The Documentary History of the Supreme Court of the United States, 1789-1800

Volume Five
Suits Against States

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For Justice William J. Brennan, Jr.

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Making of a Revolutionary, and vol. 2, *The Winning of the Peace* (New York: Harper & Row, 1975-1980).

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PTJ — *The Papers of Thomas Jefferson,* 25 vols. to date: vols. 1-20, ed. Julian P. Boyd; vols. 21-23, ed. Charles T. Cullen; vols. 24-25, ed. John Catanzariti (Princeton: Princeton University Press, 1950-1992).

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ROC — *The Documentary History of the Ratification of the Constitution,* 10 vols. to date: vols. 1-3, ed. Merrill Jensen; vols. 8-10 and 13-16, ed. John P. Kaminski and Gaspare J. Saladino (Madison: State Historical Society of Wisconsin, 1976-1993).

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SLJ — *Journal of the Senate of the United States of America,* vols. 1-5 (Washington, D.C.: Gales and Seaton, 1820-1821).

Stat. — *The Public Statutes at Large of the United States,* vols. 1-17 (Boston: Little, Brown, 1845-1873); vols. 18-94 (Washington, D.C.: Government Printing Office, 1875-1981).

Newspaper Coverage, 1787-1801

As extensive as our newspaper search has been (see the "Introduction" to volume 1), we have not been able to locate complete runs for every newspaper we wanted to read. We have given priority to reading all hard copy and microcopy available at the Library of Congress. Next, we have sought to borrow microform copy on interlibrary loan from a number of libraries and historical societies. Despite our best efforts, we often have been unable to secure all copies of every newspaper.

The list that follows presents the newspapers that were read and the extent of the coverage for each. Our short titles correspond to those used by Clarence S. Brigham in his two-volume *History and Bibliography of American Newspapers, 1690-1820* (Worcester, Massachusetts: American Antiquarian Society, 1947) and in his "Additions and Corrections to *History and Bibliography of American Newspapers, 1690-1820,*" included in the *Proceedings of the American Antiquarian Society* 71 (1961): 15-62. Brigham's bibliography and supplement provide full newspaper titles, changes in those titles, dates of publication, as well as printers and publishers. Following the name of the newspaper, we place in parentheses the years that the newspaper was published between 1787 and 1801—the years included in our search. Finally, we indicate how many issues of the newspaper we were able to find and read. We note the coverage by these terms:

"full" means all issues (sometimes with a few exceptions) were available
"very good" means three-quarters or more was available
"good" means one-half to three-quarters were available
"poor" means less than one-half was available
"scattered" means only a few issues were available.

CONNECTICUT

Hartford

American Mercury (1787-1801): 1787-1791 missing, 1792-1797 very good, 1798 missing, and 1799-1801 full.
Connecticut Courant (1787-1801): full.
Hartford Gazette (1794-1795): good.

New Haven

Connecticut Journal (1787-1801): full.

DELAWARE

Wilmington

Delaware and Eastern-Shore Advertiser (1794-1799): scattered.

Delaware Gazette (1787-1799): good.
Mirror of the Times (1799-1801): very good.

GEORGIA

Augusta
Augusta Chronicle (1789-1801): 1789-1794 very good, 1795 good, 1796-1801 missing.
Augusta Herald (1799-1801): scattered.
Georgia State Gazette (1787-1789): full.
Southern Centinel (1793-1799): scattered.

Savannah
Columbian Museum (1796-1801): 1796-1797 good, 1798-1801 poor.
Gazette of the State of Georgia (1787-1788): full.
Georgia Gazette (1788-1801): very good.

MARYLAND

Annapolis
Maryland Gazette (1787-1801): 1787-1789 scattered, 1790 very good, 1791-1794 missing, 1795-1798 very good, 1799-1801 missing.

Baltimore
American (1799-1801): very good.
Baltimore Daily Intelligencer (1793-1794): full.
Baltimore Daily Repository (1791-1793): full.
Baltimore Evening Post (1792-1793): scattered.
Baltimore Telegraphe (1795-1801): scattered.
Edwards's Baltimore Daily Advertiser (1793-1794): scattered.
Federal Gazette (1796-1801): full.
Federal Intelligencer (1794-1795): full.
Maryland Gazette (1787-1792): 1787-1790 poor, 1791-1792 missing.
Maryland Journal (1787-1797): 1787-1792 full, 1793-1794 good, 1795-1797 missing.

Easton
Maryland Herald (1790-1801): scattered.
Republican Star (1799-1801): scattered.

MASSACHUSETTS

Boston
American Apollo (1792-1794): very good.
American Herald (1787-1788): very good.
Argus (1791-1793): 1791 poor, 1792-1793 full.

Boston Gazette (1787-1798): full.
Boston Gazette (1800-1801): full.
Boston Price-Current (1795-1798): scattered.
Columbian Centinel (1790-1801): full.
Courier (1795-1796): poor.
Federal Gazette (1798): poor.
Federal Orrery (1794-1796): good.
Herald of Freedom (1788-1791): 1788-1790 good, 1791 scattered.
Independent Chronicle (1787-1801): full.
Massachusetts Centinel (1787-1790): full.
Massachusetts Gazette (1787-1788): full.
Massachusetts Mercury (1793-1801): 1793-1796 poor, 1797-1801 full.
Russell's Gazette (1798-1800): full.
Times (1794): scattered.

NEW HAMPSHIRE

Exeter
Herald of Liberty (1793-1796): scattered.
Lamson's Weekly Visitor (1795): good.
New Hampshire Gazetteer (1789-1793): scattered.
Political Banquet (1799-1800): scattered.
Ranlet's Federal Miscellany (1798-1799): scattered.

Portsmouth
Federal Observer (1798-1800): scattered.
New-Hampshire Gazette (1787-1801): 1787-1789 missing, 1790-1792 very good, 1793-1794 missing, 1795-1801 very good.
New-Hampshire Spy (1787-1793): 1787-1788 very good, 1789-1793 missing.
Oracle of the Day (1793-1799): 1793-1796 missing, 1797-1798 full, 1799 missing.
Republican Ledger (1799-1801): scattered.
United States Oracle (1800-1801): full.

NEW JERSEY

Trenton
Federalist (1798-1801): full.
Federal Post (1788-1789): poor.
New-Jersey State Gazette (1792-1796): 1792-1794 missing, 1795-1796 very good.
New-Jersey State Gazette (1799-1800): good.
State Gazette (1796-1799): scattered.

Introduction

The issue of state suability—the extent to which states are subject to suits brought by individuals in federal courts—has long been a matter of controversy and debate. All the documents collected in this volume concern aspects of that debate as it unfolded during the course of the 1790s, culminating in the ratification of the Eleventh Amendment to the Constitution. Eight suits were brought against states in the Supreme Court during this period, seven of which are chronicled here.[1] One of those suits, *Chisholm v. Georgia,* provided the occasion for the Supreme Court's ruling in 1793 that federal jurisdiction extended to suits brought by individuals against states. The Eleventh Amendment was proposed and ratified in order to overturn that decision. That much scholars agree on. But the circumstances that gave rise to the amendment and its broader meaning and purpose remain a subject of dispute.

The notion of sovereign immunity—that the king may not be sued without his consent—is an ancient one. But by the time of the American Revolution, legal procedures had developed that largely undermined this barrier to suit. By means of a *monstrans de droit,* a petition of right, or a suit for damages against a subordinate officer, a litigant with a grievance against the crown could generally receive a hearing. A petition of right, for example, routinely issued once the plaintiff made out a *prima facie* case.[2]

In the colonies, however, the king was so remote that these avenues of redress were irrelevant; any legal claim against the "sovereign" was likely to be directed to the colonial government. A few colonial charters—those of Massachusetts, Connecticut, and Rhode Island—expressly allowed lawsuits against the government, but even those authorities that were not covered by such explicit provisions were subject to ordinary common law actions as individuals or corporations. After the Declaration of Independence, Connecticut and Rhode Island adopted their colonial charters as their new state constitutions, thus preserving authorization of suits against the state. Delaware and Pennsylvania adopted constitutional provisions allowing the

1. The case that is not included in this volume is *Brailsford v. Georgia,* which involved a modest debt that the state allegedly owed to a British citizen, Samuel Brailsford. We have chosen not to treat that case in detail because very few documents relating to it are still in existence. Only one relevant court document remains, and it is badly damaged. In addition, *Brailsford v. Georgia* was not filed until 1798 and remained on the Supreme Court docket for only a very short time before it was dismissed, on February 14 of that year, as a result of the ratification of the Eleventh Amendment. Minutes of the Supreme Court, February 7 and 14, 1798, *DHSC,* 1:301, 305; Docket of the Supreme Court, *DHSC,* 1:519; Plaintiff's Declaration ("*Narratio*") in *Brailsford v. Georgia,* February 7, 1798, Original Jurisdiction Records, RG 267, DNA.

2. John J. Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," *Columbia Law Review* 83 (1983): 1895-96; Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (Westport, Conn.: Greenwood Press, 1972), pp. 5-6; Calvin R. Massey, "State Sovereignty and the Tenth and Eleventh Amendments," *University of Chicago Law Review* 56 (1989): 87-88.

legislature to regulate suits against the state. Other constitutions were silent on the subject of such suits, but none prohibited them.[3]

Thus, despite subsequent protestations to the contrary, suits against sovereigns were far from unknown in the eighteenth century. But certain conditions prevailed in post-revolutionary America that may well have made state governments wary of being sued under any circumstances. The states—like the national government—were heavily in debt. Holders of public securities that had been issued during the war in lieu of cash were now likely to sue.[4] Loyalists whose property had been confiscated by the states during the war were also possible plaintiffs,[5] and at least one dispute concerning a state's refusal to recognize land claims was already brewing.[6] Perhaps most politically sensitive were the prewar debts owed to British creditors. A number of states had passed statutes expropriating these debts, or authorizing payment in paper currency, but under Article IV of the 1783 Treaty of Peace, British creditors were entitled to recover these debts in "sterling money."[7]

Despite these looming concerns, the subject of state suability apparently did not arise at the Constitutional Convention in 1787. Article III emerged from the Committee of Detail providing for federal jurisdiction "in disputes between a State & a Citizen or Citizens of another State ... and in disputes, in which subjects or citizens of other countries are concerned." The Supreme Court was given original jurisdiction in all suits "in which a state shall be a party."[8] These provisions provoked no recorded debate in the Convention and were adopted substantially unchanged.[9]

Once the Constitution was sent to the states, questions began to arise, both in and out of the various ratification conventions. When two anonymous essayists, one styling himself the "Federal Farmer" and the other "Brutus," criticized the Constitution on the ground that it would subject a state to the humiliation of being compelled to answer an individual's suit in a court of law—which they claimed was an entirely unprecedented proposal—Alexander Hamilton attempted to deflect the attacks. In *Federalist* No. 81, Hamilton protested that it was "inherent in the nature of sovereignty" for a state "not to be amenable to the suit of an individual *without its consent*" and denied that the Constitution was intended to abrogate that principle.[10] But, as some commentators have pointed out, elsewhere in *The Federalist* Hamilton seems to imply that at least some suits against states would be tenable.[11]

3. Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," pp. 1896-99; Massey, "State Sovereignty and the Tenth and Eleventh Amendments," pp. 89-90.

4. See Lawrence C. Marshall, "Fighting the Words of the Eleventh Amendment," *Harvard Law Review* 102 (1989): 1365-66.

5. See introduction to section on *Vassall v. Massachusetts*.

6. See introduction to section on *Hollingsworth v. Virginia*.

7. Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," pp. 1900-1901. In addition, Article VI of the treaty prohibited any future confiscations of loyalist property. Ibid.

8. *RFC*, 2:147, 173, 186.

9. The final version reads as follows: "The judicial Power shall extend to ... Controversies ... between a State and Citizens of another State; ... and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects ... In all Cases ... in which a State shall be Party, the supreme Court shall have original Jurisdiction." Article III, section 2. *ROC*, 1:314.

10. Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961), pp. 548-49.

11. Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," pp. 1909-10 (discussing *Federalist* Nos. 15, 22, and 80); Martha Field, "The Eleventh Amendment and Other Sovereign Immunity Doctrines," *University of Pennsylvania Law Review* 126 (1978): 535 (discussing *Federalist* No. 80);

Within the ratification conventions themselves, the most significant recorded debate occurred in Virginia. There, George Mason, a prominent opponent of ratification, first raised the subject by adverting to an existing land dispute between the state and a group of merchants and speculators known as the Indiana Company: "Claims respecting those lands ... will be tried before the Federal Court. Is not this disgraceful?—Is this State to be brought to the bar of justice like a delinquent individual?—Is the sovereignty of the State to be arraigned like a culprit, or private offender?—Will the States undergo this mortification? ... What is to be done if a judgment be obtained against a State?—Will you issue a *fieri facias?* It would be ludicrous to say, that you could put the State's body in jail."[12] Mason's prediction proved accurate: in 1792, the Indiana Company did take its case to the Supreme Court.[13]

Others at the Virginia convention responded to Mason's objection, and the discussion revealed a high degree of uncertainty about the meaning of Article III. James Madison and John Marshall protested that the clause authorizing jurisdiction over controversies between a state and citizens of another state was intended to apply only when the state was the plaintiff, not when it was the defendant.[14] Patrick Henry, who opposed ratification, dismissed this explanation contemptuously: "If Gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument."[15] Edmund Randolph, who supported ratification, agreed with Henry that the Constitution authorized individual suits against states, but applauded the result. Randolph specifically referred to the Indiana Company's claim, and predicted that the "Court of Equity will direct a compensation to be made by the State." He then asked his fellow delegates rhetorically "if there can be honesty in rejecting a Government, because justice is to be done by it? ... Are we to say, that we shall discard this Government, because it would make us all honest?"[16]

The Virginia ratifying convention, along with the conventions of North Carolina and New York, proposed amendments to the Constitution that would have eliminated the apparent grant of federal jurisdiction over suits brought by an individual against a state.[17] The First Congress did not adopt any of these amendments, nor did the House of Representatives pass an amendment proposed by Thomas Tudor Tucker, a representative from South Carolina, that would have had the same effect.[18]

Atascadero State Hospital v. Scanlon, 473 U. S. 234, 276-78 (1984) (Brennan, J., dissenting).

It is worth noting in this connection that Hamilton, in 1796, rendered an opinion for a client based on the theory that the contracts clause of the Constitution applies against states who renege on their contracts—a theory ultimately given judicial sanction in *Fletcher v. Peck. LPAH,* 4:383, 428-31; 10 U. S. (6 Cranch) 87 (1810). Such a position appears inconsistent with a blanket opposition to suits against states.

12. *ROC,* 10:1406.

13. See introduction to section on *Hollingsworth v. Virginia.*

14. *ROC,* 10:1414, 1433.

15. Ibid., p. 1423.

16. Ibid., pp. 1427, 1454-55.

17. New York's proposed amendment provided that "the Judicial Power of the United States in cases in which a State may be a party, does not ... authorize any Suit by any Person against a State." Virginia and North Carolina would have eliminated all diversity jurisdiction but would have retained federal jurisdiction over "controversies between two or more States" and over treaty-based suits against states where the cause of action arose after the ratification of the Constitution. *FFC,* 4:18-19, 21; *ROC,* 10:1555; Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787,* 2d ed., 5 vols. (Philadelphia: J. B. Lippincott, 1876), 4:246.

18. *FFC,* 4:33; 3:153–54.

Rather, with little or no debate, Congress enacted section 13 of the Judiciary Act of 1789, which gave the Supreme Court original but not exclusive jurisdiction over controversies "between a state and citizens of other states, or aliens."[19]

Against this ambiguous background, the Supreme Court ruled, in a suit filed by Alexander Chisholm, *that it had jurisdiction over suits against states brought by* residents of other states, and that it could impose default judgments against states that refused to defend such suits. The conventional wisdom has long been that the Court's decision "fell upon the country with a profound shock,"[20] giving rise to the Eleventh Amendment. This was the view taken by the Supreme Court almost one hundred years after *Chisholm,* in *Hans v. Louisiana,* which construed the Constitution to prohibit federal jurisdiction not only over a suit filed against a state by a citizen of another state—the situation addressed by the Eleventh Amendment—but also over a suit filed against a state by one of its own citizens. The *Hans* Court assumed that the framers of the Constitution had not intended to authorize *any* suits brought by individuals against states, and it viewed the Eleventh Amendment as an effort, albeit a partial one, to restore that original understanding.[21] The Court has since developed a number of doctrines limiting the effect of *Hans,* but it has adhered to the basic premise of the decision.

In recent years the Eleventh Amendment has become the subject of intense scholarly debate. A number of commentators have argued that the amendment was intended to deprive federal courts of jurisdiction only in those cases where it is based on the parties' diversity of citizenship—that is, cases involving questions of state law, which Article III allows into federal court only because the parties come from different states. In cases involving questions of federal law, they contend, the "federal question" jurisdiction granted by Article III allows a federal court to adjudicate the dispute, regardless of whether or not the defendant is a state.[22] Others have suggested that the Eleventh Amendment's prohibition can be overcome by a congressional enactment specifically abrogating state sovereign immunity.[23] At least one commentator has urged a literal reliance on the words of the Eleventh Amendment: any suit by an out-of-state citizen, even one involving a federal question, is barred, but in-state citizens may bring such suits.[24]

Perhaps it is true that, as one Eleventh Amendment scholar has written, "The search for the original understanding on state sovereign immunity bears this much

19. The relevant portion of the section as enacted is virtually identical to an early draft, indicating that it was not viewed as controversial. *DHSC,* 4:69-70, 397; *Stat.,* 1:80.

20. Charles Warren, *The Supreme Court in United States History,* 3 vols. (Boston: Little, Brown, 1923), 1:96.

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

22. Article III grants federal courts jurisdiction over "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." The following articles are examples of the so-called "diversity explanation" of the Eleventh Amendment: Akhil R. Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1466-92; William A. Fletcher, "A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction," *Stanford Law Review* 35 (1983): 1033-1131; Gibbons, "The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation," pp. 1889-2005; Vicki C. Jackson, "The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity," *Yale Law Journal* 98 (1988): 44-51.

23. For example, John E. Nowak, "The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments," *Columbia Law Review* 75 (1975): 1413-69.

24. Marshall, "Fighting the Words of the Eleventh Amendment," pp. 1342-71.

resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire."[25] The "faithful," and others with an interest in the Eleventh Amendment, will find in this volume a wealth of material illustrating both the wide range of opinion in the 1790s concerning the subject of state suability and the diverse reactions of the six states that were sued. Perhaps these documents will not finally resolve the debate, but we hope that they will clarify, to some extent, the circumstances surrounding the Supreme Court's ruling in *Chisholm* and the subsequent ratification of the Eleventh Amendment.

