JAY, J., Separate Opinion

SUPREME COURT OF THE UNITED STATES

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2 U.S. 419

Chisholm v. Georgia

Argued: --- Decided:

Jay, Chief justice.

The question we are now to decide has been accurately stated, *viz.,* is a State suable by individual citizens of another State?

It is said that Georgia refuses to appear and answer to the plaintiff in this action because she is a sovereign State, and therefore not liable to such actions. In order to ascertain the merits **[p470]** of this objection, let us enquire, 1st. In what sense Georgia is a sovereign State. 2nd. Whether suability is incompatible with such sovereignty. 3rd. Whether the Constitution (to which Georgia is a party) authorizes such an action against her.

"Suability" and "suable" are words not in common use, but they concisely and correctly convey the idea annexed to them.

1st. In determining the sense in which Georgia is a sovereign State, it may be useful to turn our attention to the political situation we were in prior to the Revolution, and to the political rights which emerged from the Revolution. All the country now possessed by the United States was then a part of the dominions appertaining to the Crown of Great Britain. Every acre of land in this country was then held mediately or immediately by grants from that Crown. All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing or exercised here, flowed from the head of the British Empire. They were in strict sense fellow subjects, and in a variety of respects one people. When the Revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies which subsisted between the people of Gaul, Britain, and Spain while Roman Provinces, *viz.,* only that affinity and social connection which result from the mere circumstance of being governed by the same Prince; different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.

The Revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions and other temporary arrangements. From the Crown of Great Britain, the sovereignty of their country passed to the people of it, and it was then not an uncommon opinion

that the unappropriated lands, which belonged to that Crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people nevertheless continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly; afterwards, in the hurry of the war and in the warmth of mutual confidence, they made a Confederation of the States the basis of a general government. Experience disappointed the expectations they had formed from it, and then the people, in their collective and national capacity, established the present Constitution. It is remarkable **[p471]** that, in establishing it, the people exercised their own rights, and their own proper sovereignty, and, conscious of the plenitude of it, they declared with becoming dignity, **"We the people of the United States, do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country**, and, in the language of sovereignty, establishing a Constitution by which it was their will that **the State governments should be bound, and to which the State Constitutions should be made to conform**. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner, and the Constitution of the United States is likewise **a compact made by the people of the United States to govern themselves** as to general objects in a certain manner. By this great compact however, many prerogatives were transferred to the national government, such as those of making war and peace, contracting alliances, coining money, etc. etc.

If then it be true that **the sovereignty of the nation is in the people** of the nation, and the residuary sovereignty of each State in the people of each State, it may be useful to compare these sovereignties with those in Europe, that we may thence be enabled to judge whether all the prerogatives which are allowed to the latter are so essential to the former. There is reason to suspect that some of the difficulties which embarrass the present question arise from inattention to differences which subsist between them.

It will be sufficient to observe briefly that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. That system contemplates him as being the fountain of honor and authority, and **from his grace and grant derives all franchises, immunities and privileges**; it is easy to perceive that such a sovereign could not be amenable to a court of justice, or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the Prince having all the Executive powers, the judgment of the courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such ideas obtain here; at the Revolution, **the sovereignty devolved on the people, and they are truly the sovereigns of the country, but they are sovereigns without subjects** (unless the African **[p472]** slaves among us may be so called), and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.

From the differences existing between feudal sovereignties and governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or State sovereign is the person or persons in whom that resides. **In Europe, the sovereignty is generally ascribed to the Prince; here, it rests with the people**; there, the sovereign actually administers the government; here, never in a single instance; our Governors are the agents of the people, and, at most, stand in the same relation to their sovereign in which regents in Europe stand to their sovereigns. Their Princes have personal powers, dignities, and preeminences; our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

2nd. The second object of enquiry now presents itself, *viz.,* whether suability is compatible with State sovereignty.

Suability, by whom? Not a subject, for in this country, there are none; not an inferior, for all the citizens being as to civil rights perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed that one free citizen may sue another, the obvious dictates of justice, and the purposes of society demanding it. It is agreed that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases, one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally sued. In this city there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them? Can the difference between forty odd thousand and fifty odd thousand make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the Governor and Attorney General of Delaware as on the Mayor or other Officers of the Corporation of Philadelphia? Will it be said that the fifty odd thousand citizens in Delaware, being associated under a State government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their charter, that, although it may become the latter to meet an individual on an equal footing in a court of justice, yet that such a procedure would not comport with the dignity of the former? In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in **[p473]** another place be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim, with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes. Grant that the Governor of Delaware holds an office of superior rank to the Mayor of Philadelphia; they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet, in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.

