AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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

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Algernon Sidney [Spencer Roane], **"On the Lottery Decision"** (1821)[1]

The Sidney essays were written by Spencer Roane, the chief judge of the Virginia Court of Appeals, in response to the U.S. Supreme Court's decision in Cohens v. Virginia *(1821), involving Virginia's right to prohibit the sale of lottery tickets from the District of Columbia. Roane continued to develop his argument that states had the constitutional authority to regulate their internal affairs and that federal policies like the lottery could not trump those state laws. More immediately, he continued to press his decade-long disagreement with the U.S. Supreme Court, over whether the U.S. Supreme Court could hear appeals from and overrule state courts on constitutional questions. Roane's death soon thereafter cut short his effort to rally states' rights opposition to the Marshall Court over this decision. Why does Roane not trust the U.S. Supreme Court as a protector of the constitutional powers of the states?*

To the People of the United States:

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. . . . This decision also reprobates the idea that our system of government is a confederation of free states. That is no federal republic, in which one of the parties to the compact, claims the exclusive right to pass finally upon the chartered rights of another. In such a government there is no common arbiter of their rights but the people. If this power of decision is once conceded to either party, the equilibrium established by the constitution is destroyed, and the compact exists thereafter, but in name. This decision also claims the right, to amend the federal constitution, at the mere will and pleasure of the supreme court. The constitution is not less changed or amended because it is done by construction, and in the form of a decree or judgment. In point of substance, its effect is the same; and this construction becomes a part of the constitution, or of the fundamental laws. It becomes so, because it is not in the power of the ordinary legislature to alter or repeal it. This construction defies all power, but that of the people, in their primary and original character, although, in effect, it entirely changes the nature of our government. This assumption of power is the less excusable, too, fellow-citizens, because no government under Heaven, has provided so amply as ours, for necessary amendments of the constitution, by the legitimate power of the people. . . .

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With respect to oppressions of violations of the constitution, committed by the other departments of the government, they can easily be corrected, by the elective franchise; and that franchise will be graduated, by the degree of oppression which is inflicted. But the court in question claims to hold its authority paramount to the power of the people. It is not elected by, nor is amenable to them. Having been appointed in one generation, it claims to make laws and constitutions for another. It acts always upon the foundation of its own precedents, and progresses, "with a noiseless foot and unalarming advance," until it reaches the zenith of its despotic power.

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The supreme court, while it must admit, that both itself and its co-ordinate departments, are to be checked by each other . . . denies that any check exists, in favor of the state governments. The inference

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[1] Excerpt taken from the *Richmond Enquirer*, May–June 1821.

would seem to hold, a *fortiori*, in favor of the latter. It would seem to be a much smaller abuse, of the federal constitution, that a power should be exercised by one department of the same government, which was confided to another, than that one government should usurp the just powers reserved to another. If the line of demarcation between the different departments of the same government, cannot be obliterated by implication or construction, neither can that broader and bolder line, which is established between the different governments. It would be a much greater calamity to the American people, to wipe out these broader lines between the two governments, and thus establish one great consolidated government, than, by obliterating the fainter lines drawn between the different departments, to vest all the proper powers of the general government in one department. In that case they would be still federal powers, which would be exercised: but the calamity would be inconceivable, of submitting the local and municipal concern of one section of this vast country to members coming from another, and who have no common interest with them in relation thereto.

. . . .

The supreme court next supposes, that the legislatures and people of the states will imbibe improper prejudices against the general government; that the state judiciaries may not be exempt therefrom, and consequently, will not form perfectly impartial tribunals. Why should these prejudices exist in any of those parties against the government of their own creation? If these prejudices however do exist on the part of the people, that is, of the whole people, they are probably honest prejudices, and are, therefore, not to be objected to. If on the contrary these prejudices are confined to the state judiciaries, neither will the federal judges be exempt from *their* prejudices. Their prejudices will be on the side of power and of "the government which feeds them." Let FACTS speak upon the subject. Did not the federal judges lend themselves as willing instruments, to a corrupt congress to enforce the infamous sedition law? . . . . Has not this very court in this case manifested its willingness to extend the powers of the corporation of the city of Washington [the Bank of the United States] into the heart of the states, whenever congress shall give to its ordinances that form, and that extension; and this to the total overthrow of the reserved and salutary powers of the several states? . . .