25. John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* (New York: Oxford University Press, 1987), p. 28.

Van Staphorst v. Maryland

The question of the suability of states surfaced in the very first case entered on the Supreme Court docket, *Van Staphorst v. Maryland,* which commenced in February 1791 and was settled the following year. Although the state of Maryland willingly appeared in the high court and the parties were able to reach an agreement before the case was to be argued, the spirit of cooperation had not always prevailed. When *Van Staphorst* came before the justices, the conflict had been dragging on for nearly a decade, its origins dating back to the end of the revolutionary war. In 1782 Maryland borrowed money from two Dutch brothers by the name of van Staphorst, but a dispute arose over the loan and the state refused to pay it back, at least on terms satisfactory to the lenders. Caught in the middle was the Maryland agent who had negotiated the deal, Matthew Ridley. After years of wrangling, only the prospect of litigation in the Supreme Court brought the parties to a resolution of the controversy.

In March 1781 financially pressed Maryland, fearing the advance of the British army, appointed Matthew Ridley to sail to Europe to obtain a loan and buy war supplies. A successful, well-connected Baltimore merchant who was born and had lived most of his life in England, Ridley seemed to be the ideal choice to represent the state on the other side of the Atlantic.[1] The commission granted to Ridley by the governor and council authorized him to secure the necessary funding and materiel in France, Spain, or Holland.[2] The assembly approved the appointment in June and resolved that it would honor any contract Ridley made in which the state would pay back the annual interest on the loan with up to one thousand hogsheads (one million pounds) of tobacco and four thousand barrels of flour.[3] Upon sending Ridley the ratified commission in August, the council instructed him not to make any deal in which the tobacco would be valued at less than fourteen livres per hundred pounds and the flour less than thirteen livres, and the state was to be charged no more than eight percent in yearly interest paid with tobacco and nine percent with flour.[4]

When Ridley arrived in Europe in November 1781, he endeavored to secure the funding that Maryland needed by making overtures at the French court. His efforts at Versailles, however, were ultimately unsuccessful, mainly because Louis XVI's ministers were reluctant to lend money to an individual American state, rather

1. Herbert E. Klingelhofer, ed., "Matthew Ridley's Diary During the Peace Negotiations of 1782," *William and Mary Quarterly,* 3d ser. 20 (January 1963): 95-98; Kathryn Sullivan, *Maryland and France, 1774-1789* (Philadelphia: University of Pennsylvania Press, 1936), p. 121.

2. Bernard Christian Steiner, ed., *Archives of Maryland,* vol. 45, *Journal and Correspondence of the State Council of Maryland, 1780-1781* (Baltimore: Maryland Historical Society, 1927), p. 365.

3. *Votes and Proceedings of the Senate of the State of Maryland. October Session, 1780* ([Annapolis: Frederick Green, 1781]), p. 62.

4. Steiner, *Archives of Maryland,* 45:563-64.

than to the nation as a whole.[5] Ridley determined that his best course of action would be to try private Dutch sources and so in May 1782 journeyed to Amsterdam, where he entered into protracted negotiations with one of the city's leading banking houses, Fizeaux, Grand & Co. But to Ridley's frustration, no offer of a loan was tendered.[6]

The Amsterdam mission, however, did not turn out to be a failure. While Ridley was engaged in attempting to secure a loan from Fizeaux, Grand, he made contact with Jacob van Staphorst, partner in finance with his brother Nicolaas, and when it became clear that Fizeaux would not be accommodating, Ridley decided to entertain an offer from the rival house.[7] The van Staphorsts were active in the Dutch Patriot movement, and their sympathy for the American Revolution, combined with a yearning to rise to the top tier of Amsterdam banking, made them aggressive in seeking out business with the United States. While the van Staphorsts were beginning their dealings with Ridley, they concluded an agreement with ambassador John Adams, who had recently secured Dutch recognition of American independence. The van Staphorsts were to be one of three houses to participate in extending a loan to Congress.[8]

Spurred by Ridley's eagerness to leave Amsterdam, he and the van Staphorsts came to terms on a loan within a few weeks' time. On July 31, 1782, they signed their names to two separate instruments—a bond specifying Maryland's obligations for paying back the loan and a contract outlining the arrangement for redeeming the interest with tobacco. According to the agreement, the van Staphorsts would open a loan on behalf of Maryland for 300,000 florins, extendable to 600,000 or more, the principal to be paid back at the end of ten years. The state was to pay annual interest at a rate of five percent and furthermore owed the van Staphorsts a service fee of 4½ percent plus one percent annually on the interest—charges identical to those just consented to by Adams in obtaining the congressional loan. Where Ridley's deal differed most obviously from the one worked out by Adams—aside from the fact that Maryland was venturing to borrow a much more modest sum than the United States—was that the state would be paying back the interest with tobacco rather than money. Every year, for ten years, the state was to deliver to the van Staphorsts one

5. Journal of Matthew Ridley, November 20, December 23, 31, 1781, January 13, 20, 26, 29, April 22, 1782, Matthew Ridley Papers, MHi; Matthew Ridley to Thomas S. Lee, April 20, 1782, Matthew Ridley Papers, MHi; Sullivan, *Maryland and France*, pp. 122-28.

6. Journal of Matthew Ridley, January 31, March 22, May 21, 22, 23, June 1, 4, 6, 8, 12, 20, 21, 26, 27, 28, July 5, 10, 11, 12, 1782, Matthew Ridley Papers, MHi; Matthew Ridley to Nicholas Barker, April 14, 1782, Matthew Ridley to Thomas S. Lee, April 20, 1782, "Observations upon the proposals recd from Messieurs Fizeaux Grand & C°," June 25, 1782, Matthew Ridley to Thomas S. Lee, July 10, 1782, Matthew Ridley to Daniel of St. Thomas Jenifer, July 10, 1782, Matthew Ridley to Thomas S. Lee, October 14, 178[2], Matthew Ridley Papers, MHi; Pieter J. van Winter, *American Finance and Dutch Investment, 1780-1805, With an Epilogue to 1840*, rev. James C. Riley and Pieter J. van Winter, 2 vols. (New York: Arno Press, 1977), 1:29, 31, 120n, 313n.

7. Journal of Matthew Ridley, June 3, 6, 8, 20, July 9, 10, 11, 12, 13, 1782, Matthew Ridley Papers, MHi; Matthew Ridley to Nicolaas and Jacob van Staphorst, July 10, 1782, Nicolaas and Jacob van Staphorst to Matthew Ridley, July 11, 1782, Matthew Ridley to Thomas S. Lee, July 31, 1782, Matthew Ridley to Thomas S. Lee, October 14, 178[2], Matthew Ridley Papers, MHi.

8. Van Winter, *American Finance and Dutch Investment*, 1:1-7, 15, 27-28, 61, 82-93; Jan Willem Schulte Nordholt, *The Dutch Republic and American Independence*, trans. Herbert H. Rowen (Chapel Hill: University of North Carolina Press, 1982), pp. 107-8, 113-14; Matthew Ridley to Thomas S. Lee, July 31, 1782, Matthew Ridley Papers, MHi.

Jacob van Staphorst by Edme Quenedey (1756-1830). Engraving, 1790. Courtesy Foto Iconographisch Bureau, The Hague, Netherlands.

thousand hogsheads of tobacco, valued at the fixed price of fourteen livres per hundred pounds, out of which the interest would be paid. The van Staphorsts welcomed the prospect of receiving their payments in tobacco, a commodity whose trade they hoped to crack, but it was the tobacco provisions of the agreement that would prove to be the sticking point.[9]

After completing his business with the van Staphorsts, Ridley returned to France, where he began to make preparations for procuring and shipping the military supplies Maryland desired.[10] The prospect of the war ending soon did not deter him. Since he had sailed to Europe in the spring of 1781, the threat to Maryland had subsided: the Yorktown surrender of October 1781 ensured that the forces under Lord Cornwallis would not advance northward, and in the fall of 1782, as Ridley witnessed firsthand in Paris, American and British representatives were negotiating for peace. Despite the change in circumstances, Ridley was advised that a settlement was not a certainty and proceeded on the basis that further fighting could ensue.[11] Meanwhile, in Amsterdam, the van Staphorsts were having some difficulty interesting investors in subscribing to the loan but believed the chances for success would be enhanced

9. Journal of Matthew Ridley, July 9, 10, 11, 13, 18, 23, 25, 26, 27, 28, 29, 31, 1782, Matthew Ridley Papers, MHi; Matthew Ridley to Nicolaas and Jacob van Staphorst, July 26, 1782, Matthew Ridley to Thomas S. Lee, July 31, 1782, English Translation of the Bond given by Matthew Ridley as Representative of the State of Maryland, [July 31, 1782], Matthew Ridley Papers, MHi; van Winter, *American Finance and Dutch Investment*, pp. 90-91, 95, 155-57.

10. Matthew Ridley to Nicolaas and Jacob van Staphorst, August 29, 1782, September 20, 1782, Matthew Ridley to Thomas S. Lee, October 14, 178[2], Matthew Ridley to Charles Carroll, November 25, 1782, Matthew Ridley Papers, MHi.

11. Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789* (New York: Oxford University Press, 1982), pp. 570-71; Klingelhofer, "Matthew Ridley's Diary," pp. 95-133; Matthew Ridley to Nicolaas and Jacob van Staphorst, September 23, 1782, Matthew Ridley to Samuel Chase, October 14, 1782, Matthew Ridley to Charles Carroll, November 25, 1782, Matthew Ridley to Samuel Chase, March 18, 1783, Matthew Ridley to William Paca, March 20, 1783, John Jay to Matthew Ridley, March 28, 1783, Matthew Ridley Papers, MHi.

when the assembly sent notification that it had ratified the contracts.[12] Ridley was confident that the agreement he had made would be favorably received in Annapolis. As he wrote to Thomas Johnson, the former governor of Maryland and future justice of the Supreme Court of the United States, "I flatter myself my conduct will be approved."[13]

Ridley's optimism turned out to be misplaced. When details of the agreement reached Maryland, there was general consternation. Although the letter that Ridley sent to the governor on July 31, 1782, with the contracts enclosed, never reached the other side of the Atlantic, by the beginning of January 1783 news of the Amsterdam deal had arrived. The governor lay the material Ridley forwarded in October before the assembly for its consideration.[14] The Senate reacted negatively to the agreement, calling the terms "very disadvantageous to the state" and claiming the loan could place Maryland under an "extremely burdensome" debt. The House of Delegates concurred with the Senate, and together they passed a resolution in which they ratified the loan but instructed Ridley not to borrow any more money or make any more purchases.[15]

Ridley had not violated his instructions, but from the perspective of Annapolis, as of January 1783, his agreement had failed to take into account changing times. The Senate, viewing the negotiation in the light of "our present circumstances," commented upon "the low prices obtained for the tobacco." Although the stipulated price of fourteen livres per hundred pounds met the minimum demanded by the council in early 1781, the Senate implied that Ridley should have struck a more favorable deal.[16] By the beginning of 1783 a preliminary peace treaty had been signed, and with the war over, tobacco prices would surely shoot up. But now Maryland was bound to pay interest for the next ten years with tobacco that would undoubtedly be valued well below the market rate.[17] After the contracts had finally arrived in Annapolis, Charles Carroll of Carrollton presented a committee report to the full Senate in May 1783 that suggested the state could escape the burdens of the agreement by making provision to pay the principal back immediately.[18]

Another concern was exactly how much tobacco Maryland was supposed to turn

12. Van Winter, *American Finance and Dutch Investment*, 1:95-97; Matthew Ridley to Nicolaas and Jacob van Staphorst, September 27, 1782, October 4, 1782, Matthew Ridley to Thomas S. Lee, October 14, 178[2], Matthew Ridley to Nicolaas and Jacob van Staphorst, October 24, 1782 (second letter), November 8, 1782, December 15, 1782, Matthew Ridley Papers, MHi.

13. Matthew Ridley to Thomas Johnson, October 14, 1782, Matthew Ridley to Nicolaas and Jacob van Staphorst, October 14, 1782, October 24, 1782 (second letter), Matthew Ridley Papers, MHi.

14. J. Hall Pleasants, ed., *Archives of Maryland*, vol. 48, *Journal and Correspondence of the State Council of Maryland, 1781-1784* (Baltimore: Maryland Historical Society, 1931), pp. 336-37, 340; Matthew Ridley to Thomas S. Lee, July 31, 1782, October 14, 1782, Matthew Ridley to Nicolaas and Jacob van Staphorst, January 6, 1783, Matthew Ridley to William Paca, March 20, 1783, Matthew Ridley Papers, MHi.

15. *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1782* ([Annapolis: Frederick Green, 1783]), pp. 30, 31, 34, 35; *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1782* ([Annapolis: Frederick Green, 1783]), pp. 71-72, 73, 74, 76.

16. *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1782*, p. 31.

17. Middlekauff, *Glorious Cause*, p. 574; John Holker to Matthew Ridley, February 10, 1783, Mark Pringle to Matthew Ridley, March 16, 1783, Matthew Ridley Papers, MHi; van Winter, *American Finance and Dutch Investment*, 1:157.

18. *Votes and Proceedings of the Senate of the State of Maryland. April Session, 1783* ([Annapolis: Frederick Green, 1783]), pp. 52, 59, 61-63.

over to the van Staphorsts each year. Although the legislators did not highlight this issue, it would ultimately become the major source of contention between the state and the banking house. According to the tobacco contract, the state was to fulfill its interest obligations by delivering annually one thousand hogsheads of tobacco to representatives of the van Staphorsts in Maryland. However, the one thousand hogsheads represented substantially more than the state was liable for if the loan was completed at 300,000 or even 600,000 florins. The contract therefore stipulated that when the interest payment was deducted, any "residue" should be "kept at the disposition" of the state or used to redeem the interest on future loans that the van Staphorsts might make. But according to the literal language of the contract, this "residue" did not refer to the actual tobacco left over after the interest was paid but rather to the cash equivalent of that tobacco, valued at fourteen livres per hundred pounds. In other words, the van Staphorsts would simply purchase that portion of the tobacco delivery not applied to the interest payment. Because the price of the tobacco was fixed at such a low rate, the bankers would be in a position to profit handsomely. When the Marylanders received details of the contract and proceeded to ratify the loan, they could not believe that Ridley had agreed to such an arrangement. They assumed—incorrectly—that when the contract finally arrived, the clause would be worded differently. In the view of those in Annapolis, there was no reason why the state should have to turn over to the van Staphorsts any more tobacco than was necessary to pay the annual interest, but even if it did, the bankers should not be allowed simply to buy up the surplus at a bargain price. To those who were

Nicolaas van Staphorst by an unknown artist. Engraved silhouette, date unknown. Courtesy Foto Iconographisch Bureau, The Hague, Netherlands.

troubled by the loan anyway, this aspect of the tobacco contract was a bitter pill to swallow.[19]

Ridley gradually became aware of the disfavor in which his agreement was viewed back in Maryland. In mid-February 1783 he received the assembly's resolutions ratifying the loan and instructing him to proceed no further in borrowing money or buying supplies, but he apparently was not apprised of the legislators' strong misgivings about the deal. He may have thought that the main rationale underpinning his new instructions was the onset of peace. However, Samuel Chase, member of the House of Delegates and future justice of the United States Supreme Court, did at least question the agreement when he forwarded the resolutions. In response, Ridley explained in a letter of mid-March that he could not have succeeded without consenting to the ten-year schedule of interest payments and asserted that if the state was not going to borrow more than 300,000 florins, redeeming the loan would be a mere "Bagatelle."[20]

By the summer of 1783 Ridley had come to understand fully that his work had not been approved, that in fact he was the object of harsh criticism in Maryland. The state had not corresponded with him since dispatching the January resolutions, but various individuals had kept him informed. In a barrage of letters that he sent back to Maryland, Ridley wrote that he was "mortified" to hear of the reaction to his endeavors and particularly wounded by the assaults on his "Reputation." He asserted that he was the victim of a great injustice.[21] In one of these letters, in which he defended his actions at length, Ridley argued that he had remained within the bounds of his instructions, which were never revised while he was on his mission, and obtained the best agreement possible. Above all, he emphasized that when the contracts were signed, Britain and the United States were still at war, and therefore it was not fair "[t]o Judge of my Conduct from a Peace."[22]

While Ridley was justifying himself to his peers in Maryland, he was at the same time striving to reconcile the intentions of the state with the expectations of the van Staphorsts. In the process it would seem as though he accommodated himself to the prevailing views emanating from Annapolis. During the summer of 1783 Ridley informed the bankers that he understood that the state planned to deliver only as much tobacco as was necessary to pay the annual interest on the loan. Furthermore—and seemingly in contradiction to what he had agreed to in the contract—he claimed that when he struck the deal, he had assumed that this was all the tobacco the state would relinquish. Although he had surely never intended for the van Staphorsts to be able to buy up the surplus tobacco at a bargain price, there is no doubt that—for reasons which can only be conjectured—he had consented to turn over one thousand hogsheads. Now, however, he told the van Staphorsts they would have been entitled

19. Van Winter, *American Finance and Dutch Investment*, 1:156-58; Matthew Ridley to Nicolaas and Jacob van Staphorst, July 26, 1782, Matthew Ridley to Thomas S. Lee, July 31, 1782, John Holker to Matthew Ridley, February 10, 1783, Mark Pringle to Matthew Ridley, March 16, 1783, Matthew Ridley Papers, MHi.

20. Matthew Ridley to Nicolaas and Jacob van Staphorst, February 20, 1783, Matthew Ridley to Samuel Chase, March 18, 1783, Matthew Ridley Papers, MHi.

21. John Holker to Matthew Ridley, February 10, 1783, Mark Pringle to Matthew Ridley, March 16, 1783, Matthew Ridley to Jeremiah T. Chase, July 18, 1783, Matthew Ridley to William Russell, July 18, 1783, Matthew Ridley to Richard Ridgely, July 18, 1783, Matthew Ridley to Samuel Hughes, July 18, 1783, Matthew Ridley to Daniel Hughes, July 18, 1783, Matthew Ridley Papers, MHi.

