Governor Telfair, and the Attorney General of the state, Thomas P. Carnes.²² As the Court convened to hear the case, now listed as *Chisholm v. Georgia*, in August of 1792, Georgia was not represented. The Court postponed the case until February 1793.

During the session on February 4, the Court agreed to hear Edmund Randolph, Attorney General of the United States acting for the plaintiff, present his arguments, which lasted roughly two and a half hours.²³ Randolph asserted that the Court had authority under the Judiciary Act of 1789 to proceed with a lawsuit against the state of Georgia.²⁴ Once again, Georgia faced no representation in the case; however, the Court considered the suit “of considerable importance” and issued another invitation to present attorneys to make a statement if they desired, but none accepted.²⁵

From February 5 to February 18, the Supreme Court deliberated the *Chisholm* case.²⁶ Justice James Wilson characterized the fundamental nature of the issue the case presents, stating in his opinion,

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?²⁷

The last clause of Wilson’s statement raised a crucial question relating to the nature of the Union.

In response, Jay first recognized that although “thirteen sovereignties were considered as emerged from the principles of the Revolution,” in reference to the states, that “the sovereignty devolved on the people.”—thus introducing that sovereignty lies in the people, not in individual states.²⁸

This concept can be described as *imperium in imperio*, or a sovereign inside of another sovereign; in other words, if the people are sovereign in this republican Union, they cannot form a body, such as a state, that is also sovereign.²⁹ Additionally, Wilson argued that if the Framers of the Constitution built the law of the republic on the consent of the governed, sovereignty can only rest in the individual people whom of which are asked to obey the law.³⁰ He concluded, “As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.”³¹

Chief Justice Jay reaffirmed this location of sovereignty in the individual person, contending a “great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined.”³² Jay referred to the extension of the judiciary power of the United States to aforementioned controversies as “wise,” “honest,” and “useful.”³³

In his opinion, Jay delivered a line critical not just to the decision of the *Chisholm* case, but also to future deliberations: “While all the states were bound to protect each other, and the citizens of each, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done *to* each, and the citizens of each; but also to cause justice to be done *by* each.”³⁴ In this explanation, Jay claimed the national judiciary should be instituted by and be responsible to the whole nation; Jay’s reference to the United States as a nation answered the overarching issue in question by Wilson.³⁵

In his conclusion, Chief Justice Jay asserted that through Article III, Section II of the Constitution, it was proper for the national judiciary to ensure the states do justice for those with whom disputes arose.³⁶ This idea embodied the origin of the discussion of protecting the minority opinion in the federal courts through judicial review, the central thesis to John Marshall’s argument in *Marbury v. Madison*.³⁷

29 Randy E. Barnett. “The People or the State?: *Chisholm v. Georgia* and Popular Sovereignty.” *Virginia Law Review*, 2007. 1732.

30 *Ibid.*, 1733.

31 *Chisholm v. Georgia*, 2 Dall. 419 (1793), 457.

32 *Chisholm v. Georgia*, 2 Dall. 419 (1793), 479.

33 *Chisholm v. Georgia*, 2 Dall. 419 (1793), 480.

34 *Chisholm v. Georgia*, 2 Dall. 419 (1793), 474.

35 *Chisholm v. Georgia*, 2 Dall. 419 (1793), 465.

36 Gibbons, 1925-26.

37 Kemp Plummer Yarborough. “*Chisholm v. Georgia*: A Study of the Minority Opinion.” *Columbia University*, 1963.

21 Mathis, 23.

22 *Ibid.*, 24.

23 *Ibid.*, 26.

24 John J. Gibbons. “The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation.” *Columbia Law Review* 83, 1983. 1923-24.

25 Mathis, 24.

26 *Ibid.*, 25.

27 *Chisholm v. Georgia*, 2 Dall. 419 (1793), 453.

28 *Ibid.*, 454.

