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|  | ***JUDICIAL REVIEW OF STATE ACTIONS*** |
| **Chisholm v. Georgia 2 Dallas 419 (1793)** |

***SETTING***

Creation of a national judiciary in Article III of the Constitution proved to be a very controversial topic during the Philadelphia Constitutional Convention. One of the reasons opponents of the Constitution objected to it was that they feared that under Article III states would be subject to suit in federal court, which, it was argued, would destroy the states as sovereign political entities. During the Convention, Virginia delegate James Madison denied that states could be made defendants in federal suits, while fellow Virginian Edmond Randolph went on record stating that they could be. The question was not definitively resolved by the broad language of Article III, which refers merely to "The judicial Power of the United States."

Virginia delegate George Mason refused to sign the proposed

Constitution and lobbied against its ratification because of his fear that it would subject states to lawsuits in federal court. In *Federalist* No. 81, however, Alexander Hamilton declared such fears to be "without foundation." Hamilton

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wrote, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the gen-

eral practice of mankind; and the exemption, as one of the attributes of sover­eignty, is now enjoyed by the government of every State in the Union" (empha­sis in original).

Despite Hamilton's efforts to quell the fears of states' rights advocates, the question of whether states could be sued in federal court without their consent became the subject of litigation almost immediately after the Constitution was ratified. The first suit brought in the Supreme Court's 1791 Term, for example, was against the state of Maryland by a group of Dutch bankers as creditors. Other suits involving states as defendants also appeared on the Court's docket. Those suits caused great alarm among states' rights adherents, but it was a suit brought at the August 1792 Term that gave the Court its first opportunity to rule on whether states can be sued in federal court without their consent. The case arose out of a debt owed by the state of Georgia to the estate of a merchant.

On October 31, 1777, the state of Georgia, acting through agents Edward Davies and Thomas Stone, contracted with Robert Farquhar, a British merchant living in South Carolina, for the purchase of a large quan­tity of goods, to be delivered on or before December 1, 1777. Farquhar deliv­ered the goods as promised, but Davies and Stone never paid for them, despite Farquhar's many demands. Farquhar still had not received payment in January 1784, when he accidentally drowned. The executor of his estate, Alexander Chisholm of Charleston, South Carolina, continued to attempt to collect the debt.

In 1789, Chisholm presented a petition to the Georgia legislature requesting payment of the debt. That body investigated the claim and found it to be valid, but concluded that the fault for failure to pay the debt lay with Davies and Stone, not with the state of Georgia. Chisholm then filed suit against Georgia in the U.S. Circuit Court for the District of Georgia. The court issued a summons to Governor Edward Telfair, requiring him or a representative of the state to appear. Legal proceedings were delayed while Telfair sought advice about how to respond to the suit. When the case was called for argument at the October 1791 Term, Telfair claimed that no fed­eral court had jurisdiction over a suit against Georgia unless the state con­sented to it. Chisholm filed a demurrer, stating that the case should pro­ceed, because Article III of the Constitution explicitly extends the judicial power of the United States to controversies between states and citizens of other states.

The circuit court agreed with Telfair and dismissed the case for want of jurisdiction. Chisholm then filed suit in the Supreme Court of the United States at its August 1792 Term.

***HIGHLIGHTS OF SUPREME COURT ARGUMENTS***

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**BRIEF FOR CHISHOLM**

* The clear language of Article HI gives the Supreme Court jurisdiction over a state as a defendant when it is sued by a private citizen of another state.
* There are many evils that could be enumerated that could not be cor­rected if a citizen could not sue the state.
* The present Constitution produced a new order of things. Whereas the Articles of Confederation derived its authority from the sovereign states, this Constitution derives its authority from the people. The Constitution diminishes the sovereignty of the states, at least to the point of making them defendants in some legal actions.

*Note:* The state of Georgia did not appear. However, on December 14, 1792, the Georgia House of Representatives adopted a resolution stating that Article III did not give the Supreme Court jurisdiction over suits against states by citizens of other states and declaring that the state would treat any judg­ment entered in the case as unconstitutional.

***SUPREME COURT DECISION: 4-1*** (delivered *seriatim)*

**IREDELL, J.**

... The question ... is will an action of *assumpsit* [a common law action for damages for the nonperformance of a contract] 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. The part of the Constitution concerning the Judicial Power is ... Art.3. sect. 2....