22. Matthew Ridley to John Holker, July 18, 1783, John Holker Papers, DLC. Another extended defense can be found in Matthew Ridley to Charles Carroll, September 12, 1783, Matthew Ridley Papers, MHi.

to receive a thousand hogsheads per year only if they had lent a sum of money meriting that large a delivery. So problematical had the tobacco deal become that he urged the van Staphorsts to back away from it. He asserted that the state had never actually ratified the tobacco contract, only the bond for the loan, and that it would be beneficial to the van Staphorsts if they would agree to receive the interest due them in cash. In fact, he implied that if he had known when he made the contract that money would be available, he would never have offered the tobacco.[23]

The van Staphorsts stood their ground. They insisted on receiving one thousand hogsheads of tobacco per year and, furthermore, presumably expected to be able to purchase the surplus, after the interest was paid, at the price fixed in the contract. Their relations with Ridley, who was attempting to play the role of honest broker while at the same time siding with the state, inevitably deteriorated. In October 1783 Ridley wrote to the bankers that he regretted that a "difference in opinion" had arisen between them over the agreement but vowed that he would work to effect "some reasonable settlement of the matter." He insisted he wanted "Justice" for the van Staphorsts but warned them they must be realistic. Ridley lamented, "My hopes were to satisfy both parties ... but the manner in which I have been censured in America & the unreasonableness of your demands ... make me fear I shall give satisfaction to neither."[24] Into the spring of 1784 Ridley continued to urge the van Staphorsts to come to terms with the state. He counseled them to "make moderate proposals"—by which he meant that they should accept the notion that the state would deliver only enough tobacco to satisfy the yearly interest payment.[25] The van Staphorsts apparently were not receptive to Ridley's advice: in April they cut off correspondence with him.[26]

By the latter part of 1784 Ridley was concerned that the dispute between Maryland and the van Staphorsts had not yet been resolved and that in the meantime the state was refusing to pay any interest.[27] The prospects for a settlement were significantly diminished when, in December 1784, Maryland's intendant of the revenue took a hard line in a report on the matter that he delivered to the General Assembly. The intendant, Daniel of St. Thomas Jenifer, adopted the position "that the state is not bound to pay the tobacco stipulated in the ... contract, because, to say nothing of the extreme inequality of the agreement, it is clear that Messieurs Vanstaphorsts did not comply with their part of the contract." He seized on the fact that the bankers had not raised the 300,000 florins they had guaranteed to turn over to the state by January 1783 and asserted that they therefore had no grounds to demand Maryland's strict adherence to the agreement. Jenifer was not, however, claiming that the state should be exonerated based upon a mere technicality. He argued that because Maryland had been in a crisis, "a speedy advance of a considerable sum of money" was essential to the deal and that the state had consented to "pay ... dearly" based on the assumption that it would receive this quick infusion of cash. Although Jenifer

23. Matthew Ridley to Nicolaas and Jacob van Staphorst, July 31, 1783, August 14, 1783, August 31, 1783, Matthew Ridley Papers, MHi.

24. Matthew Ridley to Nicolaas and Jacob van Staphorst, October 9, 1783, Matthew Ridley Papers, MHi.

25. Matthew Ridley to Nicolaas and Jacob van Staphorst, October 23, 1783, December 4, 1783, February 5, 1784, March 4, 1784, April 7, 1784, Matthew Ridley Papers, MHi.

26. Matthew Ridley to Nicolaas and Jacob van Staphorst, April 27, 1784, Matthew Ridley to William Paca, July 12, 1784, Matthew Ridley Papers, MHi.

27. Matthew Ridley to William Paca, July 12, 1784, Matthew Ridley to Charles Carroll, September 8, 1784, Matthew Ridley Papers, MHi.

conceded that Maryland would be obligated to work out an arrangement to compensate the lenders, with interest, for the money that they had extended, around 250,000 florins, he maintained that "there can be no pretence of claim to tobacco by any rule of justice or equity, and therefore it ought not to be paid to Messieurs Vanstaphorsts."[28]

Ridley condemned the Jenifer report roundly. Not only did the intendant of revenue lack the authority to render an opinion on the matter, he wrote Thomas Johnson, but "the Spirit of [the report] is much beneath the dignity of any Independant State." Ridley continued to worry that as long as the dispute remained unresolved, the reputation of the state of Maryland would suffer.[29] At the same time his relationship with the van Staphorsts, with whom he had resumed contact in the spring of 1785, was growing more bitter.[30] The bankers made a significant move in July 1785 when they hired John Sterett & Co. to serve as their attorneys and agents in Maryland.[31] Until then Ridley's own Baltimore firm, Ridley & Pringle, had been representing the van Staphorsts' interests.[32]

In early 1786 a committee of the House of Delegates reported on a memorial Sterett filed on behalf of the van Staphorsts, leading to the passage of legislation aimed at resolving the conflict. The statute echoed the assembly report in asserting that based upon "the principles of justice, and a reasonable construction of the contract," Maryland was obligated to pay the van Staphorsts each year only enough tobacco to redeem the interest. The assembly, however, proposed a new plan providing for the state to pay the back interest it owed, with interest accumulated on that, as well as arranging for future payments. Instead of using tobacco, the state would pay with money—at a rate of 7½ percent for the first three years of interest due and then at 6 percent annually until the principal was paid. If the van Staphorsts would not agree to this solution, the assembly suggested that both sides appoint arbitrators to settle the dispute.[33]

The van Staphorsts rejected the assembly's proposed terms for paying the loan but acceded to the idea of submitting the entire matter to arbitration. In the autumn of 1786 four distinguished residents of New York City, then seat of the national government, were tapped to undertake this task. The state of Maryland named John Jay, who was serving as the secretary for foreign affairs under the Articles of Confederation and was soon to become the first chief justice of the United States Supreme Court, and Robert R. Livingston, the chancellor of New York, while John Sterett, on

28. *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1784* ([Annapolis: Frederick Green, 1785]), pp. 49-51.

29. Matthew Ridley to Thomas Johnson, June 28, 1785, Thomas Johnson Letters, MdFre.

30. Matthew Ridley to Nicolaas and Jacob van Staphorst, June 10, 1785, July 8, 1785, Matthew Ridley Papers, MHi.

31. *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1785* ([Annapolis: Frederick Green, 1786]), p. 81.

32. *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1783* ([Annapolis: Frederick Green, 1784]), p. 9; Journal of Matthew Ridley, July 26, 1782, Matthew Ridley Papers, MHi; Matthew Ridley to Nicolaas and Jacob van Staphorst, August 14, 1783, October 9, 1783, July 8, 1785, Matthew Ridley Papers, MHi.

33. *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1785*, pp. 81, 82, 171-72, 190, 192, 196; *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1785* ([Annapolis: Frederick Green, 1786]), pp. 27, 82, 83, 85, 91; "An Act respecting the loan made by this state with Messieurs Nicholas and Jacob Vanstaphorst, of Amsterdam, merchants," March 12, 1786, *Laws of Maryland*, [November Session, 1785] (Annapolis: Frederick Green, [1786]), chap. LXXXV.

behalf of the van Staphorsts, designated the mayor of New York City, James Duane, and Rufus King, delegate from Massachusetts to the Confederation Congress. By this time Ridley had returned to Maryland from Europe and was spending many of his days in Annapolis tending to the business of the loan.[34] High among his priorities, apparently, were recovering fees for the services he had performed in Holland and rehabilitating his tarnished reputation. In response to a memorial he submitted in December 1786, a joint committee of the assembly concluded that in the face of the "many difficulties" confronting him on his European mission, Ridley had handled himself "with diligence and fidelity." The committee did not, however, comment on the merits of the loan agreement. Both houses of the assembly subsequently passed resolutions approving Ridley's conduct, and furthermore, they together resolved that he should be appointed as an agent of the state "to attend" the arbitration in New York.[35]

The four arbitrators, whom Ridley met with in the spring of 1787, never had the chance to reach any determination. They suspended their deliberations in deference to a new proposal made by the state to resolve the dispute. By an act of the assembly of May 26, 1787, the state appointed Charles Carroll of Carrollton, Thomas Johnson, and Uriah Forrest to negotiate a settlement with the van Staphorsts. In explaining to Mayor Duane that a halt should be brought to the arbitration, the partners of John Sterett & Co. wrote, "We flatter Ourselves we shall not have Occasion to trouble you again, and that an independent American State will retrieve by a liberal compromise the reputation she has lost by Acts of injustice to individuals and Strangers who merited better treatment from their early confidence in our new Governments." They were optimistic about the appointment of the three commissioners, who would be guided by "such principles as appear to us just and equitable."[36]

Those "principles," as outlined in the statute, formed the groundwork for a settlement of the loan dispute. The assembly proposed that the state make annual interest payments to the van Staphorsts starting in September 1787 for a period of five to ten years, contingent upon when the principal was redeemed. In addition, the state would compensate the van Staphorsts with a sum of money for profits they lost by not receiving a thousand hogsheads of tobacco per year. The commissioners were to negotiate the details. To provide funds for the interest payments, the assembly levied new duties on a variety of imported goods.[37]

34. Aubrey C. Land, ed., *Archives of Maryland,* vol. 71, *Journal and Correspondence of the State Council of Maryland: Journal of the State Council, 1784-1789* (Baltimore: Maryland Historical Society, 1970), p. 138; Matthew Ridley to William Smallwood, September 11, 1786, Matthew Ridley to John Jay, September 22, 1786, Matthew Ridley to Samuel Chase, November 30, 1786, Matthew Ridley to Thomas Johnson, November 30, 1786, Matthew Ridley to Robert Morris, January 21, 1787, Matthew Ridley Papers, MHi.

35. *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1786* ([Annapolis: Frederick Green, 1787]), pp. 34, 34-35, 35, 36, 41, 92-93, 96-97, 97, 103; *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1786* ([Annapolis: Frederick Green, 1787]), pp. 10, 11, 36, 41; Matthew Ridley to Robert Morris, January 21, 1787, Matthew Ridley Papers, MHi.

36. Matthew Ridley to Joshua Johnson, April 4, 1787, Matthew Ridley Papers, MHi; Charles Carroll, Thomas Johnson, and Uriah Forrest to John Jay, Rufus King, Robert R. Livingston, and James Duane, May 28, 1787, John Sterett & Co. to James Duane, June 12, 1787, James Duane Papers, NHi; "An Act to procure a permanent fund for the debt due from this state to Messieurs Vanstaphorst," *Laws of Maryland,* [April Session, 1787] (Annapolis: Frederick Green, [1787]), chap. XLII.

37. Ibid.; *Votes and Proceedings of the House of Delegates of the State of Maryland. April Session, 1787* ([Annapolis: Frederick Green, 1787]), pp. 150, 160, 183-84, 184, 188; *Votes and Proceedings of the Senate of the State of Maryland. April Session, 1787* ([Annapolis: Frederick Green, 1787]), pp. 62, 79, 80.

Uriah Forrest, representing the three commissioners, traveled to Amsterdam to meet with the van Staphorsts, but the parties were unable to reach an agreement. When the assembly learned of the results of Forrest's mission at the end of 1787, a joint committee issued a report that made the prospects for any settlement remote. The committee concluded that Maryland was actually not in debt to the van Staphorsts because private individuals, rather than the bankers themselves, had lent the state money. According to the report, there was "no connexion . . . or relation" between the tobacco contract and the loan. The committee conceded that the state owed the van Staphorsts "damages for noncompliance with the [tobacco] contract" but asserted that the formula the bankers were maintaining for determining the damages was "unreasonable and unjust." Forrest, the report stated, had offered "very liberal" terms to the van Staphorsts, whose "demands for damages are most extravagant." The committee recommended that the 1786 act regarding the van Staphorsts be repealed but that the 1787 act remain on the books, with the funds raised by virtue of that statute to be used to make interest payments on the loan. As a consequence of the committee's work, the assembly passed an act affirming the sentiments of the report and incorporating its recommendations.[38]

With revenues accumulating as a result of the act of May 1787, the state began making regular interest payments to Samuel Sterett, who had succeeded his late brother John as principal agent of the van Staphorsts. The money was intended for the Dutch bondholders, as well as for the van Staphorsts, who had made advances to the investors. The assembly even made provision to divert more funds to the redemption of interest than could be raised under the 1787 statute.[39]

The van Staphorsts, however, obviously not mollified by the state's payments, moved to initiate a suit against Maryland in the Supreme Court of the United States when that opportunity became available. In late November 1790 a summons was served on the governor and council of Maryland, ordering the state to appear in Philadelphia on the first Monday in February 1791 to respond to the van Staphorsts' suit.[40] One day after being served, the governor referred the summons to the assembly for its consideration. A committee of the House of Delegates took up the matter and on December 19 reported that it was "of opinion the state should immedi-

38. *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1787* ([Annapolis: Frederick Green, 1788]), pp. 36, 53-54, 56, 58, 59, 63; *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1787* ([Annapolis: Frederick Green, 1788]), pp. 14, 15, 21, 24, 24-25, 25; Matthew Ridley to Samuel Chase, December 13, 1787, Matthew Ridley Papers, MHi; "An Act to repeal the act respecting the loan made by this state with Messieurs Nicholas and Jacob Vanstaphorst, of Amsterdam, merchants," December 17, 1787, *Laws of Maryland,* [November Session, 1787] (Annapolis: Frederick Green, [1788]), chap. XXXIII.

39. *Votes and Proceedings of the House of Delegates of the State of Maryland. May Session, 1788* ([Annapolis: Frederick Green, 1788]), pp. 67, 69, 96, 99; *Votes and Proceedings of the Senate of the State of Maryland. May Session, 1788* ([Annapolis: Frederick Green, 1788]), pp. 31-32, 32, 45; *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1788* ([Annapolis: Frederick Green, 1789]), pp. 35, 61, 82-83, 99, 101; *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1788* ([Annapolis: Frederick Green, 1789]), pp. 10, 39, 40; Land, *Archives of Maryland,* 71:266; Richard Walsh, ed., *Archives of Maryland,* vol. 72, *Journal and Correspondence of the Council of Maryland: Journal of the Council, 1789-1793* (Baltimore: Maryland Historical Society, 1972), pp. 3, 35, 57, 64, 114, 136; Edward C. Papenfuse et al., *A Biographical Dictionary of the Maryland Legislature, 1635-1789,* 2 vols. (Baltimore: Johns Hopkins University Press, 1979-1985), 2:771-73.

40. Walsh, *Archives of Maryland,* 72:157.

ately appear to the action of Messieurs Vanstaphorst." As a consequence of the committee recommendation, the house passed a resolution, which was agreed to by the Senate, "That the governor and council be and they are hereby directed to take measures for entering an appearance to and defending the suit brought against this state by Messieurs Vanstaphorst, and that they have power to employ such attornies, counsel and agents, as they may think proper."[41]

In compliance with the summons served on the executive officers of Maryland, Luther Martin, the state's brilliant and colorful attorney general, appeared in the Supreme Court in Philadelphia on February 8, 1791. As Martin later explained, the governor and council had "requested me to give my particular Attention to [the van Staphorst] Suit; _ and assured me they considered it a matter of Consequence that I should personally appear at the Supreme Court of the United States." Before Martin could present himself before the justices, however, he needed to be sworn in as a member of the Supreme Court bar. His admission was moved by the United States attorney general, Edmund Randolph, who was in court that day also in his capacity as counsel for the van Staphorsts. Martin had hired a Philadelphia lawyer, John Caldwell, to work with him on the case, because the Court distinguished between the duties of a "Counsellor," as Martin was designated, and an "Attorney," the status under which Caldwell was admitted to the bar.[42] The record furthermore reveals that only two days before the case was to begin, Maryland tapped Samuel Chase to serve as "Counsel for the State," agreeing to pay him a fee as well as "his travelling and board expences while attending the . . . suit." Chase was not admitted to the Supreme Court bar; his function, it seems, was purely to provide assistance to his close friend, Attorney General Martin.[43]

None of the principal figures in the van Staphorst dispute was present when the Court opened in February 1791. Matthew Ridley had died in 1789 at the age of forty.[44] The van Staphorst brothers were still making American loans, despite their

41. *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1790* ([Annapolis: Frederick Green, 1791]), pp. 44, 87, 97, 98, 101; *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1790* ([Annapolis: Frederick Green, 1791]), pp. 16, 35, 43-44, 45.

The delegates at the same time also passed two resolutions calling for the state to redeem any interest still owed to the van Staphorsts and for the United States senators from Maryland to press for federal assumption of the van Staphorst debt, but the state Senate disagreed to the resolutions. Ibid.

42. Minutes of the Supreme Court, February 8, 1791, *DHSC,* 1:188, 190, 191; Luther Martin to Thomas Sim Lee, December 3, 1793 (q.v.); Paul S. Clarkson and R. Samuel Jett, *Luther Martin of Maryland* (Baltimore: Johns Hopkins Press, 1970), pp. 167-68.

Counsellors were responsible for arguing cases before the Supreme Court. Attorneys, who were barred from representing clients before the Court, filed motions and handled paperwork. Minutes of the Supreme Court, February 5, 1790, *DHSC,* 1:177, 177n. The attorney assisting Randolph was Jacob Morton of New York City. *DHSC,* 1:180, 180n, 484.

43. Walsh, *Archives of Maryland,* 72:173, 231, 255-56; James Haw et al., *Stormy Patriot: The Life of Samuel Chase* (Baltimore: Maryland Historical Society, 1980), p. 162; Jane Shaffer Elsmere, *Justice Samuel Chase* (Muncie, Ind: Janevar Publishing, 1980), pp. 41-42.

Whether Chase traveled to Philadelphia for the February 1791 term of the Court or the August 1791 term, or both times, is not clear. His appointment by the governor and council on the eve of the February session suggests that they intended for him to attend the Court immediately. Biographer Jane Shaffer Elsmere claims that Chase attended the Court in the August term, but it should be noted that Martin was not arguing the case for Maryland at this point. Chase received his first installment of pay in November 1791. Ibid.; Minutes of the Supreme Court, August 3, 1791, *DHSC,* 1:195.

44. *PJJ,* 2:122n.

experience with Maryland, but there is no evidence that the plaintiffs traveled to the United States to attend the Court.[45] The February 1791 term marked the first time that the justices had sat in Philadelphia and the first time that a case had come before them. In attendance were Chief Justice John Jay and three of the five associate justices.[46] Jay had been closely connected to the van Staphorst dispute as an arbitrator, as well as a friend and then brother-in-law of Matthew Ridley, but modern standards of recusal did not yet prevail.[47]

The *Van Staphorst* case was the last order of business to be taken up by the justices on February 8. It was revealed that under the auspices of the United States marshal for the district of Maryland, a summons had been served on the governor, council, and attorney general as well, in the presence of two witnesses. For reasons that are unclear, Luther Martin made no plea on behalf of the state of Maryland; instead, he "directed" Caldwell simply "to enter an appearance." On the motion of Randolph, counsel for the plaintiffs, the Court ordered the state to plead within two months' time or face a default judgment.[48]

The state complied with the Court's command; the docket reveals that its plea was filed.[49] When the Court convened again in August 1791, however, the parties were not ready to proceed. The problem was that many of the witnesses in the case, not to mention the plaintiffs themselves, lived in Amsterdam. Randolph therefore moved, with the consent of opposing counsel, that the Court appoint a commission to take depositions. Section 30 of the Judiciary Act of 1789 provided for taking testimony through deposition in cases where witnesses lived more than one hundred miles from court; though judges and magistrates were endowed with the authority to depose witnesses, the statute also allowed for federal courts to name commissioners when necessary.[50] The justices decided that they would not grant a commission until they

45. The activities of the van Staphorsts in buying up American securities and making loans to the United States government during the 1780s and 1790s are chronicled in detail in van Winter, *American Finance and Dutch Investment*.