If there be any such incompatibility as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this -- any one State in the Union may sue another State, in this Court, that is, all the people of one State may sue all the people of another State. It is plain then that a State may be sued, and hence it plainly follows that suability and State sovereignty are not incompatible. As one State may sue another State in this Court, it is plain that no degradation to a State is thought to accompany her appearance in this Court. It is not therefore to an appearance in this Court that the objection

points. To what does it point? It points to an appearance at the suit of one or more citizens. But why it should be more incompatible that all the people of a State should be sued by one citizen than by one hundred thousand, I cannot perceive, the process in both cases being alike and the consequences of a judgment alike. Nor can I observe any greater inconveniences in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light. But if any reliance be made on this inferiority as an objection, at least one half of its force is done away by this fact, *viz.,* that it is conceded that a State may appear in this Court as plaintiff against a single citizen as defendant; and the truth is that the State of Georgia is at this moment prosecuting an action in this Court against two citizens of South Carolina. [*]

The only remnant of objection, therefore, that remains is that the State is not bound to appear and answer as a defendant at the suit of an individual; but why it is unreasonable that she should be so bound is hard to conjecture. That rule is said to be a bad one which does not work both ways; the citizens of Georgia are content with a right of suing citizens of other States, but are not content that citizens of other States should have a right to sue them.

Let us now proceed to enquire whether Georgia has not, by being a party to the National Compact, consented to be suable by individual citizens of another State. This enquiry naturally leads our attention, 1st., to the design of the Constitution; 2nd., to the letter and express declaration in it. **[p474]**

Prior to the date of the Constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction by whom the errors of State courts, affecting either the nation at large or the citizens of any other State, could be revised and corrected. Each State was obliged to acquiesce in the measure of justice which another State might yield to her or to her citizens, and that even in cases where State considerations were not always favorable to the most exact measure. There was danger that, from this source, animosities would in time result, and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable from motives both of justice and of policy.

Prior also to that period, the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations, and it was their interest as well as their duty to provide that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each State relative to the laws of nations and the performance of treaties, and there the inexpediency of referring all such questions to State courts, and particularly to the courts of delinquent States, became apparent. While all the States were bound to protect each and the citizens of each, it was highly proper and reasonable that they should be in a capacity not only to cause justice to be done to each and the citizens of each, but also to cause justice to be done by each and the citizens of each, and that not by violence and force, but in a stable, sedate, and regular course of judicial procedure.

These were among the evils against which it was proper for the nation -- that is, the people -- of all the United States to provide by a national judiciary, to be instituted by the whole nation and to be responsible to the whole nation.

Let us now turn to the Constitution. The people therein declare that their design in establishing it comprehended six objects. 1st. To form a more perfect union. 2nd. To establish justice. 3rd. To ensure domestic tranquillity. 4th. To provide for the common defence. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful to consider and trace the relations which each of these objects bears to the others, **[p475]** and to show that they collectively comprise everything requisite, with the blessing of Divine Providence, to render a people prosperous and happy. On the present occasion, such disquisitions would be unseasonable because foreign to the subject immediately under consideration.

It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the second section of the third article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, *viz.,* 1st. To all cases arising under this Constitution, because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2nd. To all cases arising under the laws of the United States, because, as such laws, constitutionally made, are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3rd. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation. 4th. To all cases affecting Ambassadors, or other public Ministers and Consuls, because, as these are officers of foreign nations whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of Admiralty and Maritime jurisdiction, because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party, because, in cases in which the whole people are interested, it would not be equal or wise to let any one State decide and measure out the justice due to others. 7th. To controversies between two or more States, because domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judicatory, and, because, in a free country, justice ought not to depend on the will of either of the litigants. 8th. To controversies between a State and citizens of another State, because in case a State (that is, all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national court than in a court of the State to which those citizens belong, the danger of irritation and criminations arising from apprehensions and **[p476]** suspicions of partiality being thereby obviated. Because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter, and true Republican government requires that free and equal citizens should have free, fair, and equal justice. 9th. To controversies between citizens of the same State, claiming lands under grants of

different States, because, as the rights of the two States to grant the land are drawn into question, neither of the two States ought to decide the controversy. 10th. To controversies between a State or the citizens thereof and foreign states, citizens or subjects, because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty, and the equal right of the people.

The question now before us renders it necessary to pay particular attention to that part of the second section which extends the judicial power "to controversies between a State and citizens of another State." It is contended that this ought to be construed to reach none of these controversies excepting those in which a State may be plaintiff. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

This extension of power is remedial, because it is to settle controversies. It is therefore to be construed liberally. It is politic, wise, and good that not only the controversies in which a State is plaintiff, but also those in which a State is defendant, should be settled; both cases therefore are within the reason of the remedy, and ought to be so adjudged unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a State and citizens of another State." If the Constitution really meant to extend these powers only to those controversies in which a State might be plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in **[p477]** any part of the Constitution. It cannot be pretended that, where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words, of the Constitution. What is it to the cause of justice, and how can it effect the definition of the word "controversy?;" whether the demands which cause the dispute are made by a State against citizens of another State or by the latter against the former? When power is thus extended to a controversy, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists.