The Supreme Court hath ... First. Exclusive jurisdiction in every contro­versy of a civil nature: 1st. Between two or more States. 2nd. Between a State and a foreign State. 3rd. Where a suit or proceeding is depending against Ambassadors, other public ministers, or their domestics, or domestic ser­vants. Second. Original, but not exclu­sive jurisdiction. 1st. Between a State and citizens of other States. 2nd. Between a State and foreign citizens or

subjects. 3rd. Where a suit is brought by Ambassadors, or other public minis­ters. 4th. Where a consul or vice-consul, is a party. The suit now before the Court (if maintainable at all) comes within the latter description, it being a suit against a State by a citizen of another State.

The Constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but in respect to the sub­ject-matter upon which such jurisdic­tion is to be exercised, uses the word "controversies" only. The [Judiciary Act] more particularly mentions civil controversies, a qualification of the gen­eral word in the Constitution, which I do not doubt every reasonable man will think well warranted, for it cannot be presumed that the general word, "con­troversies" intended to include any pro­ceedings that relate to criminal cases,

which in all instances that respect the same Government, only, are uniformly considered of a local nature, and to be decided by its particular laws....

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A general question of great impor­tance here occurs. What controversy of a civil nature can be maintained against a State by an individual? The framers of the Constitution, I presume, must have meant one of two things: Either 1. 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 it must be admitted are full and discretionary, within the restrictions of the Constitution itself), to refer to antecedent laws for the construction of the general words they use: Or, 2. To enable Congress in all such cases to pass all such laws, as they might deem necessary and proper to carry the pur­poses of this Constitution into full effect, either absolutely at their discretion, or at least in cases where prior laws were deficient for such purposes, if any such deficiency existed.... 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....

The Judicial power is of a peculiar kind. It is indeed commensurate with the ordinary Legislative and Executive powers of the general government, and the Power which concerns treaties. But it also goes further. Where certain par­ties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general government, wherein the sepa­rate sovereignties of the States are

blended in one common mass of

supremacy, yet the general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the United States may pass all laws necessary to give such Judicial Authority its proper effect. So far as States under the Constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no far­ther than the necessary execution of such authority requires. The authority extends only to the decision of contro­versies in which a State is a party, and providing laws necessary for that pur­pose. That surely can refer only to such controversies in which a State can be a party; in respect to which, if any ques­tion arises, it can be determined, according to the principles I have sup­ported, in no other manner than by a reference either to pre-existent laws, or laws passed under the Constitution and in conformity to it....

If therefore, no new remedy be pro­vided (as plainly is the case), and conse­quently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others, then it is incum­bent upon us to enquire, whether previ­ous to the adoption of the Constitution

an action of the nature like this before the Court could have been main­tained against one of the States in the Union upon the principles of the com­mon law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained; upon the construction of

the Constitution, as to the power of

Congress to authorize such a one. Now I presume it will not be denied, that in every State in the Union, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissi­ble in respect to claims against the State, were those which in England apply to claims against the crown[.]...

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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 authorise 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....

**BLAIR, J.**

... The Constitution of the United States ... is obligatory upon every member of the Union; for, no State could have become a member, but by an adoption of it by the people of that State. What then do we find there requiring the sub­mission of individual States to the judi­cial authority of the United States? This is expressly extended, among other things, to controversies between a State and citizens of another State. Is then the case before us one of that description? Undoubtedly it is[.]... After describing, generally, the judicial powers of the

United States, the Constitution goes on to speak of it distributively, and gives to the Supreme Court original jurisdiction, among other instances, in the case where a State shall be a party; but is not a State a party as well in the condition of a Defendant as in that of a Plaintiff? And is the whole force of that expres­sion satisfied by confining its meaning to the case of a Plaintiff-State? It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and, conse­quently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where a State is a party. Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that Congress has not pro­vided any form of execution, or pointed out any mode of making the judgment against a State effectual[.]...

**WILSON, J.**

... The question to be determined is, whether this State ... 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 "do the people of the United States form a Nation?"...

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....