46. Minutes of the Supreme Court, February 7 and 8, 1791, *DHSC*, 1:183, 186.

47. Jay and Ridley became friends when they were both in Paris in 1782, at which time Jay even advised Ridley on the wisdom of proceeding with purchases for the state. (See above.) In 1787 Ridley got married, for the second time, to Catharine Livingston, sister of Jay's wife. At the end of 1787 Ridley wrote to Jay that he was "apprehensive the State will make a very bungling Hand of the Business with Messrs. Van Staphorsts," and a month later Jay responded that he hoped Ridley could "disengage" himself from the matter. Before Ridley's death in 1789, Catharine wrote to Jay about a possible appointment for her husband as Supreme Court clerk. Klingelhofer, "Matthew Ridley's Diary," p. 98; *PJJ*, 2:12; Matthew Ridley to John Jay, December 6, 1787, John Jay to Matthew Ridley, January 4, 1788, Matthew Ridley Papers, MHi; *DHSC*, 1:674-75, 677.

The two other Supreme Court justices of the 1790s who were involved in the van Staphorst business were the Marylanders Thomas Johnson and Samuel Chase. Though Ridley lobbied Jay on Chase's behalf in 1789, Chase was not named to the bench until 1796, long after the van Staphorst conflict was settled. Johnson, however, received his recess appointment in August 1791, while *Van Staphorst* was still pending. During the one term he attended the Court before resigning, the August 1792 session, *Van Staphorst* was discontinued. *DHSC*, 1:71, 108-9, 200-201, 658-59, 664, 672.

48. Minutes of the Supreme Court, February 8, 1791, *DHSC*, 1:191.

49. Docket of the Supreme Court, *DHSC*, 1:484; Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, vol. 1 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan, 1971), p. 724. None of the case papers for *Van Staphorst v. Maryland* survives. According to a contemporary source, however, the plea was "filed to the action in common form, that the state never promised." See *Observations upon the Government of the United States of America* by James Sullivan, July 7, 1791.

50. Minutes of the Supreme Court, August 1, 1791, *DHSC*, 1:192; *DHSC*, 4:94-96; *Stat.*, 1:88; Goebel, *Antecedents and Beginnings to 1801*, p. 724.

knew who, exactly, the commissioners would be. Two days later Randolph came into court with a list of names that he had compiled in conjunction with the counsellor for Maryland, now Jared Ingersoll of Philadelphia, and the justices issued the commission. Seven commissioners were named, three representing the plaintiffs and four the defendants, based on the assumption that one commissioner from each side would be present for the taking of each deposition. The commissioners, all closely tied to the van Staphorsts, comprised leading members of the Dutch financial community as well as both the notary public for Amsterdam and the prominent Patriot Rutger Jan Schimmelpenninck.[51]

While plans went forward for the commission to take depositions,[52] the Maryland assembly sought to resolve the van Staphorst dispute and thus remove it from the Supreme Court. Although the state had not officially challenged the Court's jurisdiction over the case, there is evidence that Maryland believed its sovereignty was being threatened and therefore felt compelled to make an out-of-court settlement. In December 1791 a committee of the House of Delegates reported that allowing the Court to decide the *Van Staphorst* case "may deeply affect the political rights of this state, as an independent member of the union." According to the committee, it would be preferable to "compromise" with the van Staphorsts rather than "permit a precedent to be established, by which any individual foreigner may endanger the political and private rights of this state and her citizens."[53] Of course, despite the invocation of state sovereignty, pragmatism may have been as important as principle—or more so—in determining the assembly's actions. It is possible that the legislators were concerned the state's case was weak and that the outcome in the Court would be unfavorable.

Pursuant to the committee's recommendations, the assembly passed an act to facilitate the resolution of the van Staphorst conflict. The three men who were named to negotiate on behalf of the state in 1787, Carroll, Johnson, and Forrest, along with two others, were appointed commissioners to make a settlement with the van Staphorsts or their agent. The assembly charged the commissioners with effecting "the final liquidation and adjustment of all claims or demands" by the van Staphorsts and vowed to consider whatever agreement they made to be "binding" on the state. The assembly hoped that the settlement would involve the federal government taking on the van Staphorst claim as part of the general assumption of state debts but proposed as an alternative option that Maryland would turn over to the van Staphorsts United States securities it held in its coffers.[54]

The commissioners succeeded in reaching an agreement with the van Staphorsts' agent. According to the terms of the final settlement, the state of Maryland was to

51. Minutes of the Supreme Court, August 3, 1791, *DHSC*, 1:195-96. Most of the commissioners, listed by name in the Supreme Court minutes, are treated in depth in van Winter, *Dutch Finance and American Investment*.

52. Although the details are unknown, depositions were taken. After the case was over, according to the Court minutes for the February 1793 term, the commission was returned with depositions. Minutes of the Supreme Court, February 4, 1793, *DHSC*, 1:207.

53. See Report of the Committee of Ways and Means, Maryland House of Delegates, December 13, 1791.

54. *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1791* ([Annapolis: Frederick Green, 1792]), pp. 13, 86, 89, 108, 119, 136; *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1791* ([Annapolis: Frederick Green, 1792]), pp. 38-39, 45; "An Act respecting the claims of the Messieurs Vanstaphorsts against the state of Maryland," December 30, 1791, *Laws of Maryland*, [November Session, 1791] (Annapolis: Frederick Green, [1792]), chap. LXXI.

turn over to the van Staphorsts £61,525 in stock of the United States. The plan for the federal government to assume the van Staphorst claim must have been found to be either infeasible or, from the perspective of the van Staphorsts, unacceptable. This transfer of securities was to cancel any claims the van Staphorsts had on Maryland for the principal and interest of the loan and for damages.[55] Exactly when the deal was struck is unclear, but it must have been sometime between February and August of 1792. At the February 1792 term of the Supreme Court *Van Staphorst* was continued, but at the August term of that year, the case was, with the consent of both parties, discontinued.[56]

Although *Van Staphorst* was the first case to raise the issue of state suability, albeit obliquely, it was not to be the vehicle for its resolution. Maryland's belated recognition that a Supreme Court judgment against it might compromise its sovereignty appears to have been a factor in the settlement of the suit, and that very settlement enabled the Court to avoid the question.[57] Nor did the issue get much of a public airing at the time.[58] The most significant response to *Van Staphorst* came in the form of a pamphlet written by the Massachusetts attorney general, James Sullivan, while the case was still pending. In *Observations upon the Government of the United States of America,* Sullivan used *Van Staphorst* as his starting point to launch an attack on the idea that a state could be sued in the Supreme Court. Even if the defendant agreed to appear in *Van Staphorst,* he wrote, "the state of Maryland can, by no means, give a jurisdiction to the supreme court of the United States, which that court does not possess." Sullivan believed that the *Van Staphorst* case "establishes a precedent which may prove injurious to all the states."[59]

55. *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1792* ([Annapolis: Frederick Green, 1793]), pp. 30, 99-100, 105; *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1792* ([Annapolis: Frederick Green, 1793]), pp. 7, 9, 39, 42; "An Act respecting the claims of the Messieurs Vanstaphorsts against the state of Maryland," December 30, 1791, *Laws of Maryland,* [November Session, 1791], chap. LXXI.

56. Minutes of the Supreme Court, February 11 and August 6, 1792, *DHSC,* 1:198, 201.

57. In his *Chisholm* opinion of 1793, Justice James Iredell noted that if *Van Staphorst* had gone to trial rather than been "compromised," and the verdict had been for the plaintiffs, the Court would have been compelled to grapple with the propriety of allowing a judgment to go against the state. Because Attorney General Martin had "voluntarily appeared," Iredell stated, the justices could not have ruled on the jurisdiction question before trial. See James Iredell's Supreme Court Opinion, [February 18, 1793], in section on *Chisholm v. Georgia.*

58. We have evidence of only one instance of newspaper discussion of the state suability question in relation to *Van Staphorst.* See Letter from an Anonymous Correspondent, [between February 13 and 19, 1791].

59. See *Observations upon the Government of the United States of America* by James Sullivan, July 7, 1791. For a response to Sullivan's pamphlet, see *An Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States, in their Political Capacity. Being an Answer to Observations upon the Government of the United States of America: by James Sullivan, Esq. Attorney General of the State of Massachusetts,* April 12, 1792.

Letter from an Anonymous Correspondent

Independent Chronicle

[between February 13 and 19, 1791] Philadelphia, Pennsylvania

The Supreme Court of the *United States,* opened here last week. The Judges did not all attend.[1] The only action entered, was brought by a *Foreigner,* against the State of *Maryland.* The Writ was served upon the

GOVERNOR,[2] the Supreme Executive of the State,[3] and upon the Attorney General.[4] Two months are given for the State to plead. Should this action be maintained, one great national question, will be settled;—that is, that the several States, have relinquished all their SOVEREIGNTIES, and have become mere *corporations,* upon the establishment of the General Government: For a Sovereign State, can never be sued, or coerced, by the authority of another government. Should this point be supported, in favour of this cause against *Maryland,* each State in the Union, may be sued by the possessors of their public securities, and by all their creditors. As the execution will be against them as *mere corporations,* they will be issued against all the inhabitants *generally*; the Governors, and all other citizens will be alike liable. Such offices will not be coveted; even the Constitutional privileges, in the several States, against arresting *Senators* and *Representatives,* while the Courts are sitting, will be done away.

(Boston) March 3, 1791. The newspaper identifies this piece only as an "[e]xtract of a letter from Philadelphia, dated February, 1791." Because the correspondent mentions that the Court "opened here last week," he presumably wrote the letter during the week of February 13. The Court met on Monday and Tuesday, February 7 and 8. Minutes of the Supreme Court, *DHSC,* 1:183, 186.

1. Neither John Blair nor John Rutledge was present at the February 1791 term of the Supreme Court. Minutes of the Supreme Court, February 7, 1791, *DHSC,* 1:183, 183n.

2. John Eager Howard (1752-1827), governor of Maryland (1789-1791). *BDUSC.*

3. The state council.

4. Luther Martin (1744-1826), attorney general of Maryland from 1778 to 1805. *BDUSC.*

Observations upon the Government of the United States of America by James Sullivan

July 7, 1791 Boston, Massachusetts

...The following Observations will no doubt appear laboured, and be tiresome to some readers at least. They are principally upon the question, Whether the separate states, as states, are liable to be called to answer before any tribunal by civil process? and will be very unentertaining to many; but the question is very important, for in that is involved the interesting question—Whether we are an assemblage of republics, held together as a nation by the form of government of the United States, or one great republic, made up of divers corporations? If the latter is the case, it is generally agreed, that our present system of government, however agreeable and happy it is, cannot be long continued.

I have made my observations upon this point, having in view a civil

Pr (DLC, Rare Book Room). Published in Boston by Samuel Hall, 1791. Date derived from an advertisement for the pamphlet upon its publication. *Independent Chronicle* (Boston), July 7, 1791.

James Sullivan (1744-1808) became attorney general of Massachusetts in 1790. *DAB.*

action brought by Nicholas Van Staphorst against the state of Maryland, in the Supreme Judicial Court of the United States, and which is now pending in that court.[1]

. . .

The system proposed [*at the Constitutional Convention*], contained the natural division of legislative, executive and judicial powers. The judicial power is, in all governments, the most operative upon, and most familiar to the people; and while, in this situation, all wished for a union, and no one pretended to be in favour of a consolidation, there were great difficulties, in the minds of many, respecting the construction of the judiciary powers contained in the system then offered to the public. There were, however, men of learning and ingenuity, who gave that part of the Constitution a construction which made many easy with it, and which I believe to be quite consistent with truth and fairness.

It seemed then to be agreed, that the states, as states, were not liable to the civil process of the supreme judicial of the Union; and no one pretended to say, that if the states were so liable, there was not a consolidation of all the governments into one. There can be nothing, I think, more absurd and ridiculous than to suppose the governments existing as separate governments, and yet to suppose them amenable before a civil tribunal, of any kind, upon mean process. Since the establishment of the general government, and in the present year, there has been an action brought, by Jacob and Nicholas Van Staphorst, against the state of Maryland. The action is entered in the supreme judicial court of the United States of America. The writ appears to have been directed to, and served by the marshal of the district of Maryland upon the governor, executive council and attorney-general of that state. The action, as appears by the record, stands continued from February term, 1791, to August term, in the same year, with an order, that the state should file their plea within two months from February, or have judgment made up against them as of that term. A plea is filed to the action in common form, that the state never promised.

It is said, that the legislature of Maryland, by a resolve, or in some other way, consented to the bringing this suit in that court; but this does not appear upon the record.[2] Be that as it may, the state of Maryland can, by

1. Even before *Van Staphorst* came before the Court, Sullivan was concerned about the issue of state suability. In a letter to Elbridge Gerry of March 7, 1790, he stated, "The public Creditors in and out of the Legislature openly declare that they look to the General Government alone for their debts, and the idea of suing the Commonwealth in the federal District Court ɛ is ~~men~~ too frequently mentioned." Sullivan warned, "There is no process provided by the General Government for Suing States, nor can they be ameniable as States, perhaps there may be an attempt, and when there is one a civil war will be the Consequence." Gerry Papers, MHi.

2. The Maryland assembly did pass a resolution directing the governor and council "to take measures for entering an appearance," but that occurred after the suit was instituted. See introduction to this section.

no means, give a jurisdiction to the supreme court of the United States, which that court does not possess by the constitution of their power from the people of all the states. They might refer their dispute, by arbitration, to the honourable gentlemen who fill that bench, or to any other; but they cannot, if they exist as a state, find a power lodged any where, to compel a performance of the award on their part. If they could not agree with their creditor, as to the sum due, they might have resolved, that their treasurer should pay any such sum as should be found due by such and such men. But agreeing to have this suit produced against the state, as a state, carries with it an idea, that when they know how much they owe, and shall be able to pay it, yet they shall not be willing to do it; but will wait for some person or other to compel them.

The state of Maryland will pardon me while I intermeddle with their business, because, although this measure may only be a method which they have adopted to urge them to be honest, yet it establishes a precedent which may prove injurious to all the states, and therefore every citizen has a right to be heard upon the subject.

All the authority which the supreme judicial court can possibly have must be derived from the government of the United States, and all the acts and resolves of the particular states, which may be made for *enlarging* or *abridging* their jurisdiction, are no more to the purpose than the doings of any private man; and, therefore, if the court should hold cognizance of this plea, they must do it by virtue of the Constitution; and if they call upon that state to answer, they have the same right to call upon all the others. The danger of establishing precedents for power has been universally acknowledged, but generally when the time for a remedy has been gone out of reach.

The Constitution provided for a supreme judicial court, and gave Congress power to establish inferior tribunals;[3] but the mode of process was left as the subject of legislative authority. Antecedent to an act of Congress upon that subject, the supreme judicial court could not be appointed; or if the president had authority to appoint the court, the Constitution did not determine how many of them there should be upon the bench; and when this was provided for, by law, the Court could have no form or mode of civil process, without an act of the legislature. The Congress, in their laws establishing a judiciary system, provide a method of service for their precepts, but have made no provision for the service upon a state.[4] I conclude, that if they had conceived such service consistent with the government they were administering, that they would have not considered their system as complete without it.

3. Article III, section 1; Article I, section 8.

4. Congress filled in the outline of the judicial system through the Judiciary Act of 1789 and designated the modes for serving process in the Process Act of 1789. *DHSC*, 4:22, 108; *Stat.*, 1:73, 93.

In order to compel a body or an individual to answer for a debt upon a legal process, there must be a party to complain; a tribunal to complain to, invested with power to decide; authority to compel the appearance of the party complained against, and strength to enforce a compliance with the decree which shall be made. Consistently with this idea, the precept or command to answer is always made by the sovereign authority of the civil community, in the name of the government itself, or that of its supreme executive officer. In the United States, the precept is in the name of the president; in England, in the name of the king; in the state of Massachusetts, in the name of the commonwealth; and in others, according to that mode of expression which will best shew that it proceeds from the sovereign authority of, and is to be supported by the whole community. It would be an aukward business indeed, to have a precept in the name of the president, who is a citizen of Virginia, and a servant of the United States, directed to a marshal, commanding him to attach or summon the United States to appear in one of their own courts, before their own servants, to make answer to a civil suit. Who would amerce or punish them, if they would not appear; or who should carry a judgment against them into execution?

There can be no suit against a nation, by any practice yet known, or by any principles yet acknowledged in the world. A national debt lays forever, until provision is voluntarily made for the payment of it. Perhaps some may wish that nations may be compelled to do justice, as well as individuals, and many may wish the course of nature and her established laws may be altered in other matters; but this is to no purpose; for the leading principles of all governments are firmly fixed by the laws of nature, and though there appears a variety of forms in the world, yet they all arise from a different mode in the application of those principles.

We may as well attempt to erect a temple beneath its own foundations, as to attempt to erect a government with coercive authority over itself.

By the British constitution the king never can be sued; "Hence it is," says judge Blackstone, "that by law the person of the king is sacred, for no jurisdiction on earth hath power to try him; if any person has a point of property with him, or a just demand against the king, he must petition him in chancery, where his chancellor will administer right, as a matter of grace, though not of compulsion."[5] Puffendorf likewise says, a subject, so long as he continues a subject, hath no way to oblige a prince to give him his due.[6] These are speaking of a king, in his individual, private capacity, and upon demands against him for his private debts: But the king, or president of a

5. William Blackstone, *Commentaries on the Laws of England,* ed. William Draper Lewis, 2 vols. (Philadelphia: Rees Welsh, 1897), 1:242, 243. Sullivan constructs this quotation out of more than one sentence from the *Commentaries.*

6. Blackstone provides this quotation from Samuel Pufendorf, citing the German jurist's 1672 work, *On the Law of Nature and of Nations* (1. 8. c. 10). Ibid., p. 243.

state, can never be sued for the debts due from the state. They owe no greater share of it than any other member of the kingdom or commonwealth; and we all know, that no action can, or ought to be maintained against an individual member, for a debt due from the corporation to which he belongs. Every one having a demand against a government, which is unliquidated and unfunded, may petition, and must wait with patience for the efficacy of that policy and justice, which ought to urge every government to do right.

But if the United States cannot be held to answer upon a civil suit, how then can they become a party? for the Constitution has expressly provided, that "the judicial power shall extend to every case wherein the United States shall be a party." To this I answer, that they may become a party plaintiff; by bringing a suit, they may become really, though not nominally a party, by defending their tenants and servants in suits brought against them. The king of England may become a party, and daily is one. Each of the United States, before the establishment of the general government, could in this way be parties; they could not be sued, or compelled to answer, either by their own, or by any foreign, coercive power.

If then the United States cannot be called to answer in a court of law, what is there in the frame of the general government which gives the courts of the Union a coercive power over the several states?

The second section of the third article of the judicial power provides, that "the judicial power shall extend to all controversies to which the United States shall be a party; and in all cases to controversies between two or more states, between a state and a citizen 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."