Jay also advocated for a principle described as “judicial symmetry,” which reasons that if a state can sue an individual, then an individual should be able to sue a state.³⁸ In response to this stance, Attorney General Randolph expressed his frustration to James Madison, writing in August 1792, “He is clear, too, in the expression of his ideas, but that they do not abound on legal subjects has been proven to my conviction; there was no method, no legal principle, no system of reasoning!”³⁹

When delivering his opinion, Justice John Blair asserted that he would only consider the wording of the Constitution and nothing else; the issue that arose in this situation was the lack of content in the Constitution relating to sovereign immunity.⁴⁰ As a result, his opinion is brief, but Blair noted Article III, Section II, reasoning that once a state “has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.”⁴¹

Like Chief Justice Jay, Justice William Cushing also reasoned that if a state was entitled to justice in federal court against a citizen of another state, then such citizens should be entitled to justice against a state.⁴² Additionally, Cushing defended the postulation that Article III, Section II of the Constitution provided a necessary dispute resolution between states and citizens of other states.⁴³

Justice James Iredell, who had presided over the case in the circuit court, was still not convinced of the petitioner’s standing. A major part of the Associate Justice’s opinion was devoted to questioning whether the Supreme Court even had jurisdiction to hear a breach of contract case without express authorization by the Constitution or by Congress.⁴⁴ Iredell construed narrowly section 14 of the Judiciary Act as an authorization of the “issuance of writs known at common law or authorized by the defendant state’s law”—conveying that the Court had no authority to grant remedy against a state to a private plaintiff.⁴⁵

Iredell justified his circumvention of direct construction of the Constitution by stating, “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.”⁴⁶ To Iredell, his dissent stood on the basis that the Court did not hold the jurisdiction to deliberate the case, and certainly not to make a decision in *Chisholm*.

Justice Iredell’s twenty-one-page opinion in the case record contained only one paragraph relating to the constitutional question being addressed in *Chisholm*—the rest he filled with a detailed summary of English Common Law on the issue.⁴⁷ Iredell asserted that Common Law was the only law common to all the states, and parts of the common law of England relative to remedies against the Crown could be applied to this subject, as these parts had undergone no changes in the states.⁴⁸ While the other justices tended to structure their opinions based upon constitutional reasoning, Wilson did acknowledge that sovereign immunity was a part of Common Law and had been in England since the reign of King Edward I in the late thirteenth century.⁴⁹

On February 19, 1793, the Supreme Court announced their decision following the delivery of the justices’ opinions the day prior. The Court, in a four to one decision, ordered: “...that the Plaintiff in this case do file his declaration on or before the first day of *March* next.

Ordered, that certified copies of the said declaration be served on the Governor and Attorney General of the State of *Georgia*, on or before the first day of *June* next.

Ordered, that unless the said State shall either in due form appear, or shew cause to the contrary in this Court, by the first day of next Term, judgement by default shall be entered against the State.”⁵⁰

Therefore, through this decision, the Supreme Court rejected the views of Alexander Hamilton and other key Federalists that insisted a state could not, without consent, be made a party defendant in federal court by a citizen of another state.⁵¹ The people, from all parts of the United States, met the Court’s decision with an “immediate and strong”⁵² reaction;

³⁸ William A. LaBach. “The Career of State Sovereign Under the United States Constitution”. *University of Kentucky Press*, 2007. 19.

³⁹ *Ibid.*, 21.

⁴⁰ *Ibid.*, 24.

⁴¹ *Chisholm v. Georgia*, 2 Dall. 419 (1793), 452.

⁴² LaBach, 26.

⁴³ *Ibid.*, 26.

⁴⁴ Barnett, 1736.

⁴⁵ Gibbons, 1923.

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

⁴⁷ *Chisholm v. Georgia*, 2 Dall. 419 (1793), 437-45.

⁴⁸ Stewart Jay. “Origins of Federal Common Law: Part One.” *University of Pennsylvania Law Review* 133, 1984.

⁴⁹ *Chisholm v. Georgia*, 2 Dall. 419 (1793), 460.

⁵⁰ *Ibid.*, 480.

⁵¹ Mathis, 25.

⁵² *Ibid.*, 25.

on the same day the Court issued its order, the House of Representatives introduced a resolution for an amendment to the Constitution, and the following day the Senate introduced a similar resolution.⁵³ These initial resolutions themselves did not pass through their respective chambers; however, the controversy over the *Chisholm* decision did not simply dissolve, as on January 14, 1794, the United States Senate passed a new resolution for a constitutional amendment, and on March 4 the resolution passed in the House of Representatives.⁵⁴

The final wording of the Eleventh Amendment declared 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.”⁵⁵ According to historian William A. LaBach, the wording of this amendment “clearly conveyed a lack of confidence in the ability and/or willingness of judges to correctly interpret the Constitution,” claiming that the amendment failed to resolve or clarify the underlying question of sovereign immunity of the state.⁵⁶

