HON. JAMES WILSON L.L.D.
JAMES WILSON AND JAMES IREDELL.
A PARALLEL AND A CONTRAST.¹

BY HAMPTON L. CARSON

MR. PRESIDENT AND MEMBERS OF THE NORTH CAROLINA
BAR ASSOCIATION:

I visit your State with peculiar pleasure. For years past I have maintained the most agreeable relations with your representatives in the American Bar Association, and season after season have renewed and enlarged my friendships. The great work that is being done through the co-ordinated action of the Bars of forty-eight States is quickened by that delightful personal contact which gives zest to our annual reunions, and strengthens the ties which bind the North and the South, the East and the West together in a great professional brotherhood. But there is an older and a closer tie which appeals to me most strongly. I have but to mention it, to secure your hearty recognition of its worth.

James Wilson of Pennsylvania, a Signer of the Declaration of Independence, a Framer of the Constitution

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of the United States, and James Iredell of North Carolina, a publicist and jurist of surpassing strength, were friends. They were colleagues during the first decade of the Supreme Court of the United States and both held commissions as Associate Justices signed by George Washington. The date of Wilson’s commission was 29th September, 1789, and the date of Iredell’s was the 10th of February, 1790. Wilson died at Edenton, N. C., on the 21st of August, 1798, Iredell died at the same place October 20th, 1799. It is a touching incident that on the day of Wilson’s death Iredell sheltered the stricken widow beneath his own roof. Wilson was buried at Edenton, and North Carolina sheltered his ashes until November, 1906, when they were removed to Philadelphia, and re-interred in the church yard of old Christ Church.

The event was one of Interstate and National importance. The arrangements were under the skillful and competent direction of Burton Alva Konkle of Philadelphia, the historian, the author of a forthcoming Life and Works of Wilson in six volumes. The Governor of Pennsylvania and his party arrived at Edenton on the morning of November 20th, and were joined by the Governor and Chief Justice of North Carolina, in whose presence and that of a distinguished group of citizens, the exhumation was made. The cortege proceeded to Norfolk, Va., accompanied by members of the Cincinnati of North Carolina, as a guard of honor. The remains were received by the United States Government on board the U. S. S. Dubuque, and were carried to Philadelphia. There, guarded by United States Marines, the casket lay in State in Independence Hall, the scene of Wilson’s greatest triumphs.

On November 22nd, Chief Justice Fuller, and Associate Justices Harlan, White, Peckham, McKenna, Holmes and Day, and Attorney General Moody, acted as Honorary Pallbearers. Governor Pennypacker and
Attorney General Carson of Pennsylvania, Chief Justice Mitchell and his Associates, the Federal Judges, the State Judges and members of the Bar, the Mayor of Philadelphia, the Protestant Episcopal Bishop of the Diocese of Eastern Pennsylvania, and citizens who were descendants of Revolutionary families, marched in procession to Christ Church, the hearse being under the escort of the First Troop of Philadelphia City Cavalry in full uniform.

Addresses were delivered by the Governor of Pennsylvania and by Samuel Dickson, Esq., Chancellor of the Law Association of Philadelphia, speaking for the Pennsylvania Bar, Dean Lewis of the Law Department of the University of Pennsylvania, of which Wilson was the first professor, speaking for that Institution, Dr. S. Weir Mitchell, speaking for American Literature, Andrew Carnegie, speaking for Scotch American Citizenship, Hon. Alton B. Parker, as President, speaking for the American Bar Association, Senator Philander C. Knox, speaking for the Congress, Mr. Justice White of the Supreme Court, speaking for the Judiciary, Attorney General Moody for the Nation, and myself, as Historian of the Supreme Court, delivering an address upon Wilson in the presence of a distinguished company. Will you pardon the personal intrusion? James Wilson’s daughter married the brother of my maternal grandfather. For that reason, I spoke in behalf of the family. As I stood in the chancel of the historic church, and later saw the casket lowered into the vault, the thought came into my mind that some day I would like to come to North Carolina and in behalf of Pennsylvania, and of the family of Wilson express to your citizens and particularly to the warm hearted people of Edenton our deepest gratitude for the pious and reverential care with which they had guarded for so many years the bones of our distinguished son, and for the quick sympathy with which they responded to our re-
quest for permission to bring them home to a final resting place. That wish has been gratified. I thank you with an overflowing heart.

Do I need to announce my subject? For years it has been shaping itself in my mind, and your cordial invitation has furnished me with a long coveted opportunity. I shall speak of Wilson and Iredell, and particularly of their opposing theories of Constitutional interpretation as embodied in the case of Chisholm, Executor, versus Georgia, 2 Dallas, 419, the most famous and important case of that era. We can thus renew our allegiance to the Constitution, and review the principles upon which that allegiance rests.

In these days of seething discontent, when the waters of the great deep are stirred, it is well to face the perils of the present with a tranquil faith in the wisdom of the Fathers, who built even better than they knew, and to proclaim with unaltering courage our belief that in American Constitutional Freedom is to be found the strongest buttress of rational liberty and the most dependable insurance of the world's brightest hopes. James Iredell, when but a boy, wrote: “It does not follow that everything we receive from education is wrong, nor because we still continue to revere truths our fathers taught us to revere, that this must be the effect of prejudice.”

James Wilson, a native of Scotland, and a student at St. Andrews, Glasgow and Edinburgh, at the age of twenty-one emigrated to New York, in the year 1765, and some months later arrived in Philadelphia. He read law in the office of John Dickinson, and supported himself as a tutor of the classics in the college at Philadelphia.