If the judicial power shall extend to controversies between two states, how can this authority be exercised, unless one of them can be called to answer the other by civil process? There is more appearance of argument in this, than there is in any other question proposed by those who are for swallowing up all authority in that ceded to the general government. If there was any thing conclusive in this mode of expression, when duly considered, it would become necessary to refer to some other parts of the system under consideration for an explanation; but I think we need not do this, because the same method which would make the United States a party, may call up two states as parties against each other. This clause, in the Constitution of the general government, was intended to establish a tribunal for all the states to resort to, upon a question of territory. Even a corporation cannot be sued for trespass; but the tenant or servant of one state may have ejectment or trespass brought against him by another state, or by any person holding under the title of it. And thus there would be really a controversy between two states. The citizen or subject of a foreign

state or kingdom may have an action brought against him by a state; or a foreign state, or its citizen or subject, may bring an action against a citizen of one of the United States, for a supposed injury, and the state to which he belongs may become really a party; and therefore, to secure justice and to preserve the peace of the Union, it is provided, that such case shall be tried in the judicial of the United States.

I have shewn several ways in which a state may become a party, without being liable to be served with a civil process, or compelled by the coercive authority of the United States to answer upon a civil suit. But there is one other clause in this section, which deserves more particular attention. "In all cases in which a state shall be a party, the supreme court shall have original jurisdiction." Nothing is here, or any where else, said of the supreme judicial court having jurisdiction where the United States shall be a party.

We take our ideas of government generally from other nations, and more especially from that with which we have formerly been connected. It is an established maxim in the English laws, that the king by his prerogative may bring his suit in any court having cognizance of pleas. Upon this idea, it was found to be unnecessary to make provision respecting any particular courts having jurisdiction of suits where the United States are plaintiffs, because, being a sovereign power, they can bring their suits where they shall please in their own courts. It would have been nonsense to have made provision for the jurisdiction of causes wherein the United States may be defendants, because there never can be an instance of that kind; but as no one state is the sovereign power which constitutes, or can control the courts of the United States, there is no one of them which holds the prerogative of bringing its suit in which of the courts of that government it shall choose; and therefore it became necessary to make this provision, in order to give the supreme court original jurisdiction of the suits brought by the particular states. In this way speedy justice is assured to the states, their dignity preserved and their importance supported, upon principles which constantly tend to strengthen the Union.

Where either of the states brings a suit, it is to be brought immediately in the supreme judicial of the Union; and, by a fair and liberal construction of this clause, wherever a tenant or servant of a state brings an action against any one holding under, or acting by the command of another state, the action ought to be originated in the supreme judicial court of the federal government: and here a state becomes really, though not nominally a defendant; and in such case the suit will, by the intendment of this part of the Constitution, be carried to that court.

If the paragraphs above recited, by having the construction which I have given them, can be fully satisfied, and be rendered consistent with the other parts of the system they belong to; and if a contrary, or more enlarged construction would render them incompatible with, and derange the whole

system, and compel us to affix new meanings to the language of it, then I think I may conclude that my construction is right.

A sovereign can never consent to become a party before a foreign tribunal; his remedy lies in the strength and power of his own nation. He demands justice, and if it is denied him, he appeals to the sword, and makes reprisals. It would therefore have been arrogance in the people of the United States to have made provision for sustaining the suit of a foreign power. But to prevent these acts of injustice to the rights and dignity of a foreign sovereign, in the person of his public minister, which might injure the states, they have wisely provided a tribunal, near the head of the federal power, for punishing any wrong or injury done to such characters.[7]

The people of each state have ceded expressly, by the parts of the general government under consideration, and as expressly, by giving the power of making peace and war to the United States, all right of demanding justice against other nations, and against each state, as separate, sovereign powers, and of appealing to the sword where it shall be denied them. Each of them held this right before the establishment of this government; but the people have agreed to withdraw their delegated sovereignty from each state, and have lodged it in the Union, so far, in this particular, that they can make no demand upon a foreign sovereign, or upon each other, but through the medium, and consonant to the decision of the United States. But still, if a state, as a state, shall choose to violate this compact, how can it, as a state, be punished? This question I have already answered, by shewing, that although a state cannot be punished for making or continuing a war, yet the individual person, who acts under such pretence of authority, may be punished for treason, murder, or other crime, according to the facts happening from his procedure. When all the people of a state shall unjustly arm themselves against the general government, and make use of the form of the state government to conduct their enterprise, the matter must be settled, like other rebellions, by the sword.

Having, as I think, shewn that a state, by any fair construction of the judiciary powers under consideration, cannot be compelled to answer on a civil process, I will now attend to the other parts of the Constitution, and see if, by a just construction of them, or according to the nature of governments, the several states, as states, can be amenable to any civil tribunal, for any crime or misdemeanor, or coerced by any civil authority whatever.

I have already anticipated my argument under this head, by observing that no suit could be produced against a nation, or against the supreme magistrate of it. But we have a kind of government, including that of the United States as a nation, and those of the several states as separate sovereignties, which is perhaps without example in the world. In some

7. Article III, section 2, endowed the Supreme Court with original jurisdiction over cases involving "Ambassadors, other public Ministers and Consuls."

countries all the political sovereignty, taken from, or delegated by the people, is in one man, forming what we call an absolute monarchy; in others, in one body of men, forming an aristocracy, absolute in its nature[;] in others it is delegated by parcels to several men, [or] bodies of men, the legislative power to one, and the executive authority to another; but in all these the lines of the powers held are marked by the boundaries of the territory over which they are to be exercised, or by the natural division of the legislative from the executive authority.

In our country we have two sovereign powers, independent of each other in their political capacities, exercising legislative, judicial and executive authority over the same persons, at the same time, and in the same place. The lines which divide and regulate the exercise of those sovereign powers are marked and described by the Constitution of Government of the United States. As individuals retain all the powers, under a free government, which are not surrendered by the form of their constitution, so all the powers, which existed in the governments of the several states before the establishment of the general government, are yet held by them, excepting those which the people have taken back, and surrendered by that system.

The constitution of the general government, as to things within its reach, is the supreme law of the land; and all the constitutions and laws under them, so far as they militate with it, are void;[8] but those laws which shall be made by Congress, and which are repugnant to the rights and powers reserved for the state governments, are equally void. The only objection to this is, that there may be a difficulty in two sovereign powers exercising authority over one man, at the same time and place; and that where two independent powers are thus acting, there may be a controversy between them, without any acknowledged tribunal to decide upon it. But this is an inconvenience which the people have preferred to the inefficient state the nation has been in, and which they will still prefer to that of one consolidated government over the whole union.

A sovereign state cannot be coerced by its own authority in any other sense than a man can be commanded by himself; for the same authority which obliges, can at all times release from the obligation; and as an individual may resolve, and rescind the resolutions, so a civil community may determine, and recede from the determination. It may command, but it may at the same moment excuse from obedience; which shews that the obedience of a state to its own coercive precept is no more than an uncontroled, voluntary assent to a measure.

Before the revolution, the provinces and colonies in America had neither powers of making peace nor proclaiming war, nor of regulating commerce; some of them had not the power of appointing their own chief magistrate; and the prerogative of the king extended to them all; yet they held certain

8. This principle is embodied in the supremacy clause of Article VI.

sovereign powers, which put them above the coercive authority of each other, as well as above that of Great-Britain. There were no pretensions of their being liable to be sued. Allegiance was due from their members, not to them, but to the king; and offences were supposed to be committed against him, but not against them. Yet as they held some uncontrolable, sovereign powers, they were by no means liable to civil coercion.

To suppose a man can uncontrolably command another, and dispose of him as he pleases by general edicts, when he is liable to be controled, and to be disposed of himself, will not do. If the United States have a right to issue a coercive precept against the several states, they have a right to compel obedience by punishment. A corporation cannot be corporally punished, or be imprisoned, but it may be disfranchised, and lose its privileges for a misusure of them. This is called a civil death. But this process of punishment carries with it the full and complete idea of subordination to a superiour power, which is quite inconsistent with every idea of any kind of sovereignty. If one of the states, as a state, shall refuse obedience to the precept of the United States, there can be no way to punish it but by a disfranchisement, or an annihilation of its corporate powers. All right of disfranchisement goes on this idea only, that the corporation derives all its privileges from the sovereign power which protects it, and that they can be forfeited by, and taken away for a misusure. The several states existed as sovereign states before the general government was formed; they hold nothing under it, but derive their authority immediately from the same source with that; no one drop of the stream of power, issuing from the people to them, commixes itself with that of the general government in its course.

If the government of the United States, as the executors of the sovereign power of all the states, can compel each of the states to answer in their courts, then each of the states can, by their civil process, as executors of the sovereignty of its citizens, compel the United States to answer in their court, for the sovereignty of the governments are equal to that of the United States, as to the several objects and subjects of them: Neither of them is answerable to, or under the subordination of another. The nature of a delegated sovereignty is the same at all times, and in all places; but that of the United States is more extensive than that of a particular state, and has more force to support and execute it.

The United States may as well attempt to coerce, by their authority, the province of Nova-Scotia as either of the states in the Union. Perhaps this idea may hurt the feelings or wound the pride of some very honest men, whose zeal for the honour of the United States does not arise so much from reflection and reasoning as it ought. We are very apt to esteem a government in proportion as we approve its administration; and we are ready to concede the most ample powers, and to make the most unreserved surrenders to a state, when we have a full confidence in the principal

officers of it; but these inexcusable feelings have destroyed the liberties of many countries. If the men we esteem, and with whom we are ready to deposit our all, were immortal and unchangeable, we might have some excuse for such unlimited submission; but as we know there must be a succession of rulers, and do not know who they will be, it is neither wise nor prudent to give that authority to the best of men, which might injure us if it was given to the worst.

Each of the several states can undoubtedly try, condemn and execute any person for treason, murder, or for any felony committed within it, unless it be for such cause as the people have given the general government the sole power of punishing. And it would be a very barbarous and unrefined idea of government, that a body politic or state should have an uncontrolable right over life and property, and yet that same state itself be amenable to another power for its conduct. A state invested with uncontrolable legislative authority, with the absolute power of constituting all its officers, and those officers amenable to, and removeable by no power besides that of the state which appoints them, and yet that very state to be subordinate to, and the subject of the coercive precepts of another state or government, would be an heterogeneous idea of government that no well taught civilian would hold.

I am not a stranger to the hacknied objection of the *imperium in imperio*—a government within a government. This idea, when properly applied, has, no doubt, great force in it.

Where a monarch claims dominion, as his inheritance, over the people in all things, to allow any share of power in another, which is not derived from him, is against the fundamental principles of such a government; and these powers must necessarily be opposed to each other, without any arbiter to decide between them. But, in our case, should there ever be an uneasiness between the general government and those of the states, the people who formed, and who support both, will, in the same way they formed them, by a convention of their delegates, establish the boundaries, and raise up the old monuments.

There is no principle in civil government, which will admit of a judicial, without a legislative power. The judicial power is only intended to apply, and to carry into execution the ordinances of the legislative authority. There may be a judicial and legislative authority vested in the same man, or body of men; but there can be no extension of a judicial power to persons or things without a legislative authority to support, direct and limit it. If this position is just, and I believe that no one will controvert it, then it will clearly follow, that if the judicial authority of the United States can extend to the several states, as states, the several states, as states, are under the legislative authority of the United States. The Constitution provides, that "the judicial power shall be vested in one supreme court," but the judicial

power of a state can only decide upon, and execute the laws made or adopted by that state.

If the several states are under the legislative and judicial authority of the United States, they must be also under the executive authority of the same. And to suppose the government, as a government or state, subordinate to the United States, and yet to suppose that the individuals who compose the state, or any part of their property, are, in any instance, independent of the general government, will by no means do. If the authority of the United States extends to the governments of the particular states, then the republican form of government, guarantied by the United States, means nothing more than a form of police for a corporation; and the appellation of legislative and executive powers of the several states means nothing more than the powers of making and executing by-laws, provided they are neither made nor executed against the sovereign pleasure of the government of the United States.

That this is clearly our situation, provided the judicial power of the United States extends to the several states, as states, I believe will not be seriously contended. If this is our situation under the general government, then there is not, as the Convention expressed it, a consolidation of our Union, but a consolidation of our governments, and one great and general system of government embraces all the territory, from the south line of Georgia to the north line of Massachusetts, considering and holding those which were lately sovereign states as districts under the national subordination of, and amenable to that government.

To those who have been frighted by the late insurrection in Massachusetts,[9] or have complained of injustice in Connecticut, or New-Hampshire, or have been defrauded with paper money in Rhode-Island, as well as to those who want offices, preferments, and the public bread, this idea will be pleasing; but the sober politician, the man who loves his country, and delights in the freedom, happiness and security of the people, will examine the matter calmly and with integrity, before he gives his voice in favour of the measure.

. . .

There is a proposal in Congress* of consolidating the judicial powers of the United States with those of the states separate; but this will most certainly destroy the idea of a separate existence of the states, and form the strongest consolidation of the whole.[10] The judicial power is, as has been observed, the most operative and visible principle in government; without it, the legislative power could not effect any thing; and without it, the executive power would be idle.

*Mr. Benson's motion, referred to next session.

9. Shays's Rebellion (1786).

10. For information on the Benson Amendments, see *DHSC*, 4:168-72.

The judicial officers of the United States could not be amenable to that supreme, and to another supreme authority at the same time: And the judicial officers of the several states could not be amenable to the supreme power of their own state, and to that of the United States. These officers must be appointed by one or the other of the governments, and not by both.

If the several states should cease to have power to appoint a supreme judicial, they would cease to be states. To have the power to appoint, and not the power to remove or punish, would be a new kind of power. If the consolidation of the judiciary power should thus take place, the great government will swallow up the lesser ones, as a large drop of water drinks up small ones within its attractive force.

There is a great inconveniency in having so many courts to attend upon; but we are trying a new experiment to preserve our civil freedom, and we have no right to expect any enjoyment without some inconveniences; it is our duty to bear these with patience, and to suffer even the greatest hardships, rather than to give up the idea of maintaining separate republics. ...

Columbian Centinel

September 7, 1791 Boston, Massachusetts

CENTINELS upon the walls of a State, are as necessary as upon the outposts of an encampment. By proclaiming the approach of an enemy they may frequently prove the instruments of its salvation; but by sounding alarm, when no enemy is near, they may excite terrour and dismay, and thus sometimes prove the instruments of its destruction.

Mr. SULLIVAN, I doubt not, was influenced to the publication of his late pamphlet by the best motive, an anxiety for the sovereignty of the States.[1] Some of his observations in the introductory pages, upon the principles of government, are very ingenious, and will receive the approbation they richly deserve, but his remarks upon the *judiciary* system, although equally ingenious, are without foundation, and hold out to the publick eye terrours which do not in reality exist.

These remarks have originated in consequence of an action now pending in the Supreme Judicial Court of the *United States,* by JACOB and NICHOLAS VAN STAPHORST, against the state of *Maryland.*—Mr. SULLIVAN has given a construction to the clause granting this Court *their powers,* and has therein attempted to prove, that by taking cognizance of this action, they have exceeded the bounds of *these powers,* and have thus established a precedent which may warrant future invasions upon the sovereignties of the states.

Enthusiasm, I believe, has very frequently created within the minds of

men, fears, which like mere phantoms, have neither body or basis to support them.

The question is not whether there is a consolidation of the union of the states themselves. Mr. SULLIVAN's arguments in the introductory and concluding pages of his pamphlet to this point, being therefore, improper, and inapplicable, I shall not consider them.

The real question simply is, whether a state is or is not, compellible to answer in this Court upon civil process?—All other clauses or paragraphs than the one granting this Court their powers, cannot, therefore, come into consideration, and upon this alone the question must receive a solution.

As a key to open the whole mystery of the system, it may not be improper in the first place to look into the preamble to the frame of our new government. It is therein expressed, "We the people of the *United States,* in order to form a more perfect union, &c."—from which the inference is very natural, that the old union being imperfect, for want of force and energy, it was intended to form a new one more perfect, by giving it more force, and more energy.

Agreeably to this inference, we find in the constitution, that the powers of Congress are enlarged by new and more liberal cessions from the people. That the respective states have voluntarily invested it with the Supreme Legislative, and rendered themselves subordinate to this Legislative.—It is indeed a natural conclusion, that for similar purposes they likewise invested in it the supreme judicial, and perhaps in order to qualify themselves as states to enter into contracts by being compellible to fulfil them, for without this inconvenience, few, if any contracts would exist—it is presumable, that they have cloathed this Court, with power to compel them to answer upon civil process.

We will now examine the clause which provides that "The Judicial power shall extend to all controversies to which the *United States* shall be a party; and in all cases to controversies between two or more states, between a state and a citizen 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."[2]

It will not be contended that previously to the existence of this clause, a state was not compelled in any Court whatever to answer upon civil process, there being at that time no Court in the country of competent jurisdiction, but by this clause from the most natural construction of the terms, I apprehend a new tribunal is established, with a jurisdiction fully competent, and that the states have expressly allowed the competency of this jurisdiction.

Mr. SULLIVAN observes, that this tribunal is established merely and exclusively for the States to resort to upon a question of territory—had it been merely and exclusively for this purpose, I conceive the terms would not have

been general, but particular—Statutes granting cognizance in certain cases always define such cases in language unequivocal; but in this clause the terms *all* controversies are used, which cannot be said to mean any particular controversy in exclusion of all others.

Mr. SULLIVAN further observes as an argument, that he has shewn several ways in which a state may become a party without being liable to be served with a civil process or compelled by the authority of the *United States,* to answer upon a civil suit—that he has done this I do not deny—but it will not from thence follow that there can be no other instances in which a State may become a party and yet liable to be served with a civil process—This argument, therefore, can prove nothing.

By the fairest construction of the clause, and without the necessity of unnatural implication, which is never allowable in giving construction to statutes, I think it is beyond a doubt the Court have not in sustaining this action exceeded the bounds of their jurisdiction, and if they have not, however dangerous the precedent, it can be of no service for any individual, until the community at large shall feel the oppression, to hold out the danger to publick view.

(Boston) September 7, 1791. Date and place are those of the newspaper.

1. See *Observations upon the Government of the United States of America* by James Sullivan, July 7, 1791.

2. Article III, section 2.

Pierce Butler to Messrs. van Staphorsts and Hubbard

September 23, 1791 Philadelphia, Pennsylvania

... I will, as a friend, offer you my opinion, that is to prefer amicable means in adjusting Your transactions with the states of s[o] Carolina[1] & Maryland; by such You will soonest adjust Your claims. A Suit against a State cannot avail. Nor indeed can it well be brought. Who is it You'll sue? the State_ If the Court shou'd conceive itself vested with a power of proceeding and give judgement, who woud You levy on? The State is not an Individual_ The States being individually Sovereign (Quoad[2]) I doubt if an Action of Debt can be brought against any one of them. This, however, is a bare opinion of my own. I have never conversed with any man on the Subject_ It may be well however before You proceed to be on certain ground_[3] ...