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Let a State be considered as subordi­nate to the People: But let every thing else be subordinate to the State. The lat­ter part of this position is equally neces­sary with the former. For in the practice, and even at length, in the science of pol­itics there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the State has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed prece­dence of the State; and to this perver­sion in the second degree, many of the volumes of confusion concerning sover­eignty owe their existence....

Is the foregoing description of a State a true description? It will not be ques­tioned but it is. Is there any part of this description, which intimates, in the remotest manner, that a State, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended that there is. If jus­tice is not done; if engagements are not fulfilled; is it upon general principles of right, 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.... 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....

I have now fixed, in the scale of things, the grade of a State; and have described its composure[.]... I find nothing, which tends to evince an exemption of the State of Georgia, from the jurisdiction of the Court. I find everything to have a contrary ten­dency....

[Ojur 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 thirteen 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 or Judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to ensure domestic tranquillity, to pro­vide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present Constitution. By that Constitution Legislative power is vested, Executive power is vested, Judicial power is vested....

Whoever considers, in a combined and comprehensive view, the general texture of the Constitution, will 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. Is it congruous, 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? Would not such claims, crowned with success, be repugnant to our very existence as a nation? When so many trains of deduc­tion, coming from different quarters, converge and unite, at last, in the same point; we may safely conclude, as the legitimate result of this Constitution, that the State of Georgia is amenable to the jurisdiction of this Court....

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**CUSHING, J.**

The ... question in this case is, whether a State can, by the Federal Constitution, be sued by an individual citizen of another State?

The point turns ... upon the Constitution established by the people of the United States; and particularly upon the extent of powers given to the Federal Judicial in the second section of the third article of the Constitution.... The judicial power ... is expressly extended to "controversies between a State and citizens of another State." When a citizen makes a demand against a state, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citi­zen. The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to subject a State to be a Defendant, because it would effect the sovereignty of States. If that be the case,

what shall we do with the immediate

preceding clause; "controversies between two or more States, where a State must of necessity be Defendant." If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended?

Again what are we to do with the last clause of the section of judicial powers, viz. "Controversies between a state, or the citizens thereof, and foreign states or citizens?" Here again, States must be suable or liable to be made Defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the United States and a foreign State, as the clause expresses, one of them must be Defendant. And then, what becomes of the sovereignty of States as far as suing affects it? But although the words appear reciprocally to affect the State here and a foreign State, and put them on the same footing as far as may be, yet ingenuity may say, that the State here may sue, but cannot be sued; but that the foreign State may be sued but cannot sue. We may touch foreign sovereignties but not our own. But I conceive the reason of the thing, as well as the words of the Constitution, tend to show that the Federal Judicial power extends to a suit brought by a foreign State against any one of the United States.... States at home and their citizens, and foreign States and their citizens, are put together without distinction upon the same footing, as far as may be, as to controversies between them. So also, with respect to contro­versies between a State and citizens of another State (at home) comparing all

the clauses together, the remedy is reci­procal; the claim to justice equal. As controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such contro­versies, and preserve peace and friend­ship. Further; if a State is entitled to Justice in the Federal Court, against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individ­uals, or else vain is Government.

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But still it may be insisted, that this will reduce States to mere corporations, and take away all sovereignty. As to cor­porations, all States whatever are corpo­rations or bodies politic. The only ques­tion is, what are their powers? As to individual States and the United States, the Constitution arks the boundary of powers. Whatever power is deposited with the Union by the people for their own necessary security, is so far a cur­tailing of the power and prerogatives of States. This is, as it were, a self-evident proposition; at least it cannot be con­tested....

Upon the whole, I am of opinion, that the Constitution warrants a suit against a State, by an individual citizen of another State.

A second question made in the case was, whether the particular action of assumpsit could lie against a State? I think assumpsit will lie, if any suit; pro­vided a State is capable of contracting.

JAY, C.J.

... The question now before us renders it necessary to pay particular attention to that part of the second section [of Article III of the Constitution], 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....

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 any part of the Constitution....

I am clearly of opinion, that a State is suable by citizens of another State; but lest 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 pre-

pared 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....

*JUDICIAL POWERS* **91**

It is ordered, that the Plaintiff in this cause do file his declaration on or before the first day of March next.

*QUESTIONS*

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....