James Iredell, a native of England, of Irish extraction and of the blood of the redoubted Ireton, the son-in-law of Oliver Cromwell, at the age of seventeen came to Edenton, N. C., via Boston, in the year 1768, to fill
JAMES IREDELL
The Saint Memin Portrait
James Wilson and James Iredell.

the office of deputy comptroller of his Majesty’s customs at Roanoke, N. C., an office which he held until April, 1776. He read law in the office of Samuel Johnston, the naval officer of the Crown, whose daughter he subsequently married.

It is interesting to note the characters of the legal preceptors of the Scotch and Irish-English lads. It will enable us to judge of the intellectual and political influences by which both were surrounded, while still young and their minds were in plastic condition. John Dickinson was the author of the “Farmer’s Letters” which in renown and in their telling effect were unequalled by any other serious political essays of the Revolutionary era. His foreign reputation as a pamphleteer exceeded that of any other American excepting Franklin. He was talked of in the salons of Paris, was likened to Cicero, and was noticed and applauded by Voltaire. These letters and his authorship of numerous other State papers and addresses led Bancroft, the historian, to call him “The Penman of the Revolution.” He wrote the famous “Liberty Song,” in which the well known lines occur:

“In freedom we’re born, and in freedom we’ll live,
Not as slaves, but as freemen, our money we’ll give.
United we stand, but divided we fall.”

He became a member of the Continental Congress, an officer in the army, the Governor of Delaware, a member of the High Court of Errors and Appeals in Pennsylvania, and a Framer and Signer of the Constitution of the United States.

Samuel Johnston, the preceptor of Iredell, while not so widely known, was a lawyer of great powers. His political creed was expressed in a letter to his pupil, written at the time when the first constitution of North Carolina was being considered: “After all it appears to me that there can be no check upon the representatives of a people in a democracy, but the people them-
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selves; and in order that the check may be more efficient, I would have annual elections." He was anxious to secure the rights of property, individuals and minorities, against the tyranny of majorities, the capricious fluctuations of the masses. To effect this as far as practicable, he was disposed to limit and restrain the powers of the Legislative Assembly by organic laws. In 1780 he was a member of the Continental Congress, and in 1787 was elected Governor of his State. He was eminent in the Debates of the first State convention called to ratify the Federal Constitution, and was its ardent supporter, and, after its qualified rejection, presided over a second convention which added North Carolina to the circle of the Union. He was then sent to the first Senate of the United States.

Such were the preceptors of Wilson and of Iredell. Though both pupils were possessed of strong and original minds, which ripened into intellects of bold and independent strength, developing upon somewhat divergent lines, yet it is not a hazardous surmise that each owed much to precept and example, and happily drew from their surroundings the most nourishing and wholesome principles which equipped them for the distinguished parts in the American drama which they were destined to fill.

Wilson after several years of practice at Reading and Carlisle, Pa., and Annapolis, Md., where the traditions of his successes at the bar still linger, returned to Philadelphia and soon stood in the foremost rank, attracting such attention as to be commissioned by Louis XVI as Avocat Général de la Nation Française à Philadelphie, while Washington, passing by the Wythes and Pendletons of Virginia, selected him as the preceptor of his nephew Bushrod Washington. He was for six years, though not continuously, a member of the Continental Congress, and was one of the Signers of the Declaration of Independence. As an orator he held high rank both
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as an advocate and a parliamentary debater. He was one of the ablest and most active of the members of the Federal Convention, was one of the Signers of the Constitution, and his speeches in the ratifying Convention of Pennsylvania are regarded by students as among the most illuminating expositions of the work of that day, ranking with the papers of Madison, Hamilton and Jay collected under the title of "The Federalist." In 1790 he was chosen as Professor of Law in the University of Pennsylvania—the first publicly established law school in the United States, and his lectures, as published after his death in three volumes, constitute an interesting and valuable contribution to the literature of the profession, particularly as pointing out the differences between the American system and the English as described by Blackstone.

Iredell, though never conspicuous as an orator, steadily forced his way to leadership. He became a deputy Attorney General, and later Attorney General, a Councillor of State and a judge of the District Court. He was an active political writer. Two of his efforts deserve special mention: his discussion in a Newbern paper under date of August 17, 1786, of the subordination of the Legislature to the Constitution, which was embodied in his argument in the case of Bayard vs. Singleton, 1 Martin, 42, and his "Reply to the Objections of George Mason." Both of these papers raised him in the opinion of competent judges to the position of the ablest legal reasoner in his State. Indeed, it has been said, that they attracted the attention of Washington and led to his choice of Iredell to the bench of the Supreme Court of the United States.

With this general review of the positions and attainments of the two men, it is now in order to examine with some particularity their views as statesmenlike lawyers upon the nature of constitutional government,
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as a proper introduction to their judicial views of the
great instrument they were called upon to construe.

Unfortunately we are without a record of the debates
in the Continental Congress. The thirteen volumes of
the Journal disclose only motions, reports, resolutions
and ordinances. Hence we can only judge from acts
what views that body entertained of its own powers.
There is, however, in the closing part of the third vol-
ume of Wilson's Works an elaborate argument by Wil-
son entitled Considerations on The Bank of North
America, published in 1785. So far as I know this is
the earliest exposition of views concerning national
sovereignty under the Articles of Confederation in the
shape of a legal argument.