Lb (ScU, Pierce Butler Letterbook).

Pierce Butler (1744-1822), United States senator from South Carolina (1789-1796). *BDUSC.* Another part of the letter reveals that Butler was in debt to his correspondents.

In 1789 the English-born Nicolaas Hubbard became a partner of Nicolaas and Jacob van Staphorst. Van Winter, *American Finance and Dutch Investment,* pp. 369-70n.

1. The van Staphorsts were attempting to recover money they had lent to South Carolina. See introduction to section on *Cutting v. South Carolina.*

2. "As to this; with respect to this; so far as this in particular is concerned." *Black's Law Dictionary* under *Quoad hoc.*

3. Butler makes these comments as though he were unaware that *Van Staphorst v. Maryland* was pending in the Supreme Court. Yet as a United States senator resident in Philadelphia, it would seem that he should have known about the suit.

Report of the Committee of Ways and Means, Maryland House of Delegates

December 13, 1791 Annapolis, Maryland

[*The report first provides an accounting of the state's finances.*] These objects, thus examined by the committee, there then remained for their consideration one demand against the state of very serious complexion and extent. The claim alluded to is that of the Messieurs Vanstaphorst, of Amsterdam, for the recovery of which, with extravagant damages, they have already instituted a suit in the supreme federal court.

In compliance with the application of the said Messieurs Vanstaphorst and their agent,[1] made by letters to the legislature, and referred to the committee, an estimate of appropriations already made, and of others, are now proposed, for the complete payment of the annual interest arising on the principal sum loaned of £.40,500 currency, which every concurrent motive of national faith, and her own interest, would induce government to pay regularly, rather than permit to accumulate.

But, as the final liquidation of this demand in the mode now pursued, may deeply affect the political rights of this state, as an independent member of the union, the committee are of opinion that it would be advisable rather to propose reasonable offers of compromise, than to permit a precedent to be established, by which any individual foreigner may endanger the political and private rights of this state and her citizens; and, for this purpose, they propose, that the act of April session, 1787, chap. 42,[2] be now revived, and that the commissioners thereby appointed be authorised to liquidate and finally adjust with the said Messieurs Vanstaphorst, or their agent duly authorised, their said claim, and to propose to them either to subscribe the same in part of this state's quota of the assumed debt of the United States, if the time for completing the same shall be prolonged, or to receive in discharge thereof, at a reasonable price, so much of the deferred or three per cent. stock of this state, as may be agreed on. And the committee are of opinion that the legislature should pass such acts and resolutions as may be necessary for all the foregoing purposes.[3] ...

Pr (Printed in *Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1791* ([Annapolis: Frederick Green, 1792]), p. 89).

1. Samuel Sterett (1758-1833), Baltimore merchant. Papenfuse, *Biographical Dictionary of the Maryland Legislature,* 2:772-73. See also introduction to this section.

2. For details on this statute, see introduction to this section.

3. A discussion of the consequences of the committee report can be found in the introduction to this section.

An Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States, in their Political Capacity. Being an Answer to Observations upon the Government of the United States of America: by James Sullivan, Esq. Attorney General of the State of Massachusetts ————

April 12, 1792 Charleston, South Carolina

A PAMPHLET has lately appeared under the signature of JAMES SULLIVAN, Esq. printed in Boston, entitled, "Observations upon the government of the United States of America,"[1] in which the author has undertaken to discuss a question, whether under the federal government, an individual state can be called to answer, as a defendant in the court of the union? While I applaud the spirit and freedom, with which this writer discusses a question of so much magnitude, still I am constrained to differ from him in the doctrine which he inculcates, and endeavors to support.

. . .

To the author of the "observations, &c." whose principles and arguments I shall oppose, in the ensuing pages, I give the most unqualified credit for purity of intentions, & for patriotic virtue. He, no doubt, believed as he wrote—and had it occurred to him, that in placing every state superior to the jurisdiction or controul of the supreme court of the union, he had left them without any constitutional umpire to decide their differences, but *arms,* or had rendered a civil war almost inevitable, whenever those differences should happen; he would have drawn his conclusion with reluctance, and perhaps have been impelled to test with a severer scrutiny, the arguments which induced it.

As I propose to hold the affirmative of the question, *whether a state can, in a direct way, be called upon in the supreme federal court, in answer to a plaint preferred against it by another party, plaintiff or complainant*—I will first

Pr (DLC, Rare Book Room). Printed in Charleston by W. P. Young, 1792. Date and place are those provided by the author, who signs his name as "Hortensius." Charles Warren and others have stated that "Hortensius" was David Ramsay, but the most recent thinking among scholars and bibliographers is that the pamphlet was written by Timothy Ford. Warren, *The Supreme Court in United States History,* 1:92n; Pierce Welch Gaines, comp., *Political Works of Concealed Authorship Relating to the United States, 1789-1810, with Attributions,* 3d ed. (Hamden, Conn.: Shoe String Press, 1972), p. 18; Jacobs, *The Eleventh Amendment and Sovereign Immunity,* p. 174n; Richard A. Harrison, *Princetonians: A Biographical Dictionary,* vol. 3, *1776-1783* (Princeton: Princeton University Press, 1981), p. 403.

1. Q.v., under date of July 7, 1791.

adduce my reasons in its support; and then take notice of such adverse objections, in our author, as it may be proper to answer.

This being a constitutional question, our ideas upon it must be drawn from the *principles,* the *spirit,* the *tenor,* and the *words* of the charter itself. It is obvious, that the enquiry will have nothing to do with examples drawn from other nations, or from the political institutions of other countries. These might have had their weight with the framers of the constitution, when the point deliberated was what *it ought to be!* but they cannot safely be employed in conducting us to the knowledge of *what it is.* It is equally true, that the discussion will have no connection with all those theoretic difficulties, which ingenuity can figure and throw in as embarrassments. Were these to prevail, I fear that no part of the judicial system would be able to stand the test. Difficulties there no doubt will be, in the process of a system, so extensive, and so intricate; but I hope that few of them will turn out to be of the practical kind, and that even those will be tempered by the benign influence of legislative wisdom, and of popular acquiescence.

I have already observed, that this question must be answered by a reference, amongst other things, to the *principles* of the constitution. I know, that objections to this mode of resolving constitutional points, have been insisted on by many. They alledge, that it is dangerous to travel out of the letter of the charter itself. That once you let loose the exuberant powers of fancy and ingenuity, and suffer them to work upon the indefinite subjects of principles, spirit and implication, no person can forsee to what point their wild vagaries will conduct; nor where the boundaries can be drawn, at which they may be compelled to stop. That under the management of weak or wicked men, the constitution may become a monster, to devour the liberties of the people. Arguments of this kind have been elucidated by examples drawn from other countries; whose latitude of construction, under the guidance of subtilty, have made laws and constitutions speak a language never contemplated by the makers—and even repugnant to their obvious intentions.

It cannot be denied that this has been true in a greater or less degree; but it is equally true, that the inconvenience results rather from the imperfection of human things, than from any innate defect of this mode of reasoning. That same imperfection, which renders the constructions of men variant and repugnant, incapacitates the human powers from framing, in the first instance, a set of laws or constitutions, so perfect, as to stand in no need of exposition and construction. Hence the safest method in framing a constitution, is to lay down the principles, and leave the construction of them to the impartial wisdom, and the sound sense of the government which is to administer it. Indeed, the objections' rightly considered, conclude rather against the *improvident or vicious use* of this power, than

that "a sovereign state can never *consent* to become a party before a *foreign** *tribunal.*"[3] If they cannot consent, it is clear they cannot be compelled. But what is implied in this sovereignty which each state possesses? Is it a sovereign power to do as they please? But the constitution contains both positive and negative injunctions upon every state.

Surely, as far as those injunctions extend, the States are not *sovereign,* but are *subordinate.* Do these injunctions lie on the people only! The constitution explicitly declares the contrary. But says our author, though the interdictions lie on the states, the laws act upon the people; and if they obey an un-constitutional act they will incur the punishment of the federal government. Our author has carried this idea so far, as to suppose, that if one state should declare war of its own accord, the general government would have no other prohibitory method, but to hang the citizens, who should acquiesce, for treason and murder. Admitting however this direful doctrine, in all its latitude, we still must own, that if the *people* of the states, are so strongly bound by a federal law, the *government* of the state is bound with them. To deny this would be at once to establish *imperium in imperio;* and to contend for the absurdity of *equal sovereignty*—an idea that cannot be expressed without a solecism in speech. If then the government be bound, whenever the people are bound, we must confess, that as well the government, as the people, becomes an object of federal legislation. They can, therefore, constitutionally commend[4] or interdict the performance of an act by the state; provided the law, which is made, for the purpose, be pursuant to, (that is confined to the objects contained in) the constitution. It is no objection to ask how a state shall be punished for disobedience? Once latitude is indulged in framing suppositions of state delinquency—it may be asked how they shall be compelled to appoint electors for president; to elect senators, and the like delinquencies; each of which would threaten the dissolution of the government itself: but each of which involves an un-constitutional supposition. As well might the constitution have prescribed a mode for trying a whole state for high treason, and have declared the punishment—as to have noticed cases of this kind.

But this is in some degree digressing from the point immediately before us. It must be clear, that in establishing justice, the constitution intended *public* as well as *private* justice; more especially as we find in the same clause another declared object, viz. "to ensure domestic tranquility."[5] How can domestic tranquility be preserved or ensured, if the constitution

*I presume the author cannot intend to apply the word *foreign* to the government of the United States.

3. See text preceding note 7 in *Observations upon the Government of the United States of America* by James Sullivan, July 7, 1791.

4. In an errata sheet the word "commend" is corrected to read "command."

5. Preamble of the Constitution.

provides no standard, but *arms,* to decide the differences between two states, or between one state and the citizens of another? I will suppose for sake of illustration, that a difference has arisen between two states, concerning a portion of territory; one state demands it of the other, who persisting in her claim, refuses to give it up. Who shall decide between them? Not the federal government, says our author, because one sovereign state cannot consent to be subjected to a foreign tribunal. The appeal lies *to arms,* and that under a constitution, which professes to ensure domestic tranquility! It must surely be considered as a most singular method of preserving domestic tranquility, by instituting the *sword* as the constitutional umpire of disputes*.[6] I rather suspect, that this method being *dreaded,* and its approach discovered, gave the most powerful stimulus to the people of America to form the present government. The spirit of discord was going forth in its might—it threatened soon to produce dissensions and disputes—the people saw with terror, that there existed no common tribunal, but that of *arms,* to which an appeal could be made, and from which a decision could be obtained. It is true, the old federal compact contained an illy defined provision; but that, with all the rest of its provisions, having crumbled into feeble atoms, scarcely capable of sustaining the empty pageantry of its tottering forms, made it idle to repose any hope in a remedy from its interference. Nevertheless, it may be remarked by the way, that even under that confederation, which reserved to each state, in the most unqualified manner, her original sovereignty, a court was provided, and in one instance was actually constituted to decide a controversy between two states, relating to territory. Upon full hearing of both parties they decided the right; and the decision was acquiesced in by the high-spirited state against whom it was given.[7] Surely a common tribunal of justice is not more inconsistent with our present partial consolidation, than with a mere confederacy. And yet in constituting it, even under her former confederacy, America did not act without precedent, both in ancient and modern times. I will mention but one of each. The Amphyctionic and the Germanic confederacy, both included in their system a federal judiciary; to which the political members were amenable, and which took cognizance of and decided their differences.[8]—It is true, that the practical process of the

**vid.* 'observations, &c.' page 37.

6. See text preceding note 7 in *Observations upon the Government of the United States of America* by James Sullivan, July 7, 1791.

7. Article IX of the Articles of Confederation provided for Congress to establish courts to settle territorial controversies between states. In 1782 such a court ruled in Pennsylvania's favor in the commonwealth's dispute with Connecticut over the Wyoming Valley. Richard B. Morris, *The Forging of the Union, 1781-1789* (New York: Harper & Row, 1987), p. 71.

8. The Great Amphictyony was a league of tribes in ancient Greece. The "Germanic confederacy" refers to the cities and principalities that by the late 1700s had been loosely linked for centuries under the German king. *The New Columbia Encyclopedia,* ed. William H. Harris and Judith S. Levey (New York: Columbia University Press, 1975).

institution in both, did not fulfil the plausibility of the theory; but this arose, not from any absurdity in the thing itself, but from the feebleness of the ties which bound the compact—an experience of which, in America, has induced her to abrogate, as visionary, and ineffectual, a mere confederacy, and to introduce to a certain extent, the more effectual principle of consolidation.

I cite these instances, and employ this reasoning, not to evince the expediency of a common judiciary among confederated states; but from the possibility, proved by the fact, of its existence among such, to infer (and I think the inference a fair one) that it is not inconsistent with the principles of our government, which to a confederation of the states superadds a consolidation of the people.

I think, that by this time, I am warranted in the conclusion that as well the principles, as the spirit and tenor of our federal government, favor the position, that the states, in their collective or political capacity, are and ought to be amenable to the federal judiciary; where they ought to be decreed to do justice. At the suit of what persons or bodies, and under what modifications, is altogether a distinct enquiry. If the express *words* of the constitution favor the same thing, I should suppose the conclusion to be irresistable. We will lastly proceed therefore to examine *the words.*

The 2d section of article 3 is in these words—"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." It goes on—"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction."

These are the clauses, under which the question agitated arises—a question, which I will venture to say, never occurred to any man upon their first perusal. Without tautology, or circumlocution, the convention have expressed their meaning in the most unequivocal manner. A person must be indebted for his doubts, solely to the subtil operations of his own mind; excited by a predetermination, if possible, not to believe.

The obvious meaning of the words separately, he must strain through close refiners; the import of each branch must be warped by arbitrary distinctions, or forced into narrower limits, by far fetched principles, protracted beyond their natural limits; and the spirit of the whole clause must be subverted from the ample and national provisions it intended, and confined to a paltry operation upon special cases. Such a person lays himself

under the necessity of arraigning the convention under a direct charge of inaccuracy and obscurity. He must say that they have left their meaning at least doubtful to *ordinary* men; and so expressed that it cannot be attained, but by a painful process of subtil disquisition. In fact, the meaning can scarcely be said to be doubtful to *ordinary readers;* for *they* immediately apprehend, from the words, that a state is as liable to be sued, in the federal court, as an individual. But our author contends, that a state cannot be made a party *defendant* except by voluntarily entering herself as a co-defendant with some of her citizens, who have been cited thither, and who claim, or justify under her. That where, in obedience to her laws, or in reliance upon her grants, or some of her engagements, he becomes obnoxious to the federal judiciary, the state may condescend to compassionate his case, and to present herself before the supreme tribunal, for his countenance and support. If she *may* do this, she *may* also neglect it; and abandon the unfortunate litigant to the fate that may await him. If therefore, one state have a cause of controversy against another state, she may *arrest* a single individual of that state—and he must be compelled to stand the shock; unless his own state *think proper* to embark in the cause, and lend him her support. In so unequal a conflict who could stand? What citizen, whose private fortune would not be ruined? A person inhabiting an acre of disputed territory, might be called to support the right of the state to the whole, or be mulct in an action of trespass, and loose his freehold besides. He might invoke the justice of his own state to lend her aid; but she might choose to sleep, and his supplicant hands would be spread in vain. If he should object before the tribunal, that the state *ought to be called in* to answer for her own territory—no, he is told, your state is above the reach of this court, and you must stand alone. If this is true, let our author demand of the convention, and it is a question which he cannot refrain from asking, *why did you in meaning so little declare so much?* While you only intended, that a state should have the privilege of vouching for her own citizens in the federal court, and that at her own pleasure, you have expressed yourselves so inaccurately, as to almost give the impression, that a state may be *impleaded* as a party. Nay, so great a bias have you given the words towards this, that their most obvious import is that which you never meant; while your real meaning lies so deep, that none but a metaphysician can dive and bring it up.

To this reproach, the convention would probably reply, none but a metaphysician could possibly misconstrue our meaning—our meaning is plain; but it is often his part to begin upon that which is plain, and leave it, at last, perplexed in doubt and uncertainty. True philosophy is always willing to *begin* in doubt; but it is a point at which it seldom leaves off.

But let us now take a more minute survey of the words; for they are the surest and safest standard to resort to. Any construction, which absolutely contradicts them must be erroneous.

They do not pretend to organize the court, much less to prescribe its proceedings. They set out with defining the judicial *power*—their object is to mark its extent. Without commenting upon every branch of this comprehensive sentence, I shall only select those which appear to have a reference to the argument under discussion.