1. Read Article III, section 2, of the Constitution. Does it clearly give the Supreme Court jurisdiction over the states? What language is dispos-itive? Compare the language of Article III with the language in the Preamble to the Constitution. Does the Preamble help to resolve the question? Political scientist C. Herman Pritchett wrote of the *Chisholm* decision:

[l]n *Chisholm,* the Supreme Court improperly and imprudently inter­preted [the Constitution] as permitting a state to be made a defen­dant in a suit brought by citizens of another state. Georgia then refused to permit the decree to be enforced, and widespread protests against the Court's action resulted in its prompt reversal by adoption of the Eleventh Amendment. Later the Court [in *Hans a. Louisiana,* 134 U.S. 1 (1890)] itself admitted that the *Chisholm* deci­sion was wrong. *(The American Constitution* [New York, NY: McGraw-Hill, 1959], p. 122)

Does the language of Article III support Pritchett's view that

*Chisholm* was "improperly and imprudently" decided? Do "improper and imprudent" decisions undermine the authority of judicial review?

1. Supreme Court historian Charles Warren reported that the *Chisholm* decision "fell upon the country with a profound shock. Both the Bar

and the public in general appeared entirely unprepared for the doc­trine upheld by the Court; and their surprise was warranted, when they recalled the fact that the vesting of any such jurisdiction over sovereign States had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption" *(The Supreme Court in United States History,* 2 vols. [Boston, MA: Little Brown, 1926], I: 96). Would the

country find the *Chisholm* result shocking today? If not, what has changed regarding beliefs about state versus national sovereignty?

1. Counsel for Chisholm observed during oral argument that if a state resisted the exercise of the Supreme Court's jurisdiction over it, it

would fall to the executive to solve the problem that would result. Counsel observed,

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I will not believe that in the wide and gloomy theatre, over which his [the executive's] eye should roll, he might perchance catch a distant glimpse of the federal arm uplifted. Scenes like these are too full of horror, not to agitate, not to rack, the imagination. But at last we must settle on this result: There are many duties, precisely defined, which the states must perform. Let the remedy which is to be administered, if these should be disobeyed, be the remedy on the occasion, which we contemplate. The argument requires no more to be said; it surely does not require us to dwell on such painful possibilities.

In modern terms, what was Chisholm's counsel saying? Does his argument presuppose that the majority of states would be willing or unwilling to submit to the Court's jurisdiction?

***COMMENTS***

1. At the time *Chisholm* was decided, the Court followed the British tra­dition of issuing its opinions *seriatim;* that is, each justice stated his views in a series of separate opinions, with no single opinion repre­senting the whole Court. Chief Justice John Marshall ended the prac­tice of *seriatim* opinion writing. He strove to have the Court speak with one voice, merely one of his efforts to increase the authority and stature of the national judicial branch. Thomas Jefferson was a vehe­ment opponent of ending the practice of *seriatim* opinion writing.
2. The negative political response to the Court's decision in *Chisholm* was intense. For example, the Georgia House of Representatives passed a bill in 1793 stating that "any Federal Marshall, or any other person," seeking to enforce *Chisholm v. Georgia* was "guilty of a felony, and shall suffer death, without benefit of clergy, by being hanged." At the next session of Congress after the *Chisholm* decision was announced a constitutional amendment was proposed to respond to it. The Eleventh Amendment was quickly approved by both the House and Senate. As ratified in February 1795, it provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Chief Justice Marshall, the staunch advocate of both a strong national government and a powerful federal judiciary, was the first to construe the Eleventh Amendment. See *Cohens v. Virginia,* 6 Wheaton 264 (1821), excerpted on pp. 103-112.

1. Supreme Court historian Maeva Marcus reports that Alexander Chisholm did not actively pursue the case after 1794 because the Georgia legislature settled the Farquhar claim. As Marcus observes, the settlement was advisable because "even if the Supreme Court awarded damages in *Chisholm,* Georgia might never comply with the ruling, so it was better to take what he could get from the legislature" *(The Documentary History of the Supreme Court of the United States, 1789-1800,* vol. 5 [New York, NY: Columbia University Press, 1994], p. 135-136).

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1. After delivering the *Chisholm* decision, the Court issued no further opinions for a year, because yellow fever was raging in Philadelphia, where the Court met at that time.