In May, 1781, Robert Morris, the superintendent of
Finance, laid before the Congress a plan of a bank,
which was approved by a series of Resolutions, provid-
ing that a Charter should be granted so soon as sub-
scriptions should be filled, directors chosen and applica-
tion made to Congress. It was also recommended to
the States that they provide by law that no other bank
or bankers should be established or permitted within
the States during the War: that the notes to be issued
by the bank, and payable on demand, should be receiv-
able in payment of all taxes, duties and debts due or
that might become due or payable to the United States:
that the legislatures be asked to pass laws making it
felony without benefit of clergy to counterfeit such
notes, and to pass such notes knowing them to be coun-
terfeit, and also providing against fraud or embezzle-
ment by the officers and servants of the bank. The con-
ditions of subscription having been complied with, Con-
gress granted a Charter under the title, "The President
and Directors of The Bank of North America," to cer-
tain individuals, of whom Wilson was one, on the 31st
of December, 1781. This was done by an ordinance of
incorporation, a copy of which was forwarded by
Morris to the Governors of each State asking for such State action as might be judged necessary to give the ordinance its full operation. Pennsylvania responded, on the 18th of March, 1782, by an Act for preventing and punishing the counterfeiting of the common seal, bank bills and bank notes of the Bank of North America, and on the first of April of the same year passed an "Act to incorporate the subscribers to the Bank of North America," reciting the ordinance of Congress, vesting all the powers usual to corporations in the same individuals as were named in the Congressional Charter, and declaring that this act should be construed and taken most favorably and beneficially for the corporation. Massachusetts, Connecticut and Rhode Island passed laws substantially similar. In 1785, the Treaty of Peace being eighteen months old, the repeal of the Pennsylvania act was attempted.

It was in opposition to this that Wilson's argument was made. He insisted on two points of great interest, and occupied advanced ground, anticipating by many years the views of Hamilton as Secretary of the Treasury, and the decisions of Marshall. He even anticipated the doctrine of the Dartmouth College case. The argument shows the depth, the boldness and the originality of Wilson as a constitutional lawyer, and is as remarkable for its simplicity as for its strength.

He presented but two questions: first, Is the Bank of North America constitutionally instituted and organized under the charter by Congress? and second, Would it be politic in the legislature of Pennsylvania to revoke the charter it had granted? Both of these he regarded as of "national" importance.

Observe the use of the word national, and consider the time when it was used. The only existing frame of Federal Government at the date of the charter—December, 1781—was under the Articles of Confederation, and was but nine months old. Those Articles were
reported to Congress late in 1777 by a Committee appointed in July, 1776, but the requisite number of States had not ratified them until March, 1781. Observe now the difficulties that Wilson had to overcome. The Second Article declared that, "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not, by the Confederation, expressly delegated to the United States in Congress assembled." In none of the Thirteen Articles was there a delegation of the power to grant charters of incorporation. Congress, however, had exercised the power and had acted, being "convinced," as the Pre-amble to the Ordinance of Incorporation declared, "of the support which the finances of The United States would receive from the establishment of a national bank."

Wilson met the situation without evasion. He conceded that there was no express delegation of power to sustain the Act, but he denied that the power was one of those reserved by the Second Article to the States. Herein lies the boldness and the originality of his conception. He divined the thought, now so familiar to us, that the government, resulting from the union of several governments separately incompetent, possessed inherent sovereignty over matters of general concern. He clearly saw that a government of limited powers, but entrusted with the accomplishment of certain objects beyond the reach of the confederating states, was as to those objects inherently supreme. He argued that none of the States previous to the Confederation could have chartered a bank for North America—"in other words, commensurate to the United States." No State could pretend to exercise any power or act of sovereignty over all the other States or any of them. Hence the incorporation of the Bank by Congress did not rest on any power, which, under the Articles of Confederation could have been or must
have been expressly delegated. But though Congress derived from the particular States no power, jurisdiction or right which was not expressly delegated, it did not follow that the United States had no other powers than those expressly delegated. "The United States had general rights, powers and obligations, not derived from any particular States, nor from all the particular States, taken separately, but resulting from the union of the whole," and therefore it had been provided by the Fifth Article of the Confederation "that for the more convenient management of the general interests of the United States delegates shall be annually appointed to meet in Congress * * * For many purposes the United States must be considered as one undivided, independent nation, and as possessed of all the rights, powers and properties by the law of nations incident to such." Now mark these words: "Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity belong to the United States in Congress assembled. There are many objects of this extended nature." He cited the purchase, sale, defense and the government of lands not within any State as covered by the Resolution that the western territory should be divided into distinct States. An institution for circulating paper and establishing its credit over the whole United States was of the same general character. The Act of Independence, made for the general interest, and before the Articles of Confederation, was of the same character. The Confederation was not intended to weaken or abridge the rights of the United States. It was not intended to transfer general sovereignty to particular States or to any of them. The sovereign powers resulting from the Union were vested in and had been exercised by Congress before the Confederation, and remained vested. "The Confederation clothed the United States with many, though, perhaps not with sufficient
powers; but of none did it disrobe them. * * * Rights may be vested in a political body, which did not previously reside in any or all the members of that body, derived solely from the union of those members.’’

I need not pursue the matter. The outline given indicates the vast scope of his thoughts. It is not too much to say that in Wilson’s reasoning is to be found the marrow of all subsequent arguments in favor of the incidental and implied powers of the present Federal government. He anticipated in substance the reasoning of Marshall in Cohens vs. The State of Virginia, 6 Wheaton, 381, and pointed out the basis on which rest so many of the subsequent decisions of the Supreme Court of the United States to the effect that where the object sought to be accomplished is national in its character, the government of the United States has the power to use any means to accomplish that object not expressly prohibited. In short, Wilson, in 1785, had sounded the keynote of National Sovereignty.

In support of his second point that it would not be politic for Pennsylvania to revoke the State charter, he urged, first, that the proceeding would be nugatory, because the recall of the State charter could not repeal that of the United States, and, second, because though the legislature might destroy the legislative operation, yet it could not undo the legislative acknowledgment of its own act. The act formed a charter of compact between the legislature and the bank. This he proceeded to sustain by a demonstration almost identical with the reasoning of Marshall in Fletcher v. Peck, 6 Cranch, 87, and in the Dartmouth College case, 4 Wh. 518.

