AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Judicial Power and Constitutional Authority

Cohens v. Virginia, 19 U.S. 264 (1821)

The District of Columbia ran the National Lottery to raise funds for the municipality. The Cohens Lottery and Exchange Office, based in Baltimore, was a major national distributor of lottery tickets, which were a popular means for state and city governments to raise money in the early republic. Cohens' Norfolk branch ran afoul of an 1820 Virginia law banning the sale of out-of-state lottery tickets. Once Cohens was convicted in state court and fined $100 for selling tickets to the National Lottery in the state of Virginia, it sought review in the U.S. Supreme Court asserting that the National Lottery was a federal enterprise like the Bank of the United States and therefore was immune from interference by the states. The legal team for Cohens included William Pinkney, then a U.S. senator for the state of Maryland.

The Virginia state government took an immediate interest, with the legislature passing resolutions asserting that the Supreme Court "have no rightful authority under the Constitution to examine and correct the judgment" of the state court.[1] *The state's legal team included a leading states' rights defender in the House of Representatives, Philip Barbour.*

There were two issues in the case. Did the Court have the authority to hear an appeal from the state courts by an individual against a state government? If so, did the state have the authority to prohibit the sale of lottery tickets authorized by an act of Congress? Virginia's lawyers had been instructed by the state to limit their arguments to the jurisdictional question and to refuse to argue the merits of the case, so the Court asked Daniel Webster, who was representing New York in a similar case, to argue the merits in Cohens. *The U.S. attorney general joined the lawyers for Cohens to speak on behalf of federal authority. Coming on the heels of* Martin *and* McCulloch, *the case was potentially volatile, but Congress had far less invested in the District of Columbia's lottery than it did in the Bank.*

This time Chief Justice Marshall was able to participate in the case and write the opinion for the Court. The Court split the difference, upholding its jurisdiction to hear the case but avoiding the constitutional question of whether the state could keep out the lottery. Virginia radicals, including Spencer Roane, were outraged by the reassertion of federal judicial authority, but national Republicans were generally pleased with the outcome. James Madison rebuffed Roane's requests that he go public with criticisms of the Court, admitting that he thought the Supreme Court was largely correct. Thomas Jefferson did publish an indirect swipe at the Court, and the administration of President James Monroe was forced to come to the Court's defense. With so much disagreement among the giants of Virginian constitutional politics, the states' rights complaints never gained traction (even the Virginia legislature declined to recommend a constitutional amendment to weaken the Supreme Court), and the episode eventually blew over with Roane's death in 1822.

CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

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The defendant in error moves to dismiss this writ, for want of jurisdiction.

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The questions presented to the Court by the two first points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government

[1] Herman V. Ames, ed., *State Documents on Federal Relations*, vol. 4 (Philadelphia: University of Pennsylvania, 1906), 16.

to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the Courts of every State in the Union. That the constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the Court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this Court to say so; and to perform that task which the American people have assigned to the judicial department.

1st. The first question to be considered is whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

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. . . . A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reason to depart from that construction.

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The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present constitution.

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One of the express objects, then, for which the judicial department was established, is the decision of controversies between States, and between a State and individuals. The mere circumstance, that a State is a party, gives jurisdiction to the Court. How, then, can it be contended, that the very same instrument, in the very same section, should be so construed, as that this same circumstance should withdraw a case from the jurisdiction of the Court, where the constitution or laws of the United States are supposed to have been violated? . . .

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The mischievous consequences of the construction contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every State in the Union. And would not this be its effect? . . . Each member will possess a veto on the will of the whole.

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These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own Courts, rather than on others. . . .

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. . . . The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the States, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think they have attempted it. . . .

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2d. The second objection to the jurisdiction of the Court is, that its appellate power cannot be exercised, in any case, over the judgment of a State Court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a State; and as being no more connected with it in any respect whatever, than the Court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

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That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one, and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. . . . The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire -- for some purposes sovereign, for some purposes subordinate.

. . . . We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

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Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.

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In discussing the extent of the judicial power, the Federalist says, "Here another question occurs: what relation would subsist between the national and State Courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter, to the Supreme Court of the United States. . . ."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act [of 1789] itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution. . . .

While on this part of the argument, it may be also material to observe that the uniform decisions of this Court on the point now under consideration, have been assented to, with a single exception, by the Courts of every State in the Union whose judgments have been revised. . . .

After having bestowed upon this question the most deliberate consideration of which we are capable, the Court is unanimously of opinion, that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

Motion denied.

This case was stated in the opinion given on the motion for dismissing the writ of error for want of jurisdiction in the Court. It now comes on to be decided on the question whether the Borough Court of Norfolk, in overruling the defense set up under the act of Congress, has misconstrued that act. . . .

Two questions arise on this act.

1st. Does it purport to authorize the Corporation to force the sale of these lottery tickets in States where such sales may be prohibited by law? If it does,

2d. Is the law constitutional?

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In inquiring into the extent of the power granted to the Corporation of Washington, we must first examine the words of the grant. We find in them no expression which looks beyond the limits of the City. The powers granted are all of them local in their nature, and all of them such as would, in the common course of things, if not necessarily, be exercised within the city. . . .

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To interfere with the penal laws of a State, where they are not leveled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed. . . .

That the power to sell tickets in every part of the United States might facilitate their sale, is not to be denied; but it does not follow that Congress designed, for the purpose of giving this increased facility, to overrule the penal laws of the several States. In the City of Washington, the great metropolis of the nation, visited by individuals, from every part of the Union, tickets may be freely sold to all who are willing to purchase. . . .

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Whether we consider the general character of a law incorporating a City, the objects for which such law is usually made, or the words in which this particular power is conferred, we arrive at the same result. The Corporation was merely empowered to authorize the drawing of lotteries; and the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the Corporation. That subject does not seem to have been taken into view. It is the unanimous opinion of the Court, that the law cannot be construed to embrace it.

Judgment *affirmed*.