Over a decade following the passage of the Eleventh Amendment, Justice Joseph P. Bradley explained that the history of the amendment had never intended to extend jurisdiction to such cases; he claimed that *Chisholm* “created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court.”⁵⁷

However, in the 1809 Supreme Court case *United States v. Bright*, Justice Bushrod Washington claimed the wording of the Eleventh Amendment to be worthy of strict interpretation, questioning, “Would we be justified by any rule of law in admitting such an interpolation, even if a reason could not be assigned for the omission of those words in the amendment itself? I think not. In our various struggles to get at the spirit and intention of the framers of the constitution, I fear that this invariable

charter of our rights would, in a very little time, be entirely construed away, and become at length so disfigured that its founders would recollect very few of its original features.”⁵⁸ Moreover, Strasser argued that if the purpose of the Eleventh Amendment was simply to overturn *Chisholm*, the Amendment would no longer permit similar suits to be heard and federal court, but also not alter any other section of the Constitution.⁵⁹

After being ratified by the necessary three-fourths of the states on February 7, 1795, the Eleventh Amendment had been proposed and ratified in less than two years following the *Chisholm* decision—an unusually short period of time for the passage of an amendment to the Constitution.⁶⁰ Despite its ratification in 1795, the Eleventh Amendment was not proclaimed as part of the United States Constitution by the President until John Adams in January 1798.⁶¹

It was the haste at which the legislature and states ratified the Eleventh Amendment that contributed to the aforementioned stance that *Chisholm v. Georgia* was not to be considered a landmark Supreme Court case; in result of its being “overridden” by an amendment, the decision itself, as well as its definition of sovereignty, are a “dead letter,” as explained by law professor Randy Barnett.⁶² However, Barnett pointed out that the question occupying the Supreme Court in *Chisholm* of the nature of sovereignty in the United States was its first major decision and ideal in studying the decisions of cases deliberated by the Marshall and Roger B. Taney Courts. In fact, he referred to the cases of the Marshall Court without mention of *Chisholm* as “out of context.”⁶³

Furthermore, Justice Bradley once again referred to the significance of the *Chisholm* decision in the *Hans* case, proclaiming, “The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest away in sustaining suits against the officers or agents of States.”⁶⁴

⁵³ *Dunlap’s American Daily Advertiser*, Feb. 22, 1793. *Gazette of the United States*, Feb. 20, 1793.

⁵⁴ Mathis, 26.

⁵⁵ U.S. Const., amend. XI.

⁵⁶ LaBach, 48.

⁵⁷ *Hans v. Louisiana*, 134 U.S. 1 (1890)

⁵⁸ *United States v. Bright*, 24 F. Cas. 1236.

⁵⁹ Mark Strasser. “Chisholm, the Eleventh Amendment, and Sovereign Immunity: On Alden’s Return to Confederation Principles.” *Florida State University Law Review* 28, 2001. 618.

⁶⁰ Orth, 256.

⁶¹ Mathis, 26.

⁶² Barnett, 1740.

⁶³ *Ibid.*, 1739.

⁶⁴ *Hans v. Louisiana*, 134 U.S. 1 (1890). 16.

Furthermore, Barnett argued that the decision in *Chisholm* represented the “road not taken” with respect to constitutional amendments—the idea that the case revealed a piece of the Constitution found to be “inconvenient in practice” and presented an opportunity to point out a “regular mode,” discussed by Justice Cushing, for amendment.⁶⁵ In the 1996 Supreme Court case *Seminole Tribe of Florida v. Florida*, Chief Justice William Rehnquist articulated that “the people of the United States in their sovereign capacity subsequently decided” against the current interpretation of Article III, Section II of the Constitution following the *Chisholm* decision and in favor of the passage of the Eleventh Amendment.⁶⁶

In summary, the *Chisholm* decision served as a critical and foundational point in United States legal and constitutional history as it questioned the nature of the Union, defined sovereignty as it related to the states, introduced the origins of judicial review in the federal judiciary, and affirmed the people as sovereign through the push toward passing an amendment to reverse the effects of the decision.

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⁶⁶ *Seminole Tribe of Florida v. Florida*, 517 U.S. 54 (1996).

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