Two years later, we find Wilson, as one of the Framers of the Constitution of the United States, contending on all points that a National government was preferable to one purely federative, and that it did not involve the destruction of the individuality and sovereignty of the States. In matters of national concern
there had to be national supremacy. Of necessity there must exist in every government a power from which there was no appeal, and which for that reason, might be termed supreme, absolute and uncontrollable. Where did the power reside? In Britain, in the Parliament, but the British Constitution was just what the British Parliament pleased. "To control the power and conduct of the legislature by an overruling Constitution was an improvement in the science and practice of government reserved to the American States."

The underlying principle, however, was that the supreme power resided in the people and they never parted with it. "If the error be in the legislature, it may be corrected by the constitution; if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in government, if the People are not wanting to themselves. * * * *

If we take an extended and accurate view of it, we shall find the streams of power running in different directions, in different dimensions, and at different heights, watering, adorning and fertilizing the fields and meadows, through which their courses are led; but if we trace them, we shall discover, that they all originally flow from one abundant fountain. In this constitution, all authority is derived from The People."

Such were the political creed and its expression of James Wilson.

I now turn to James Iredell. On the 26th of August, 1787, while the Federal Convention was still sitting in Philadelphia behind closed doors, and its work and the views of members were still unknown to the public, Iredell, writing to Richard Dobbs Spaight concerning the decision of the lower court in the famous case of Bayard vs. Singleton (1 Martin, 42) used this remarkable language. "In regard to the late decision at Newbern, I confess it has ever been my opinion, that an act inconsistent with the Constitution was void; and that
the judges, consistently with their duties, could not carry it into effect. The Constitution appears to me to be a fundamental law, limiting the powers of the legislature, and with which every exercise of those powers must, necessarily be compared. * * * * The Constitution, therefore, being a fundamental law, and a law in writing of the solemn nature I have mentioned (which is the light in which it strikes me), the judicial power, in the exercise of their authority, must take notice of it as the ground work of that as well as of all other authority; and as no article of the Constitution can be repealed by a legislature, which derives its whole power from it, it follows that the fundamental unrepealable law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people, and to which, therefore, the people owe no obedience. It is not that the judges are appointed arbiters, and to determine as it were upon any application, whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must unavoidably determine one way or another. If it is doubted whether a subsequent law repeals a former one, in a case judicially in question, the judges must decide this; and yet it might be said, if the legislature meant it a repeal, and the judges determined it otherwise, they exercised a negative on the legislature in resolving to keep a law in force which the Assembly had annihilated. This kind of objection, if applicable at all, will reach all judicial power whatever, since upon every abuse of it (and there is no power but what is liable to abuse) a similar inference may be drawn; but when you once establish the necessary existence of any power, the argument as to abuse ceases to destroy its validity, though in a doubtful matter it may be of great weight."

Thus did the great North Carolinian fourteen years
before the case of Marbury vs. Madison (1 Cranch, 137) proclaim doctrines which have made Marshall famous. Critics of language and of legal logic may well hesitate before awarding primacy to either, but none can deny Iredell's claim to priority of statement. I would not have it thought that the doctrine was novel. George Wythe of Virginia had announced it in Commonwealth vs. Caton, (4 Call, Va. 5-21) in 1782, so too did David Brearley of New Jersey in 1784, in the case of Holmes vs. Walton (referred to in State vs. Parkhurst, 4 Halstead (N. J.), 444, Appendix) and James M. Varnum of Rhode Island in 1786 in the case of Trevitt vs. Weedon, all of which preceded the case of Bayard vs. Singleton. But the significance of Iredell's masterly presentation of his views is that the letter which I have quoted was in answer to a complaint of Spaight that the decisions of the judges were "an assumption of authority," and that "the State instead of being governed by the representatives in General Assembly would be subject to the will of three individuals who united in their own persons the legislative and judiciary powers, which no monarch in Europe enjoyed and which would be more despotic than the Roman Decemvirate, and equally as insufferable." In 1792 in the case of Bowman vs. Middleton (1 Bay 252) the Supreme Court of South Carolina held an act of a Colonial legislature passed in 1712, as *ipsa facta* void because in contravention of Magna Charta. In view of this striking list of cases from New England to the Carolinas, all prior to Marbury vs. Madison, the well informed student of our legal development may well smile at charges against John Marshall of indulgence in novelty of doctrine or usurpation of power.

In 1788, Iredell, over the signature of Marcus, published a pamphlet entitled "'Answers to Mr. Mason's objections to the New Constitution Recommended by the Late Convention at Philadelphia.'" Of this paper
it has been said, "the author was immediately recognized by his vigor, as a giant by the imprint of his foot." There were eleven objections and as many specific answers all closely reasoned. I shall present but one—the fourth—as a sample of Iredell's method. "Mr. Mason has asserted, 'that the judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States.' How is this the case? Are not the State judiciaries left uncontrolled as to the affairs of that State only? In this as in all other cases, where there is a wise distribution, power is commensurate to its object. With the mere internal concerns of a State Congress we are to have nothing to do. In no case but where the union is in some measure concerned, are the Federal courts to have jurisdiction. The State judiciary will be a satellite waiting upon its proper planet: That of the Union, like the sun, cherishing and preserving a whole planetary system. * * * * Will not every man see how irrational it is to expect that any government can exist which is to be fettered in its most necessary operations for fear of abuse?"