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|  | ***JUDICIAL REVIEW OF STATE ACTIONS*** |
| **Martin v. Hunter's Lessee 1 Wheaton 304 (1816)** |

***SETTING***

In *Marbury v. Madison,* John Marshall asserted the Supreme Court's power to nullify acts of Congress deemed to conflict with the Constitution. It was not clear from *Marbury,* however, whether the doctrine of judicial review included the power to rule on the constitutionality of state actions or to review the decisions of state courts. Section 25 of the Judiciary Act of 1789, which appeared to answer that question affirmatively and uphold the principle of federal supremacy, was not an issue in *Marbury.*

Section 25 authorized appeals to the Supreme Court of the United States from the highest state court under three circumstances: (1) when a state court had declared unconstitutional a federal law or treaty; (2) when a state court had upheld a state act that had been challenged as conflicting with the Constitution, treaties, or laws of the United States; or (3) when a state court had ruled against a right or privilege claimed under the federal Constitution or federal law. The character of jurisdiction conferred by Section 25 was at the center of the controversy in *Martin v. Hunter's Lessee,* a property case that also put the issue of states' rights versus federal judicial power high on the Court's agenda.

The case arose from the estate of Thomas Lord Fairfax, a British loyalist who fled to England during the Revolution. He owned some 300,000 acres of

valuable timber and tobacco land on the Potomac River in Shenandoah County located in the Northern Neck of Virginia. Fairfax died in England in December 1781. By will, he bequeathed his prime American real estate to his nephew, Denny Martin, a British citizen. Martin was an enemy alien during the Revolutionary War. The State of Virginia contested Martin's inheritance, claim-

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ing that, under state law, aliens could not inherit property. Furthermore, Virginia had passed a series of laws confiscating the lands of British aliens

during the Revolutionary War. It claimed that in 1777 Lord Fairfax's property

had been confiscated by the state and that in 1789 it had sold a 788-acre tract of the property to David Hunter.

In 1791, David Hunter filed an action against Denny Martin in a district court of Virginia to eject Martin from the property. The trial court held for Martin in 1794. Further proceedings were postponed for sixteen years, while John Marshall, as a member of the Virginia legislature, negotiated a compro­mise between the state and the Fairfax heirs. That compromise failed to resolve the controversy between David Hunter and Denny Martin, however. In 1810, the Virginia Supreme Court of Appeals heard the case and reversed the

trial court, giving judgment for Hunter. By the time the Virginia Supreme Court of Appeals ruled, Denny Martin had died. Philip Martin, his heir, removed the case to the Supreme Court of the United States.

In 1813, in *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603, the Supreme Court reversed the Virginia Supreme Court of Appeals. It ruled that the Treaty

of Paris of 1783 and Jay's Treaty of 1795, affirming the rights of aliens to own land in the United States, overrode Virginia law. The Supreme Court remanded the case to the Virginia Supreme Court of Appeals with the instructions: "You are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, and agreeably to said judgment...."

On December 16, 1815, a unanimous Virginia Supreme Court of Appeals refused to recognize those instructions. It held that

the appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the Constitution of the United States; that so much of the Twenty-fifth Section of the Act [Judiciary Act of 1789] ... to establish the Judicial Courts of the United States as extends the appellate jurisdiction of the Supreme Court to this Court, is not

in pursuance of the Constitution of the United States ... and that obedience to [the Supreme Court's] mandate be declined by this court.

The Virginia court insisted that, when determining the validity of Virginia's laws, its interpretation could not be reviewed by the Supreme Court of the United States because the states were coequal sovereigns with the federal

government.

The Virginia Court's refusal to comply with the Supreme Court's man­date resulted in a second writ of error, which brought the controversy back to

the Supreme Court.

***HIGHLIGHTS OF SUPREME COURT ARGUMENTS* BRIEF FOR MARTIN**

*JUDICIAL POWERS* 95

* Ratification of the Constitution should have ended the debate about whether federal judicial authority extends to a review of state court decision.
* This government is no longer a confederacy. In its legislative, execu­tive, and judicial authorities, it is a national government. The national govern­ment pervades their territory and acts upon all their citizens.
* Under the Constitution, the federal judiciary has exclusive authority to interpret treaties. Since state legislatures cannot make treaties, neither can state judiciaries expound upon them.
* The words "shall extend" in Article III, Section 2, describing the judicial power of the national government, express an imperative mandate. The power to review decisions of state courts on questions of federal law is inherent in the Supreme Court's appellate jurisdiction, because state courts are bound by the Constitution to adjudicate cases under the supreme law of the land.