1. "It shall extend to all cases arising under this constitution, and the laws of the United States." I must be under a great mistake if it has not already been evinced, that *by this constitution* every state in the union, *as a state,* is subject to the *laws of the United States.*

They may, therefore, pass laws, directly obligatory upon each state. If under one of those laws, so passed, a case should arise; that case, and necessarily the *state,* relative to which it should arise, would, from the very terms of this clause, be subject to the judicial power. It would be absurd to say, that a law made expressly to bind a state, in its collective capacity, must take its operation only upon the individuals. It no doubt would bind the individuals also—by the same rule, that as a thing is to the whole, so it is to all the parts. So also a law made, with a direct view to the people, would bind the whole state—by the same rule, that as a thing is to all the parts, so it is to the whole. The result is, that in the former case, the law would have an obligatory effect upon all the people, because it directly bound the whole state; in the latter it would have the same effect upon the state, because it directly bound all the people. But it is not to be inferred from hence, that the cases are exactly similar—because the positive operation of the law may be upon the one, with only a prohibitory negative upon the other. Thus if the state is commanded to do a particular act, the people are prohibited from counteracting the injunction of the law; and vice versa, where the people are commanded, the state is prohibited from doing any thing that may render the command abortive. These principles are so plain, that it would be unnecessarily tedious to illustrate them by examples. However, were there nothing else in the constitution, but the words we have cited, supported as they are by the above principles and reasoning, I should assert the affirmative of the question, under discussion, with less confidence. They are well employed, as auxiliary arguments, but perhaps, could not stand firmly alone. After describing what *cases* the judicial power shall take cognizance of; it proceeds to determine what *controversies* shall appertain to its jurisdiction—thus,

2. "To *controversies,* to which the United States shall be a party; to controversies *between* two or more states." Here the variation of the phraseology leads directly to an important distinction, which governs and elucidates the sense of the clause. Why are *different words* used in speaking of the United States, from those used, when speaking of the individual states? I shall ask in another place, why are the *same words* used in speaking of the states, with those, which speak of citizens of different states? But to answer the first question. The convention knew that the United States could never be sued in their own court. The principles built upon, by our author, had their full

operation—that a sovereign state could never be called to answer in its own tribunals. But the United States may *sue;* may call others to answer, and therefore might, in that way be a party. They may prosecute criminally or civilly. In either case they are a party. And the cognizance of causes, in which they prosecute, as well as those in which they may, though not as a party, yet incidentally be concerned, appertains with obvious fitness to the federal courts. Why did not the clause go on, and say, "to which *a state* shall be a party?" Because, it would by using the same words, have seemed to put each state upon the same footing with the United States; and to have given birth to the doctrine, that a state can be no otherwise a party than as the United States—that is a party plaintiff. As this was not intended, they *varied the phraseology* from that which spoke of the United States, to that which speaks of the states themselves, and (what is very important in this enquiry) *of individuals.* It accordingly adds "to controversies between two or more states." Now let me ask, how a controversy, in a tribunal can subsist *between two states,* unless one may be plaintiff or complainant, and the other defendant? Will it be satisfactory, or even plausible, to say that a citizen of one state, may implead the citizen of another state in that court, and the states may be reciprocally interested in the subject of litigation, and therefore step forth to the support of it, and thus become a party? I alledge, that this would not technically make either of them a party. At most they would come under the denomination of *privies.* And could this be called, in the sense of the constitution, a controversy between two states? No it would be a controversy between two individuals, supported and encouraged by two states. It would have been a misfortune, indeed, if the constitution had authorised every individual in each state, to bring forward into litigation, the interests of that state, when and how he pleased—or to have authorised any two, and of course every two colluding individuals, in two neighbouring states, to harrass the repose of either, whenever they pleased, by perhaps a fictitious litigation touching its territory or its interests, in the federal court. Who can tell how far a licence of this kind might be extended; and what consequences it might produce? What shield or guard would the states have against the combinations of individuals? Each state must have an agent constantly watching in the federal courts, to give notice of those discussions—to prevent her interests from passing without her knowledge *in rem judicatam.*[9] Or each state must interdict her citizens from bringing suits in the federal court, until licenced by some state tribunal, who must previously have examined the grounds. But such an institution, would be putting it in the power of the state to negative the cognizance of the federal court; and to strip her citizens of a right conferred upon them by the federal constitution, to sue there. Or shall the federal court, whenever the rights of any state come into litigation, suspend proceedings, and call the state to come in and defend? This would

9. In the matter adjudged. *Black's Law Dictionary* under *Res judicata.*

be at once making the state a party; the very thing disputed. For what is to be done if the state disobey the admonition? The court proceeds to judgment. That is a judgment *by default*—the usual and ordinary proceeding where a party refuses to appear, and the threatened penalty which inforces the appearance. Thus we find, that even by indulging the construction contended for, we either involve the system into inextricable difficulties, or bring it by the natural course of things into the very same situation which the constitution evidently intends. What occasion was there then for the framers to take the circuitous way? If several balls lie in a range, a blow given to the first, in the series, will as necessarily impinge on the last, as though that last had received the blow in the first instance. To make a state a party in the first instance, in a direct way, is far more simple and in every view more eligible than by circumvention, or indirectly drawing into discussion their essential interests, and that at the instance of every party, who gives colour to his pretences, to keep them always in a painful state of vigilance, or always acting on the defensive. But I resort to the words; and until it is shewn how a controversy can subsist between *two states,* without the one being plaintiff and the other defendant, shall think myself well warranted in concluding, that by virtue of those words, the one may sue and implead the other. Should this need any confirmation, I will observe

3. That the judicial power extends to "controversies between a *state* and *citizens* of another state." Our author would contend that a state can no otherwise be made a party, than by the indirect means of some of her citizens being impleaded, relative to matters concerning her interests at large. But why are the two cases separated in the constitution—do both mean the same thing? If so, it was a piece of idle tautology. In the clause immediately preceding, we have the case of a controversy between *two states*—here between a state and *citizens of another state.* But says our author, this only intends that a state may *sue* the citizens of another state, but cannot be sued by them. To this it is a sufficient answer to say, that rights and remedies are always reciprocal. It is an odious doctrine, that a state can compel justice from the citizens of a neighbouring state; but may withhold it from them during her pleasure. This absurdity must surely have sprung from the excess of theoretic scruple, or a blindly devoted homage to the idol of state sovereignty. It wages war with that divine principle, which lies at the foundation of the constitution, of establishing justice and ensuring domestic tranquility.

4. It extends to "controversies between citizens of different states, and between citizens of the same state, claiming lands, under grants from different states." Here, in this last clause, the very case is expressly provided for *by itself,* which our author contends to be a general principle running through the whole—that is where state rights may be involved in private litigations. Why need this have been expressed, if it were so violently implied in all the rest. The very expressing of it is a palpable evidence that it was neither implied nor intended, in the antecedent cases.

5. It cannot be remarked, without adding considerable weight in the scale of this argument, that the same phraseology is used in describing the jurisdiction when it speaks of a state, as when private persons are the subject; from whence I infer, that private persons and states stand on the same footing in the federal courts. The United States being a party, is first spoken of by itself—all the rest of the cases then follow each other, connected by a constant copulative, understood and referring to one common contecedent,[10] "*controversies*" standing at the head of them all.

States and individuals promiscuously spoken of, and evidently acquiring reciprocal remedies against each other. Now to say after all this, that the one is intended only to possess the privilege of *suing,* without being *subjected to suits,* is surely resorting to an arbitrary or capricious construction in violation of the arrangement, the spirit, the words, and plain import of the clause.

The sum and substance then of all the foregoing arguments (which I flatter myself have been satisfactorily elucidated) is shortly this—that under our present constitution, the states have parted with that complete local sovereignty, which they antecedently possessed, and as to all national objects, have vested it in the federal government; the principles of which subject each state, and consolidate the individuals of all, into a national government of a mixed form; which government possesses legislative, executive, and judicial powers commensurate with the whole, and in their spheres supreme and independent. That each state, as such, and each individual in every state, is subject to be acted upon by these powers in their constitutional forms; the power of the former to uncontrolable legislation, and of the latter to unqualified obedience, being confined to those objects, which fall under that residuary sovereignty, not parted with to the general government. That the *spirit* and *tenor* of the constitution, both conspire to represent the states as amenable to the fountain of *justice,* which it was a primary object to establish; and *that* for the sake of ensuring that *domestic tranquility promoting that general welfare, and securing those blessings of liberty* of which it gives such flattering prospects. And lastly, that the *words* of the particular clause, which constitutes the judicial power, with obvious fitness to the principles, the spirit and tenor, expressly declare, that the judicial shall have cognizance, not only of cases, where the United States may be a party, but of all *controversies between* two or more states, a state and citizens of another state, citizens of different states, and of the same state, claiming lands under different states. The import, spirit and necessary construction of which words are, that as on the one hand; every state may apply to this tribunal for justice against any state, any individual, or any corporate body, in the nation; so they in their turns possessing reciprocal rights, may appeal to this great and paramount source, and obtain *justice* when it is unconstitutionally withheld by any state; on every of which its obligations are equally binding.

10. In an errata sheet the word "contecedent" is corrected to read "antecedent."

According to the method proposed, I am now to answer such objections of our author, as appear to militate against the doctrine I have contended for. . . .

. . .

3. In page 32.[11] He infers, that because Congress, in their laws establishing a judiciary system, have provided no method for service of process upon the states, they conceived such service to be inconsistent with the government they were administering. It is not usual, and I apprehend not correct, to infer the *non-existence* of a power from the temporary *non-user* of it. Have Congress already organized, or used all the powers delegated in the constitution? Take one single instance as a specimen of hundreds. Have they availed themselves of all the modes of taxation, which the constitution gives them? and suppose they should not find it necessary for a century to come—would this be a ground to question the power or the right? This argument wants plausibility even on the first blush. The next, however, deserves a little more discussion.

4. He proceeds—"In order to *compel* a body, or an individual, to answer for a debt upon a legal process, there must be a party to complain; a tribunal to complain to, invested with power to decide; authority to compel the appearance of the party complained against, and strength to enforce a compliance with the decree which shall be made." These positions, in the abstract, are all true; the error lies in the application of them. Abstract propositions, incautiously or subtilely applied, are generally the most fruitful sources of error, and the most dangerous engines of sophistry. They gain upon the mind imperceptibly, under the seductive impression of their original plausibility; and surprize it into conclusions to which it never expected to assent.

This proposition sets out with placing the stress upon the *compulsory* power of the tribunal. "In order to compel a body, &c." The question is embarrassed in the first instance, with introducing the last supposition, which ought ever to be made—the contumacy of the states against this branch, or any branch of the federal government.

Are we to resort to this standard, in other cases, and on other questions, in order to determine the power and the rights of the federal government? Does it possess no powers, and on the states are no duties imposed, but what the constitution has provided a compulsory method to guard and to enforce? This would be laying the foundation of it in force, and not in contract. The constitution supposes compliance, and not resistance. He ought to have begun his sentence in this way "In order to constitute a *legitimate system of judicature,* for supposing the system legitimate or constitutional, all questions as to the mode of action are purely legislative. Let us then suppose for a moment, that all the particulars enumerated by our author are necessary—we will examine them apart with reference to the constitutional powers of

11. See text accompanying note 4 in *Observations upon the Government of the United States of America* by James Sullivan, July 7, 1791.

the general government, and see if they present any obstacles to the construction I contend for.

1. *There must be a party to complain.* This is an elementary proposition—an axiom in jurisprudence; and there is another equally obvious and self evident, viz. *that there must be a party to be complained against.* I draw one plain inference from both; which is, that whoever complains, and whosoever is complained against, are, strictly speaking, *parties in the suit;* and of them it may be said, in the words of the constitution, that there is a "controversy between" them. Now the instrument says, that the judicial power shall extend "to *controversies between* two states, a state and the citizens of another state, &c." And it follows, that as well a state, as its citizens, may be a party *to complain,* and any other state a party to be *complained against.*

2. *There must be a tribunal to complain to, invested with power to decide.* That tribunal is the supreme federal court, which is, by the constitution, invested with what? Not with the privilege of being chosen by a state "to be arbitrators to whom the dispute may be referred["]—not with the liberty of acquiring a transient delegated jurisdiction over a particular case from the occasional grant of one or more states *pro hac vice*[12]—but with the *power* (the strongest word that could be used) over the cases which are therein enumerated. Surely this must mean a *power to decide.*

3. *Authority to compel the appearance of the party complained against; and strength to enforce a compliance with the decree that shall be made.*

Here we must distinguish as to the different kinds of appearance, and the modes of compelling it in a court of justice. In America we derive our jurisprudence from the common law, and from the civil law. In England, by the common law, the first proceeding is by an original writ, which is a motion to do justice, or appear at court, and shew cause wherefore he refuses. If this be not complied with, the next is in some measure compulsory, and is called an *attachment or posse*[13] by which the sheriff takes certain goods of the defendant, which are forfeited if he do not appear. Next follows a *distringas* or distress infinite, by which his goods are taken, from time to time, until he is gradually stripped of all his possessions, unless he complies with the mandate. It is unnecessary to go into the tedious detail of innovations to deduce the means by which a *capias ad respondendum* became at last the ordinary mode of commencing a suit, since no application of it could be made to a state, which upon the same principles could not be subjected to the process of out-lawry. Peers of the realm, members of parliament, and *corporations,* are privileged from both—the process against them being

12. "For this turn; for this one particular occasion." *Black's Law Dictionary.*

13. In an errata sheet the word "*posse*" is corrected to read "*pone.*" "Attachment" refers to the process of seizing, under court order, property or persons to force an appearance in court. "*Pone,*" in this context, is an abbreviation for "*pone per vadium,*" "an obsolete writ to the sheriff to summon the defendant to appear and answer the plaintiff's suit, on his putting in sureties to prosecute." Ibid., under Attachment and *Pone per vadium.*

summons and distress infinite, instead of a capias; and by the same rule that they cannot be arrested, they cannot be held to bail. Latterly, however, a mode has been adopted in England, which, as far as my observation has extended, has been generally imitated in America, more simple and equally efficient with the rigid mode of distress; which is, upon serving the defendant with process, if he refuses, or neglects to appear and controvert the plaintiffs claim, to presume therefrom, that he admits the claim to be just; and to grant what is called a judgment by default. In England the plaintiff files common bail (which is nothing but a mode of entering the appearance) for the plaintiff; and then proceeds with his suit. In America that formality is not observed, being, in fact, preserved in England for the only purpose of securing to the different officers, those fees which they would be entitled to, in case the defendant had appeared. It may be objected, that this is not a mode of *enforcing* the appearance. True—but if all the ends of an appearance are obtained by it, what substantial imperfection does it include?

The civil law corresponds in substance with the common law—if the party do not obey the citation *mittitur adversarius in possessionem bonorum ejus.*[14] In the chancery proceedings, the bill, after obstinate default, is taken *pro confesso.*[15] Now therefore, whether the suit proceed to a judgment by default at law; or the bill be taken, *pro confesso,* in equity, the result is the same—the right is fully and ultimately determined. Let us now apply these principles. Although I will not deny, that Congress, in adjusting the judicial system to controversies, to which a state may be called to be a party, have the constitutional power of enforcing an appearance by distress, such as seizing or sequestering the property or interests of the obstinate state; yet I should strenuously controvert the expediency and the prudence of the measure; especially when so obvious, and at the same time so effectual a mode might be adopted, in making a *judgment by default,* the penalty for contumacy. The state legislature would illy answer to their constituents for the prejudice their interests might sustain from being suffered, through deliberate *laches* to pass, undiscussed and unattended to, through the judicial decision of the supreme court. They would be accused before the tribunal of the people, of arrogance, in rising up in opposition to the constitutional authority of the federal government; of perjury in thwarting, instead of supporting and obeying that government, which they were sworn to do when they took their seats—and of a breach of fidelity to their constituents, in abandoning their rights and interests. Or if the executive of the state, should be considered

14. "The adversary is sent into possession of his goods." Adolf Berger, *Encyclopedic Dictionary of Roman Law, Transactions of the American Philosophical Society,* n.s., vol. 43, pt. 2 (Philadelphia, 1953), p. 584. We are grateful to Charles Donahue, Harvard Law School, for his assistance in translating this passage.

15. "For confessed; as confessed. A term applied to a bill in equity, and the decree founded upon it, where no answer is made to it by the defendant." *Black's Law Dictionary.*

the proper representative of that state in the federal court, he would be far less competent to encounter that storm of popular resentment, to which such negligence would properly and necessarily expose him. It would be in vain to oppose his private notions of constitutional rights, as a shield to protect him. The good sense of *the people* would see, that however it might once have been a question, whether a state may be called to answer, if the point had once been decided by that body, or tribunal, to whom the prerogative of deciding may appertain, all resistance afterwards is unconstitutional, and tends to open the doors of civil war; which is, at all times, an equal enemy to their repose, and to their liberties. The people of America are, at this day, too much enlightened to be gulled by their rulers into a belief, that in thwarting constitutional powers, their interests are to be advanced. While on the one hand, they will rally round their state standard to check the progress of lawless rule in the federal government; they will, on the other, frown into insignificance every demagogue, and abandon to disgrace every local officer, who shall presume to excite their jealousies, alarm their fears, or embroil the government under false pretences.

I infer, that the appearance of a state in the federal court will be sufficiently secured, and enforced by making a judgment by default, the penalty of refusal. The federal court possessing a power to grant such a judgment, are in possession of power, sufficient to answer that requisite laid down by our author; and that by the rule laid down by himself, which is good one, that "where a power is given to act, all necessary correspondent powers are implied in the grant."

But our author adds, *there must be strength to enforce a compliance with the decree when made.* I presume he does not mean that the requisite strength must reside in the court which makes the decree; but in the government, under which the court is constituted. In this view I admit the position; but nevertheless, must be permitted to indulge a sentiment, which I trust, is not peculiar to myself—it is this; that if the tribunal have a constitutional right to make the decree, the state concerning whom it is made, will need no external agency to carry it into effect. It will appertain to the legislature as the depository of the will of the people to make provision for a compliance. I presume that no federal laws will be passed to provide for the case of a refusal, unless those cases actually happen. That they will happen, it is un-constitutional and irreverent to suppose beforehand—and I add, highly improbable, also.

1. The people in ratifying the federal government, surely did not expect, or intend to reserve to the state legislatures, the power of controverting or opposing any part of its legitimate authority. If the existence of such cases, under the old confederation, was the very evil complained of, and intended to be remedied in the new government; it is very absurd to imagine that in adopting the remedy they meant to continue the evil.

2. To suppose then the existence of such a case (which must necessarily be done in providing a remedy) is at once to impute to the legislatures a

design to contradict the will of the people, whose will they are constituted to represent, and to advance. It contains a charge of treachery, in the first instance, accompanied with weakness. Moreover the supposition must be accompanied with another, either that the people of the state will countenance the legislature, or that they will disavow their obstinancy. To suppose the former, involves the irreverent supposition, that a state will revolt from the union. A person capable of harbouring this supposition must be equally capable of imagining, that one state will make war, form alliances, divide itself into two states, coin money—in short, where is the end of suppositions of this kind? The fact is, they are all equally wild and un-constitutional. On the other hand, to suppose that the people will disavow the obstinacy of their legislature, is giving up the point.

3. That the state legislatures will provide for a compliance, is further to be inferred from the obligations of their oaths, and the dictates of wisdom and sound policy. If the federal judiciary have the power to make a decree to bind a state; the legislature of that state cannot infringe the decree, without directly violating the constitution, which they are sworn to support. They must not only stand convicted of perjury, as men; but of weakness as politicians. If the federal government is instituted for the purpose of securing justice, domestic tranquility, and perpetuating the blessings of liberty—they must bring into jeopardy these precious benefits, whenever they weaken the fabrick on which they rest. And as every state in the union would have an equal right to do the same, they would add the contagion of example, to the gross measure of guilt, which they would incur.

4. Supposing all these powerful incentives to be of no avail (and the supposition is an extravagant one) the probability that the state would comply, results strongly from this—that there resides in the union an ultimate power, which will be prompted by an irresistible duty, to compel it. Government is founded on the weakness and the wickedness of men. Mutual protection is derived from mutual strength. The laws are the safeguard of the good against the bad. When principle is lost in selfishness, sentiment in vice, and public spirit in avarice, the laws will then act on the fears of the debased individual; and their apprehended terrors will stimulate the obedience of him, whom no morals can bind, nor sense of duty prompt. That legislature, therefore, which should be so lost to private virtue and public spirit, would still be apt to yield to fear, that compliance, which no principle could procure. Terrified by the solemn account to which their constituents would summon them—should they, by their delinquency, call down the strong arm of the union to execute the decrees of justice, they would not dare the consequences. Abandoned as they might be themselves, they would not be so hardy as to discard from their deliberations the honour of the state, and consign to chance the repose of her citizens.