During July of 1788, the State Convention, consisting of 280 members, met at Hillsborough, N. C., to consider the adoption or rejection of the Federal Constitution. The President was Samuel Johnston, then Governor of the State, the preceptor and the father-in-law of Iredell. He was a Federalist, and the leaders in debate upon the floor were Iredell, Davie, Spaight, Maclaine and Steele. Against them was arrayed the most influential politician in the State. Wilie Jones, a democrat in theory, an aristocrat in habit, living sumptuously and clad in fine linen, but stealing his way into the hearts of farmers by smoking with them and chatting of crops, ploughs and cattle. With him were Caldwell, a divine, who dwelt in the mountains, and, though a man of the closet, ruled the views of his people through his char-
itable ministrations, and Judge Spencer of "a candid and temperate disposition," and Timothy Bloodworthy, "smith, farmer, doctor, watchmaker, wheelwright and politician." Jones sought to cut off debate at the outset by moving that the question upon the Constitution should be put "as every man's mind was made up." This was promptly and successfully opposed by Iredell. Then Caldwell submitted abstract propositions, the absurdity and impracticability of some of which were exposed by Iredell, and the debate was on. We are told by the biographer of Davie that Iredell was "the leading spirit in the whole body, conspicuous for his graceful elocution, for the apt application of his varied learning, his intimate knowledge of the working of schemes of government, and his manly and generous temper." The record shows that the burden of argument in favor of the Constitution fell upon Iredell, who spoke more frequently and at greater length than any other on the floor. His brother wrote him: "I wish you could communicate your talent to me: There is no waste of language in your speeches. You say more in five words than is commonly expressed in fifty." But Jones held his forces too well in hand to be beaten. The Convention determined neither to ratify nor to reject, but to recommend a declaration of Rights and twenty-six amendments, which in the main were similar to those suggested in Virginia, and to await the action of the other hesitating States. It was not until after the Federal Government had been actually organized in March of 1789, and then through a second Convention in November of that year that North Carolina entered the Union. Among all the men of his State Iredell stood forth as the most conspicuous champion of the Constitution, like a Roman propugnator in the thick of the fray.

It is a most impressive circumstance that the two men whose characters and careers I have but sketched,
both of them of foreign birth, but nurtured from early
manhood under American colonial conditions and
tested by the fires of the Revolution, after displaying
a remarkable similarity of thought and action, should
approach each other on converging lines of public duty
and finally find themselves, during the last eight years
of lives all too brief, associated as colleagues in the
final interpretation of the great organic instrument
which one had helped to frame and the other to advo-
cate. It is a no less impressive circumstance that in
the first and only intellectual battle between them they
should differ radically, a striking illustration of the
freedom of thought fostered by our institutions. It is
far more impressive still that such was the strength
and originality of their conflicting views that each has
been since regarded as the founder of a distinct school
of Constitutional interpretation. The happy conse-
quence has been that each school moderated the excesses
of the other, and just as in celestial mechanics the el-
liptical pathways of the planets resulted from the con-
lict between centripetal and centrifugal forces, so in
the domain of constitutional jurisprudence the rounded
harmony of our system is the direct though unforeseen
resultant of the disagreement between Wilson and Ire-
dell in Chisholm’s Executor vs. Georgia (2 Dallas 419).

Before considering the renowned case which I have
just named, let me pause to analyze the conditions
which made such disagreement inevitable. The men
differed in natural temperament. Wilson was of a
sanguine, speculative, philosophic bent, with many of
the qualities of a Locke or a Montesquieu. Iredell was
of a colder, less imaginative type, practical and busi-
ness like. Wilson had been classically educated at the
Scotch Universities, and had made himself familiar
with Greek and Latin literatures, and the works of the
great historians, and publicists. Herodotus, Thucyd-
dides, Plato, Tactitus, Livy, Clarendon, Grotius, Puf-
fendorf, Vattel and Burlamaqui were among his favorite authors. Iredell had never been to an university, was largely self taught and preferred to dip into Coke-Littleton or Sellon’s Practice and had saturated himself with Blackstone. He was ten years younger than Wilson and had not acquired his breadth of view. But behind differences of temperament and education was the more important matter of contact with men. Wilson had spent a few months in New York before coming to Philadelphia, and before settling down to practice in the Colonial capital, had practiced law in Reading and Carlisle in Pennsylvania, and in Annapolis, Maryland. Iredell after reaching Edenton had never strayed. Wilson became a member of the Continental Congress, in close contact with statesmen from all parts of the old Thirteen, was familiar in the most intensive sense with all the weaknesses and defects of the Confederation, and knew, as but comparatively few men knew, the need for a strong National Government. He had never been a judge of local courts, nor an Attorney General, and hence, while looking broadly at public affairs, had never learned the practical difficulties of enforcing remedies, nor addressed himself to purely administrative problems. Iredell had been a Deputy Attorney General, a District Court Judge and finally Attorney General, and necessarily had viewed legal questions arising within his State from the standpoint of their practical enforcement. He had never been a member of Congress, nor was he a member of the Federal Convention. His first field of action on an elevated plateau was when he served in the North Carolina Convention.

It is plain, I think, that Wilson would not have been true to himself had he not maintained the theory of National Sovereignty, and that Iredell could not have been expected to do otherwise than maintain the doctrine of State Rights.

We are now ready to consider and appreciate the
manner in which both men bore themselves in the mighty judicial debate which marked the climax of their life achievements.

In judging of the merits of the respective arguments advanced by Wilson and Iredell in support of their respective contentions we must divest ourselves, if such a thing be possible, of all knowledge of our own concerning the later decisions of the Supreme Court which have settled the method of construction of the Constitution. We must put ourselves in their positions considering a strictly novel question with minds unembarrassed by any previous determination. It is only in this way that we can appreciate the originality, the boldness and the force of each man's view. I shall confine myself to the opinions of these two justices, first because I am not discoursing upon the case at large, and next because in these two opinions is to be found the sharpest contrast of doctrine. In short, it is because of this, that each man has been since regarded as the founder of separate schools of Constitutional thought. I shall begin with Iredell, because as the junior justice he opened the judicial discussion, and his opinion is the first to appear in Dallas's report of the case.