**BRIEF FOR HUNTER**

* Section 2 of the Judiciary Act does not apply in this case because the original cause is not before the Supreme Court. The state court of appeals has done nothing, so there can be no error in its proceedings.
* Recognizing federal jurisdiction in this case would violate the genius, spirit, and tenor of the Constitution. The whole scheme of the Constitution aims at acting on citizens of the United States at large, not on state authorities.
* State courts are bound by treaties as a part of the supreme law of the land, and must construe them in order to obey them.
* The Constitution does not give the Supreme Court appellate jurisdic­tion. Such jurisdiction is neither expressed nor implied.
* Attempting to establish appellate jurisdiction over state court actions will begin a conflict between national and state authorities that may ultimately involve both in one common ruin. The taper of judicial discord may become the torch of civil war.

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| ***SUPREME COURT DECISION: 6-0***  (Marshall, C.J., did not participate.) **STORY, J.**  ... The questions involved in this judg­ment are of great importance and deli­cacy. Perhaps it is not too much to affirm, that, upon their right decision, rest some of the most solid principles | | which have hitherto been supposed to sustain and protect the constitution itself....  The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the |
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constitution declares, by "the people of the United States." There can be no doubt that it was competent to the peo­ple to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme author­ity. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state govern­ments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to dele­gate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a sur­render of powers already existing in state institutions, for the powers of the states depend upon their own constitu­tions; and the people of every state had the right to modify and restrain them, according to their own views of the pol­icy or principle. On the other hand, it is perfectly clear that the sovereign pow­ers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

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These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been posi­tively recognised by one of the articles in amendment of the constitution, which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The government, then, of

the United States, can claim no powers which are not granted to it by the con­stitution, and the powers actually granted, must be such as are expressly given, or given by necessary implica­tion. On the other hand, this instrument, like every other grant, is to have a rea­sonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The constitution unavoidably deals in general language. It did not suit the pur­poses of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execu­tion. **It** was foreseen that this would be a perilous and difficult, if not an impracti­cable, task. The instrument was not intended to provide merely for the exi­gencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legiti­mate objects, and to mould and model the exercise of its powers, as its own

wisdom, and the public interests, should require.

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With these principles in view, princi­ples in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the con­stitution, so far as regards the great points in controversy.

The third article of the constitution is that which must principally attract our attention. The 1st. section declares, "the judicial power of the United States shall be vested in one supreme court, and in such other inferior courts as the con­gress may, from time to time, ordain and establish." The 2d section declares, that "the judicial power shall extend to all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime juris­diction; to controversies to which the United States shall be a party; to contro­versies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under the grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects." It then proceeds to declare, 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. In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

Such is the language of the article cre­ating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was, in many respects, national, and in all, supreme. It is a part of the very same instrument which was to act not merely upon individuals, but upon states; and to deprive them altogether of the exer­cise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the leg­islature. Its obligatory force is so imper­ative, that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested (not may be vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish.... The judi­cial power must, therefore, be vested in some court, by Congress; and to sup­pose that it was not an obligation bind­ing on them, but might, at their plea­sure, be omitted or declined, is to suppose that, under the sanction of the constitution, they might defeat the con­stitution itself; a construction which would lead to such a result cannot be sound....

If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judi­cial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one

class of cases enumerated in the consti­tution, and thereby defeat the jurisdic­tion as to all; for the constitution has not singled out any class on which con­gress are bound to act in preference to others....

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It being, then, established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the constitution itself, The judicial power shall extend to all the cases enumerated in the constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other....

[I]t is manifest that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of Congress.... Congress, throughout the judicial act [of 1789], and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts....

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the constitution to the supreme court in all cases where it has not original juris­diction; subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in

the constitution, which is not exclu­sively to be decided by way of original jurisdiction. But the exercise of appel­late jurisdiction is far from being limited by the terms of the constitution to the supreme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is dele­gated by the constitution in the most general terms, and may, therefore, be exercised by Congress under every vari­ety of form, of appellate or original juris­diction. And as there is nothing in the constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost lati­tude of which, in its own nature, it is susceptible.