But it may be asked, supposing the worst—by what power and in what mode, would the general government inforce the decree? I am not bound to

answer this question, in order to support any of the principles I have been contending for—the mode, which prudence would point out for the exercise of a power, must even[16] be distinct from the question, whether the power exists. Yet a few thoughts on this subject may be indulged. I have already shown, that Congress probably will not, and perhaps ought not, pass any law on this subject, until the case occurs. If however, contrary to all the calculations of probability, and to all the principles above urged, a state should think proper to disregard the judgments or decrees of the federal judiciary: the occasion would call loudly for the interposition of the general government. An act of Congress would probably be passed for enforcing the decree. If a sum of money were awarded, it might sequester the revenues of the state, and enjoin the collectors to pay them into the hands of commissioners. This law they could not disobey; for it would be "the supreme law of the land." Or they might provide for levying a tax upon the citizens of the state, according to the state assessment—or they might order vacant lands of the state to be publicly sold. In these, or some other way, and far be it for me to prescribe, Congress might perhaps effectuate the decrees of justice. As the laws so passed would be the supreme law of the land, opposition from any number of citizens, or from any citizens, would incur criminal prosecution.

If the rights of territory should pass into judgment—laws might, in like manner, be framed for quieting the possessors from all impositions by the evicted state, and from all interferences on the behalf of its citizens. These hints, however, are only thrown out, in order to shew that some mode might be adopted, without presuming to prescribe to the wisdom of the general government. Indeed I pass hastily over them; for my mind dwells with reluctance upon cases so extravagant in the supposition, and so painful in the detail. I cherish too much veneration for the good sense of my country, and too much love for its repose, to entertain, in imagination, a scene so derogatory to both. I am persuaded, indeed, that the instance will seldom occur, of a state refusing to do justice, and being called on that account into the supreme court; but I will never believe, until I see it, that after that court has passed a decree, she will obstinately persist.

Our author goes on to shew the impossibility of a kingdom, or state, being sued in its own courts; and applying the reasoning to the United States, represents it as aukward and absurd, that a precept should go forth in the name of the president, who is a citizen of Virginia, and servant of the United States, to call the general government to answer before the supreme court. His principle requires no demonstration; and the impossibility of the United States being sued, is equally palpable. It is true, that no suit can be brought against a nation—and such are the United States of America. But as the similitude does not hold between the United States, in their national capacity, and any one of the states in its individual, the conclusion

16. In an errata sheet the word "even" is corrected to read "ever."

that therefore the latter cannot be sued, is utterly unwarranted by the premises.

I agree indeed with our author, that a state cannot be called to answer *criminalitur;*[17] no doubt they are constitutionally out of the reach of criminal process, because the nature of the compact does not countenance the supposition, that any state, as such, can commit a crime.

Should any state pass a law, contrary to any constitutional law of the United States; her executive and judicial are bound by their oaths not to carry it into effect. Should she combine her powers, in opposition to the general government, her citizens would be reduced to obedience, or a revolution would ensue. A state, however, withdrawing herself from the union, is a case not contemplated by the constitution. Every thing which supposes *a dissolution of the compact itself,* cannot be aptly considered as a question *arising under the compact.* Innumerable cases of this kind may be feigned for the sake of indulging speculation, or of exercising ingenuity; but after all they serve only to embarrass those who would candidly and ingenuously discuss constitutional questions, and to alarm the fears of the weak or the uninformed. It is equally inadmissible to introduce into the discussion and lay any considerable stress upon the notions, entertained amongst ancient confederacies, the rules of modern corporations, the technical nicety of common law doctrines, and the subtil refinements of political theories. Ours is a government *sui generis;* though in its parts it embraces the principles of many, as a whole it is exampled by none. Some of its traits are peculiar to itself, some are borrowed—but they are for the most part combined in a manner so original, that their progressive operation only can fully instruct us in the relative momentum of each. Like a number of unequal bodies put into motion, which must be left to find their common centre; which they would do of themselves in a short time, with more accuracy than any calculation could attain to. The government will soon assume its level and unfold its operation. . . .

17. In an errata sheet the word "*criminalitur*" is corrected to read "*criminaliter.*" The word means "criminally" and is used to distinguish a criminal prosecution from a civil one. *Black's Law Dictionary.*

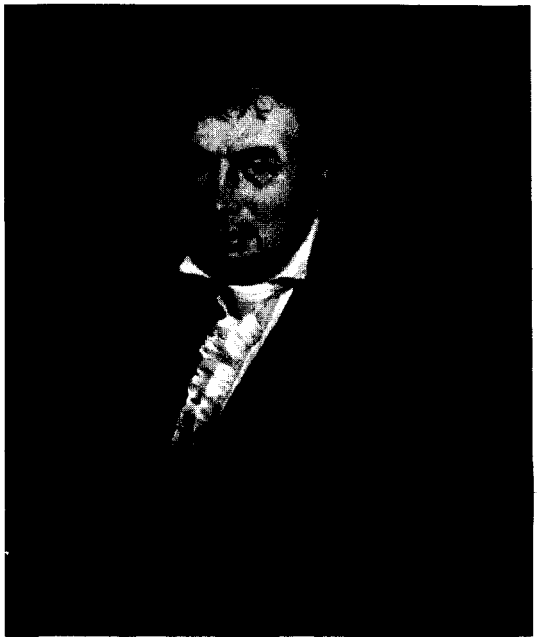
Luther Martin to Thomas Sim Lee

December 3, 1793 Maryland

December 3[d] 1793

Sir,

I do myself the Honor at this time to address your Excellency on behalf of John Caldwell Esq[r] of the City of Philadelphia[1] and of myself, and to state to your Excellency that in consequence of the action commenced against this State by the Mess[rs] Van stophorsts, his Excellency the Governor a[nd] their



Luther Martin by Bernard Francis Hoppner Meyer (b. 1811). Oil on paper, ca. 1835. Courtesy National Portrait Gallery, Smithsonian Institution.

Honors the Council on the Seventeenth of January seventeen hundred & ninety one requested me to give my particular Attention to that Suit;_ and assured me they considered it a matter of Consequence that I should personally appear at the Supreme Court of the United States, which was to be held at Philadelphia on the first monday of February then next following._

They at the same time authorized me to to employ an Attorney on the part of the State (in that Court, the Duties of Attorney & Counsel being distinct) and to enter into such Engagements with an attorney as might be reasonable;_ all which your Excellency will fully perceive by the Letters which I have the Honor to lay before you[2]

Your Excellency will further observe by those Letters that I also had assurance that my attention to the Business should meet with an adequate Compensation_ Thus authorized, I employd as an Attorney on behalf of this State John Caldwell Esq[r], a Gentleman of Merit and Abilities, who during the pendency of the Suit conducted it with that Precision and Fidelity for which he is distinguished._ I stipulated no particular fee, but assured him my State would not be deficient in rewarding his Services

As to myself_ In consequence of those Communications from the Governor and Council, I attended the Supreme Court at Philadelphia,_ at the time requested_, a Season of the year which was peculiarly disagreeable;_ and was necessarily absent near a fortnight._ I also during

the pendency of the Suit devoted no small Portion of my Time to the Investigation of Papers relative thereto, which were voluminous _ to Directions in conducting the same _ and to preparation for the Trial

The Action hath been now terminated for some time; _ Permit me therefore to request your Excellency's Interposition in favor of M^r^ Caldwell, in order that necessary Measures may be adopted for discharging that Engagement which, so being authorized, I entered into with him, and for the fulfilment of which I feel myself particularly sollicitous. _ At the same time permit me to flatter myself that the necessary Measures may be adopted for my receiving that reasonable Compensation of which I was assured when applied to originally on behalf of the State in that Business

I have the Honor to be with the most perfect respect and Esteem,

Your Excellency's, very hum^bl^ Serv^t^

Luther Martin

ARS (NjP, General Manuscripts). Reading in brackets supplied where document is damaged.

Thomas Sim Lee (1745-1819), governor of Maryland (1792-1794). *BDUSC*.

1. John Caldwell (ca. 1759-1820) was admitted to the bar of the Supreme Court of the United States as an attorney in February 1791. *DHSC*, 1:190, 190n.

2. Letters not found.

James Iredell's Supreme Court Opinion

[February 18, 1793] Philadelphia, Pennsylvania

Executor
of Farquhar,
vs
The State of Georgia

In the Supreme Court.
February Term 1793.

My Argument in delivering my Opinion _ February 18th 1793.[1]

This great Cause comes before the Court, on a motion made by the Attorney General, That an order be made by this Court to the following Effect:

"That unless the State of Georgia shall after reasonable previous[2] notice of this motion cause an appearance to be entered on behalf of the said State on the fourth day of next Term, or shew cause to the contrary, Judgment shall be entered for the Plaintiff, and a Writ of Enquiry ~~ordered~~ shall be awarded."[3]

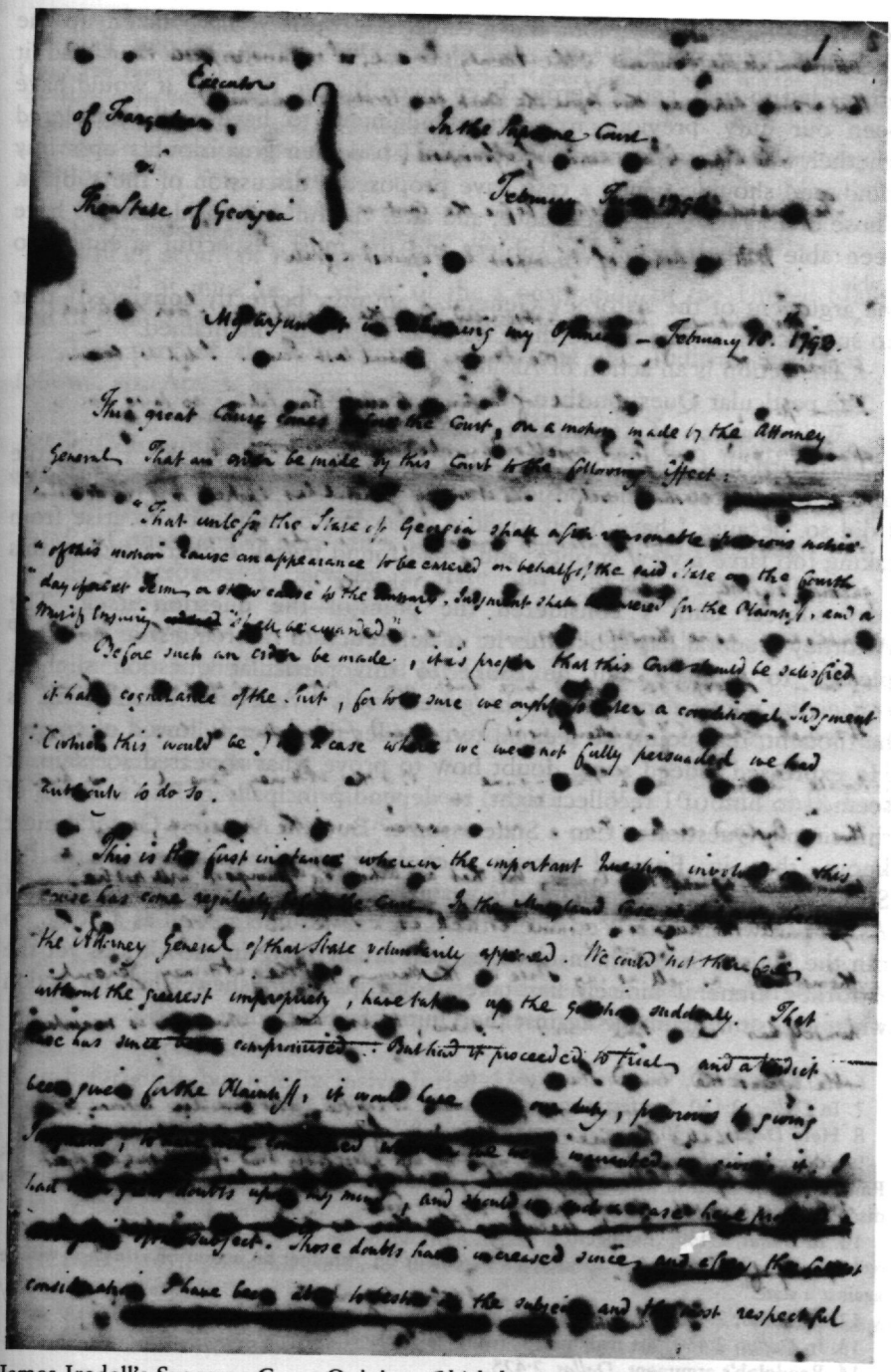
Before such an order be made, it is proper that this Court should be satisfied it hath cognizance of the Suit, for to be sure we ought not to enter a conditional Judgment (which this would be) in a case where we were not fully persuaded we had authority to do so.

This is the first instance wherein the important Question involved in this cause has come regularly before the Court. In the Maryland Case it did not, because the Attorney General of that[4] State voluntarily appeared.[5] We

AD (Nc-Ar, Charles E. Johnson Collection). Endorsed by Iredell "Nº 2 Rough Substance of my Argument in the Suit against the State of Georgia." We have chosen to date this document February 18, 1793, the day the Court announced its decision. Except for punctuation, spelling, and capitalization, differences between the text of this manuscript and Iredell's opinion as published in *Dallas* have been footnoted.

As opinions were given only orally in the Supreme Court in the 1790s, there is no way of knowing exactly what Iredell said on February 18, 1793. But Iredell's endorsement on this document and other internal evidence suggest that it may have been written after he had delivered his opinion in *Chisholm.* It is also possible that this document was copied from another version, a draft that may have been used by Iredell for his oral presentation. (For the likelihood of an earlier draft, see the source note to the next document, James Iredell's Observations on "this great Constitutional Question," [February 18, 1793].) One other possibility is that Iredell produced this manuscript exclusively for the use of Alexander James Dallas. (For a discussion of Dallas's publication of the opinions of the Court, see the Guide to Editorial Method in this volume under the heading "Opinions of the Justices.")

1. This sentence does not appear in *Dallas,* 2:429.
2. This word is omitted in *Dallas,* 2:429.
3. The motion had been offered on August 11, 1792. Minutes of the Supreme Court, *DHSC,* 1:205; Orders in *Chisholm v. Georgia,* August 11, 1792, Drafts Relating to Court Proceedings, *DHSC,* 1:479; *Dallas,* 2:419.
4. In *Dallas,* 2:429, "the."
5. See introduction to section on *Van Staphorst v. Maryland.*



James Iredell's Supreme Court Opinion, *Chisholm v. Georgia,* [February 18, 1793]. Courtesy North Carolina Department of Cultural Resources, Division of Archives and History, Raleigh.

could not therefore, without the greatest impropriety, have taken up the question suddenly. That Case has since been compromised. But had it proceeded to trial, and a Verdict been given for the Plaintiff, it would have been our duty, previous to[6] giving Judgment, to have well considered whether we were warranted in giving it. I had then great doubts upon my mind, and should in such a case have proposed a discussion of the subject. Those doubts have increased since, and after the fullest consideration I have been able to bestow on the subject and the most respectful attention to the able argument of the Attorney General, I am now perfectly convinced[7] that no such action as this before the Court can legally be maintained.

The action is an action of Assumpsit.

The particular Question then before the Court is,

Will an action of Assumpsit lie against a State?

This particular Question (abstracted from the general one[8]) I took the liberty to propose to the consideration of the Attorney General last Term.[9] I did so, because I have often found a great deal of confusion to arise from taking too large a view at once, and I had found myself embarrassed on this very subject until I considered the ~~point of the~~ abstract question itself. The Attorney General has spoken to it, in deference to my request as he was[10] pleased to intimate, but he spoke to this particular question slightly, conceiving it to be involved in the general one.[11] And after establishing, as he thought, that point, he seemed to consider the other followed of course. He expressed indeed some doubt how to prove what appeared so plain. It seemed to him (if I recollect right) to depend principally on the solution of this simple Question _ Can a State assume? But the Attorney General must know, that in England certain Actions,[12] not inconsistent with the Sovereignty, may be maintained[13] against the Crown, but that an action of Assumpsit will not lie. Yet surely the King can assume as well as a State. So can the United States themselves, as well as any State in the Union, yet the Attorney General himself has taken some pains to shew, that no action whatever is maintainable against the United States.[14]

6. In *Dallas,* 2:429, "our" was inserted here.

7. In *Dallas,* 2:430, "perfectly convinced" reads "decidedly of opinion."

8. Here *Dallas,* 2:430, adds a comma and "viz. Whether a State can be sued?"

9. Although there is no other evidence that Iredell posed this question in August 1792, Randolph includes it in his argument as one of the four questions the Court had asked him to discuss. *Dallas,* 2:420.

10. In *Dallas,* 2:430, "has been."

11. See *Dallas,* 2:428, for Randolph's statement on "whether an action of *assumpsit* will lie against a state."

12. In *Dallas,* 2:430, "certain Actions" reads "judicial proceedings."

13. In *Dallas,* 2:430, "be maintained" reads "take place."

14. Randolph's argument, *Dallas,* 2:425.

confine myself, ~~to~~ as much as possible, to the particular Question before the
I shall therefore ~~vary the order of treating the subject as it was spoken to~~
Court, tho' every thing I have to say upon it will affect[15] every kind of ~~subjec~~ suit the object of
~~by the Attorney General, making this particular question the principal one,~~
which is to compel the payment of money by a State.
~~and only discussing the other as it may be important to do so by way of illustration~~

as I before observed,
The Question ~~then necessary for this Court~~ [*word inked out*] ~~to decide~~ is,
Will an action of Assumpsit lie ~~in this Court~~ against a State?

If it will, it must be in virtue of the Constitution of the United States, and of some Law of Congress conformable thereto.

The part of the Constitution concerning the Judicial Power is as follows, viz. Art. 3. Sect. 2.

(Here repeat the first Paragraph).[16]

The Constitution therefore provides for the Jurisdiction wherein a State is a Party, in the following instances.

1. Controversies between two or more States.
2. Controversies between a State and Citizens of another State.
3. Controversies between a State and Foreign States, Citizens or Subjects.

And it also provides, that in all cases in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

The words of the general Judicial Act, conveying the authority of the Supreme Court, under the Constitution, so far as they concern this question, are as follow.

(Sect. 13. Repeat it so far as these words _ "Vice Consul, shall be a Party.")[17]

The Supreme Court hath therefore

1. Exclusive Jurisdiction in every Controversy of a civil nature
   1. Between two or more States.
   2. Between a State and a Foreign State,
   3. Where a Suit or Proceeding is depending against Ambassadors, other public Ministers, or their Domestics, or Domestic Servants.[18]
2. Original, but not Exclusive Jurisdiction,
   1. Between a State and Citizens of other States.
   2. Between a State and Foreign Citizens or Subjects.

15. In *Dallas,* 2:430, "effect."

16. *Dallas,* 2:430-31, prints the paragraph from Article III, section 2.

17. *Dallas,* 2:431, prints this portion of the text of section 13 of the Judiciary Act of 1789. *DHSC,* 4:69; *Stat.,* 1:80.

18. At this point in the document Iredell included the notation, "See p. 5." This appears to have been an instruction to skip a blank page and proceed to the passage that follows.