The suit was by Chisholm, Executor of a citizen of South Carolina, and himself a citizen of that State, against the State of Georgia. The cause of action does not appear, but the form was in assumpsit and from the return by the Marshall it appeared that process had been served on the Governor and Attorney General of Georgia. The suit was brought originally in the Supreme Court of the United States, and did not reach there by appeal. Georgia refused to appear. Thereupon the Attorney General of the United States moved "That unless the State of Georgia shall, after reasonable previous notice of this motion, cause an appearance to be entered in behalf of the said State, on the
fourth day of the next term, or shall then show cause to the contrary, judgment shall be entered against the said State, and a writ of enquiry of damages shall be awarded." Ingersoll and Dallas of the Philadelphia Bar, the Court then sitting in Philadelphia, presented to the Court a written remonstrance and protestation on behalf of the State, against the exercise of jurisdiction in the cause, but, in consequence of positive instructions, they declined taking any part in arguing the question.

Edmund Randolph, the Attorney General, who had been Governor of Virginia, and who had taken the initiative in the Federal Convention by presenting what is historically known as the Virginia Plan, then proceeded to discuss the motion under four forms, which it seems had been arranged "at the pleasure of the court:" 1st, Could the State be made a defendant in any case in the Supreme Court at the suit of a private citizen of another State? 2nd, If so, would assumpsit lie? 3rd, Was the service made a competent service? 4th, By what process ought the appearance of the State to be enforced?

Iredell and Wilson considered but the first two points. Iredell called it a "great cause," and began, as might be expected from his exact training and experience as a pleader, with a precise statement of the issue. "The action," said he, "is an action of assumpsit. The particular question then before the Court is, will an action of assumpsit lie against a State?" In abstracting this particular question from the general one, whether a State can in any instance be sued, you will observe that Iredell considered the second proposition of primary importance. In this circumstance alone we have the clearest revelation of the quality of Iredell's mind. Trained as a deputy Attorney General, and by subsequent experience as Attorney General, and accustomed as a district judge to view process critically, he men-
tally inquired: "What is the form of action? Is the form of action sustainable? Is the process usual and regular? Does it raise the main question? If it does not, clearly it would be premature to pass on the deeper question of power, and extra judicial to express sentiments not necessarily involved. Although these features are not expressed in terms, I think that every exact lawyer will agree with me that they are discoverable in Iredell's method of dealing with the case, and exhibit in the clearest light the eminently judicial qualities of his mind. It was the record he looked at, and it was the record that bounded his vision. "Will an action of *assumpsit* lie 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." There you have, in Iredell's own words, the crux of his opinion. The answer justifying the form of process resorted to must be found in the Constitution and in an Act of Congress. He reviewed the entire judiciary Article of the Constitution, and pointed out that it provided, inter alia, for original jurisdiction in the Supreme Court in "controversies between a State and citizens of another State." He then turned to the 13th Section of the general judicial Act of 24th September, 1789, entitled An Act to establish the Judicial Courts of the United States, which provided "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens: and except also between a State and citizens of other States." The Constitution was particular in expressing the parties who might be the objects of the jurisdiction, but, in respect to the subject matter, used the word "controversies" only. The Act of Congress qualified the word "controversies" by the word "civil," a well warranted qualification, for it could not be presumed by any reasonable man that the general word "controvers-
“Sies” as used in the Constitution was intended to include criminal cases, which in all instances respecting a State were uniformly of a local nature and to be decided by State law. “What controversy of a civil nature could an individual maintain against a State? The framers must have meant one of two things: Either, 1st in the conveyance of that part of the judicial power which did not relate to the execution of the other authorities of the general government (which within the restrictions of the Constitution were full and discretionary) to refer to antecedent laws for the construction of the general words used; or, 2nd to enable Congress in all such cases to pass all such laws as they might deem necessary and proper to carry the purposes of the Constitution into effect, either absolutely at their discretion, or at least in cases where the prior laws were deficient, if any such deficiency existed.”

He scouted as novel and untenable the argument of the Attorney General in these words: “His construction I take to be this: ‘That the moment a Supreme Court is formed, it is to exercise all the judicial power vested in it by the Constitution, by its own authority, whether the Legislature has prescribed methods of doing so, or not.’ My conception of the Constitution is entirely different. I conceive that all the Courts of the United States must receive, not merely their organization as to the number of Judges of which they are to consist, but all their authority, as to the manner of their proceeding, from the Legislature only. * * * Having a right thus to establish this Court, and it being capable of being established in no other manner, I conceive it necessarily follows, that they are also to direct the manner of its proceedings * * * Subject to the Constitution, the whole business of organizing the Courts, and directing the methods of their proceedings where necessary, I conceive to be in the discretion of Congress. If it shall be found on this occasion, or on any
other, that the remedies now in being are defective, for any purpose it is their duty to provide for, they no doubt will provide others. It is their duty to legislate so far as is necessary to carry the Constitution into effect. It is ours only to judge. We have no reason, nor any more right to distrust their doing their duty, than they have to distrust that we all do ours. There is no part of the Constitution, that I know of, that authorizes this Court to take up any business where they left it, and, in order that the powers given in the Constitution may be in full activity, supply their omission by making new laws for new cases; or, which I take to be the same thing, applying old principles to new Cases materially different from those to which they were applied before. * * * If therefore this Court is to be (as I consider it) the organ of the Constitution and the law, not of the Constitution only, in respect to the manner of its proceeding, we must receive our directions from the Legislature in this particular, and have no right to constitute ourselves an Officina brevium, or take any other short method of doing what the Constitution has chosen (and, in my opinion, with the most perfect propriety) should be done in another manner."