The exception contended for would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is to ensure justice to all -- to the few against the many as well as to the many against the few. It would be strange indeed that the joint and equal sovereigns of this country should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality as to give to the collective citizens of one State a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them. We find the same general and comprehensive manner of expressing the same ideas in a subsequent clause in which the Constitution ordains that,

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.

Did it mean here party plaintiff? If that only was meant, it would have been easy to have found words to express it. Words are to be understood in their ordinary and common acceptation, and the word "party" being in common usage, applicable both to plaintiff and defendant, we cannot limit it to one of them in the present case. We find the Legislature of the United States expressing themselves in the like general and comprehensive manner; they speak in the thirteenth section of the judicial Act, of controversies where a State is a party, and as they do not impliedly or expressly apply that term to either of the litigants in particular, we are to understand them as speaking of both. In the same section, they distinguish the cases where Ambassadors are plaintiffs from those in which Ambassadors are defendants, and make different provisions respecting those cases; and it is not unnatural to suppose that they would in like manner have distinguished between cases where a State was plaintiff and where a State was defendant if they had intended to make any difference between them, or if they had apprehended that the Constitution had made any difference between them. **[p478]**

I perceive, and therefore candor urges me to mention, a circumstance which seems to favor the opposite side of the question. It is this: the same section of the Constitution which extends the judicial power to controversies "between a State and the citizens of another State" does also extend that power to controversies to which the United States are a party. Now it may be said, if the word party comprehends both plaintiff and defendant, it follows that the United States may be sued by any citizen between whom and them there may be a controversy. This appears to me to be fair reasoning, but the same principles of candour which urge me to mention this objection also urge me to suggest an important difference between the two cases. It is this: in all cases of actions against States or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction, important conclusions are deducible, and they place the case of a State, and the case of the United States, in very different points of view.

I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is or is not now the case ought not to be thus collaterally and incidentally decided. I leave it a question.

As this opinion, though deliberately formed, has been hastily reduced to writing between the intervals of the daily adjournments, and while my mind was occupied and wearied by the business of the day, I fear it is less concise and connected than it might otherwise have been. I have made no references to cases, because I know of none that are not distinguishable from this case; nor does it appear to me necessary to show that the sentiments of the best writers on government and the rights of men harmonize with the principles which direct my judgment on the present question. The acts of the former Congresses, and the acts of many of the State Conventions, are replete with similar ideas, and, to the honor of the United States, it may be observed that in no other country are subjects of this kind better, if so well, understood. The attention and attachment of the Constitution to the equal rights of the people are discernable in

almost every sentence of it, and it is to be regretted that the provision in it which we have been considering has not in every instance received the approbation and acquiescence which it merits. Georgia has in strong language advocated the cause of republican equality, and there is reason to **[p479]** hope that the people of that State will yet perceive that it would not have been consistent with that equality to have exempted the body of her citizens from that suability which they are at this moment exercising against citizens of another State.

For my own part, I am convinced that the sense in which I understand and have explained the words "controversies between States and citizens of another State" is the true sense. The extension of the judiciary power of the United States to such controversies appears to me to be wise, because it is honest and because it is useful. It is honest because it provides for doing justice without respect of persons, and, by securing individual citizens as well as States in their respective rights, performs the promise which every free government makes to every free citizen of equal justice and protection. It is useful because it is honest; because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and because it brings into action and enforces this great and glorious principle -- that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges, and they ought not to forget that nothing but the free course of constitutional law and government can ensure the continuance and enjoyment of them.

For the reasons before given, I am clearly of opinion that a State is suable by citizens of another State; but left I should be understood in a latitude beyond my meaning, I think it necessary to subjoin this caution, *viz.,* that such suability may nevertheless not extend to all the demands and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.

The following order was made:

By The court. It is ordered that the plaintiff in this cause do file his declaration on or before the first day of March next.

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

Ordered that, unless the said State shall either in due form appear, or show cause to the contrary in this Court, by the first day of next Term, judgment by default shall be entered against the said State. [*]

* Georgia v. Brailsford, et al., ante.

* In February Term, 1794, judgment was rendered for the plaintiff, and a Writ of Enquiry awarded. The Writ, however, was not sued out and executed, so that this cause, and all the other suits against States, were swept at once from the Records of the Court by the amendment to the Federal Constitution, agreeably to the unanimous determination of the judges, in Hollingsworth et al. v. Virginia, argued at February Term, 1798.