He then referred to the 14th Section of the Judicial Act, and, after enumerating the special writs there mentioned such as scire facias, habeas corpus and "all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions," pointed out that these according to the express terms of the statute must be "agreeable to the principles and usages of law." He then proceeded, in a most exhaustive discussion of English cases, covering page after page, to demonstrate that the remedy against the Crown was not by way of assumpsit but by petition. He refused to recognize the analogy of suits against corporations to suits
against a State. Corporations were creatures, States were sovereigns. They did not owe their origin to the government of the United States. They were in existence before it, and derived their authority from "the same pure and sacred source as itself; the voluntary and deliberate choice of the people." The distinctions between corporations and a State were so palpable that he could never admit that a system of law calculated for one class of cases was to be applied, as a matter of course, to the other without admitting, as he conceived, that the distinct boundaries of law and Legislation would be confounded "in a manner that would make courts arbitrary, and in effect makers of a new law, instead of being (as certainly alone they ought to be) expositors of an existing one."

In conclusion, he said: "I have now, I think, established the following particulars:—1st, That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts and prescribing their methods of proceeding. 2nd, That Congress has provided no new law in regard to this case, but expressly referred us to the old. 3rd, That there are no principles of the old law, to which we must have recourse, that in any manner authorize the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with."

Wilson's point of view was diametrically opposite. Instead of first looking at the record, he looked first at the Constitution. He saw a vision of the Nation that was to be, his mind quivering with ecstasy as he looked. He divined the future, while reflecting on the past, and rose to heights of judicial inspiration. He saw a strong principle at work destroying technical difficulties as acid eats into metal. As Copernicus tore himself away
from Ptolemaic doctrines and established the heliocentric theory, so Wilson announced the basic principles of National Sovereignty.

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

He examined it first by the principles of general jurisprudence. He inquired into the meaning of the word Sovereign. "To the Constitution of the United States the term sovereign is totally unknown. There is but one place where it could have been used with propriety. But even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They might have announced themselves 'Sovereign' People of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.' * * * "In one sense the word sovereign had for its correlative, subject. In this sense the term can receive no application, for it has no object in the Constitution of the United States. Under that Constitution there are citizens but no subjects. 'Citizen of the United States.' 'Citizen of another State.' Citizens of different States.' 'A State or citizens thereof.' The term subject occurs, indeed once in the instrument, but to mark the contrast strongly, the epithet 'foreign' is prefixed.'"

He then examined the meaning of the word State. In his view it meant "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others.
It is an artificial body. It has its affairs and its interests. It has its rules; it has its rights, and it has its obligations. It may acquire property distinct from its members. It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts and for damages arising from the breach of those contracts. * * * * If justice is not done; if engagements are not fulfilled, is it upon general principles of right, no less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that which will not be voluntarily performed? Less proper it surely cannot be. The only reason, I believe, why a free man is bound by human laws is that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the courts of justice which are formed and authorized by those laws. If one free man, an original sovereign, may do all this, why may not an aggregate of free men, a collection of original sovereigns do likewise? If the dignity of each singly is undiminished, the dignity of all jointly must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: the latter is amenable to a court of justice: upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a sovereign State? Surely not."

He then drew together the branches of the argument by this bold and striking declaration. Each word is fraught with meaning, and contains a pregnant thought: "As a Judge of this Court, I know, and can decide upon the knowledge that the citizens of Georgia when they acted upon the large scale of the Union, as a part of "The People of the United States" did not
surrender the Supreme or Sovereign Power to that State, but, as to the purposes of the Union, retained it to themselves; as to the purposes of the Union, therefore, Georgia is Not a Sovereign State. If the judicial decision of this case forms one of those purposes, the allegation that Georgia is a sovereign State is unsupported by the fact."

Those sentences contain the crux of Wilson’s opinion. If I may be pardoned for introducing a medical term into a legal paper, I would say that they constitute the foetus of the National doctrine.

He then examined the question by the laws and practice of different States and Kingdoms, displaying a wide range of reading, and, in reviewing English authorities, cited the Mirror of Justices and Bracton to the effect that in receiving justice the King should be placed on a level with the meanest person in the Kingdom. "True it is," he admitted, "that now in England the King must be sued in his courts by Petition; but even now the difference is only in the form, not in the thing. The judgments or decrees of those courts will substantially be the same upon a precatory as upon a mandatory process."

He then asked: Could the Constitution of the United States vest a jurisdiction over the State of Georgia? By slow degrees and many historical examples he worked his way to the final thought that as the Constitution was the result of the united wills of all the people of the United States, including the people of Georgia, it was competent for a United People, distinct from the individual aggregations of people constituting separate states, to bind itself by the terms of its constitution which was the product of the union, and to exact obedience to national mandates even from the States themselves. The Constitution was framed not for the States, nor by the States, but for the Nation and by the People of the Nation. I am not using his
words, but I have, I think, summarized accurately his contention. He pointed out that in England the body politic was Parliament. The People were nowhere. The King, the Lords and the Commons together formed the corporation or body politic of the Kingdom. In the United States it was the people who spoke the Government into existence. The truth was often lost sight of by the exaltation of the States. "The States, rather than the people, for whose sake the States exist, are frequently the objects which attract attention." The inaccuracy of political conception was fostered by inaccuracy of common speech. "Is a toast asked? 'The United States,' instead of 'The People of the United States' is given. This is not politically correct. The toast is meant to present to view the first great object in the Union. It presents only the second. It presents only the artificial person, instead of the natural persons who spoke it into existence." When Homer enumerated the other nations of Greece whose forces acted at the siege of Troy, he arranged them under the names of their Kings, but when he came to the Athenians he called them the People of Athens. Demosthenes always addressed his countrymen as "Oh, Men of Athens." "With the strictest propriety, therefore, classical and political," Wilson declared "our national scene opens with the most magnificent object which the nation could present. 'The People of the United States' are the first personages introduced. Who were those people? They were the citizens of the United States each of which had a separate constitution and government and all of which were connected together by Articles of Confederation. To the purposes of public strength and felicity, that Confederacy was totally inadequate. A requisition on the Several States terminated its legislative authority; Executive and Judicial Authority it had none. In order, therefore, to form a more perfect union, to establish justice,
ensure domestic tranquillity, to provide for the common
defence, and to secure the blessings of liberty, *those people*, among whom were the people of Georgia, or-
dained and established the present Constitution. By
that Constitution legislative power is vested, Executive
power is vested, judicial power is vested. The question
now, opens fairly to our view. Could the people of
those States, among whom were those of Georgia, bind
those States and Georgia among the others by the
legislative, executive and judicial power so vested? If
the principles on which I have founded myself are just,
this question must unavoidably receive an affirmative
answer. If those States were the *work* of those people;
those people, and, that I may apply the case closely,
the people of Georgia in particular, could alter as they
pleased their former work. To any given degree, they
could diminish as well as enlarge it. Any or all of the
former States powers, they could *extinguish* or *trans-
fer.*” The inference was plain that those people, in-
cclusive of the people of Georgia *could vest* jurisdiction
or judicial power over those States and over the State
of Georgia in particular.

Had they done so? Did “those people” mean to
exercise their undoubted power? Did “those people”
tend to bind “those States” by the Legislative power
vested by the Constitution? Surely it could not be
contended that the Legislative power of Congress was
meant to have *no* operation on the States. Did the
people of the United States intend to bind the Several
States by the Executive power of the national govern-
ment? The answer must be in the affirmative. Ever
since Bracton’s day it had been a maxim that “*it would
be superfluous to make laws, unless those laws, when
made, were to be enforced.*” When the application of
them was doubtful or intricate, judicial authority was
necessary. One of the declared objects of the Constitu-
tion was to establish justice. Whoever considered “in
a combined and comprehensive sense the *general texture* of the Constitution," must be satisfied that the People of the United States intended to form themselves into a nation for national purposes. "They instituted for such purposes a national government, complete in all its parts, with powers Legislative, Executive and Judiciary, and in all those powers extending over the whole nation." It would be indeed incongruous that with regard to such purposes, any man, or body of men, any person natural or artificial should be permitted to claim successfully an entire exemption from the jurisdiction of the national government. Such a claim, crowned with success, would be repugnant to our very existence as a Nation. All trains of deduction converged and united upon this point.

Finally, the express language of the Constitution put the matter beyond all doubt. "The judicial power of the United States shall extend to controversies between two States." Clearly one of the States must be a defendant. "The judicial power of the United States shall extend to controversies between a State and citizens of another State." Could legal language be clearer, could all the niceties of the strictest pleading describe with more precise accuracy the cause now depending? "Causes, and not parties to causes are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind." Tried by all the touchstones of general jurisprudence, by the laws and practices of States and Kingdoms, and by the Constitution of the United States, from all combined, the inference was that the action would lie.

Chief Justice Jay, and Justices Blair and Cushing, in separate opinions, concurred in this.

I confess that I do not know where to find throughout the whole mass of judicial utterances since that August term, 1792, more impressive presentations of
a fundamental question from opposite points of view than those of Wilson and Iredell. But when I consider that they are the first to be encountered in the books, and are the products of minds working without the assistance of prior adjudications, I regard them with admiration. Yet while in seeming opposition, they are not in antagonism. Nowhere does Iredell confute or attempt to challenge Wilson's majestic reasoning. Nowhere does Wilson pause to notice Iredell's contention that the powers of the Constitution relating to the Judiciary can become effective only through an Act of Congress. The result has been, happily for ourselves, that both doctrines have stood. Wilson's theory and its propulsive force have supplied the necessary stimulus and energy to Congressional action. Iredell's protest against spontaneous constitutional self enforcement has protected us against excessive or capricious exercises of judicial power. Wilson's opinion is in itself a constitutional dynamo: Iredell's a constitutional regulator, without which the engine would have thrashed itself to pieces.

The case of Chisholm, Executor, vs. The State of Georgia and the opinions of the Judges are not as well known and not as frequently read as they deserve to be. This is largely due to the fact that two days after the decision was pronounced, such was the anti-federal fury, the Eleventh Amendment to the Constitution was proposed to Congress and formally acted upon in December, 1793. It was not declared adopted by the several States until January, 1798. In the meantime the Court refused to bend, and after a year rendered judgment by default and ordered an inquiry of damages. The plaintiff, however, confronted by a Statute of Georgia denouncing the penalty of death against any one who presumed to enforce any process, prudently awaited action on the proposed amendment. In February, 1798, the case of Hollingsworth vs. Virginia (3
Dallas 378) being before the Court, it was declared that, in view of the amendment, jurisdiction was renounced "in any case past or future, in which a State was sued by citizens of another State, or by citizens or subjects of any foreign State." Hence interest in the case as a precedent slept until awakened in the Virginia Coupon Cases, (114 U. S. 270) and Hans vs. Louisiana, (134 U. S. 1) in 1889. In the last named case the whole subject of the suability of a State is fully discussed by Mr. Justice Bradley.

The value of the utterances of Wilson and Iredell can never be lost. They form a part not only of the pattern but of the texture of our national jurisprudence. They struck as by intuition, directly on the results of reasoning which is still considered sound. Time, which gnaws and diminishes many reputations, has left theirs untouched.

In the quiet burying ground of the Johnston family at Edenton, on the 20th of November, 1906, a cenotaph to the memory of James Wilson was dedicated in the presence of the Governor and Chief Justice of North Carolina and the Governor of Pennsylvania. It stands but a few feet away from the grave of Iredell. Though Pennsylvania claimed and now guards the ashes of her son, the memory of the close association of these two useful and productive lives is preserved in North Carolina.