As, then, by the terms of the constitu­tion, the appellate jurisdiction is not lim­ited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends....

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the juris-

diction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals.... If some of these cases might be entertained by state tribunals, and no appellate juris­diction as to them should exist, then the appellate power would not extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without con­trol, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitu­tion. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus foederis* [the case of a treaty] should arise directly, but when it should arise, incidentally, in cases pending in state courts. This construc­tion would abridge the jurisdiction of such court far more than has been ever contemplated in any act of Congress.

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On the other hand, if, as has been contended, a discretion be vested in congress to establish, or not to estab­lish, inferior courts at their own plea­sure, and congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances it must be held that the appellate power would extend to state courts; for the constitution is peremptory that it shall extend to cer­tain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradic­tion, that a discretionary power vested in congress, and which they might right­fully omit to exercise, would defeat the

absolute injunctions of the constitution in relation to the whole appellate power.

But it is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this constitution, and the laws of the United States which shall be made in pur­suance thereof, and all treaties made, or which shall be made, under the author­ity of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstand­ing." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their pri­vate, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—"the supreme law of the land."...

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would inciden­tally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully

and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tri­bunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

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It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the con­stitution. That the latter was never designed to act upon state sovereign­ties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts....

[T]he constitution ... is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article con­tains a long list of disabilities and prohi­bitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohib­ited to be exercised, it cannot be cor­rectly asserted that the constitution does not act upon the states. The lan­guage of the constitution is also impera­tive upon the states as to the perfor­mance of many duties.... When, therefore, the states are stripped of some of the highest attributes of sover­eignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to

support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institu­tions. The courts of the United States can, without question, revise the pro­ceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal valid­ity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not inde­pendent; they are expressly bound to obedience by the letter of the constitu­tion; and if they should unintentionally transcend their authority, or miscon­strue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordi­nate departments of state sover­eignty....

On the whole, the court are of opin­ion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdic­tion in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution....

The next question which has been argued, is, whether the case at bar be within the purview of the 25th section of the judiciary act [of 1789], so that this court may rightfully sustain the present writ of error....

That the present writ of error is

founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States, is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties is equally true; for if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this court utterly void. The decision was, there­fore, equivalent to a perpetual stay of proceedings upon the mandate, and a perpetual denial of all the rights acquired under it. The case, then, falls directly within the terms of the act....

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any process by which this court can revise its own judgments....

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

JOHNSON, J.

[T]his question ... presents an instance of collision between the judi­cial powers of the union, and one of the greatest states in the union, on a point the most delicate and difficult to be adjusted....

I must claim the privilege of express­ing my regret, that the opposition of the high and truly respected tribunal of that state had not been marked with a little more moderation. The only point neces­sary to be decided in the case then before them was, "whether they were bound to obey the mandate emanating from this court?" But in the judgment entered on their minutes, they have affirmed that the case was, in this court, *coram non judice* [in the presence of one not authorized to judge], or, in other words, that this court had not jurisdic­tion over it.

This is assuming a truly alarming lati­tude of judicial power. Where is it to end?...

[This] collision has been, on our part, wholly unsolicited.... Had [the Virginia Supreme Court of Appeals] ... refused to grant the writ in the first instance, or had the question of jurisdiction, or on the mode of exercising jurisdiction, been made here originally, we should have been put on our guard, and might have so modelled the process of the

But it is contended, that the former judgment of this court was rendered upon a case not within the purview of this section of the judicial act, and that as it was pronounced by an incompe­tent jurisdiction, it was utterly void, and cannot be a sufficient foundation to sus­tain any subsequent proceedings. To this argument several answers may be given. In the first place, it is not admit­ted that, upon this writ of error, the for­mer record is before us. The error now assigned is not in the former proceed­ings, but in the judgment rendered upon the mandate issued after the former judgment. The question now litigated is not upon the construction of a treaty, but upon the constitutionality of a statute of the United States, which is clearly within our jurisdiction. In the next place, in ordinary cases a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to per­ceive how such a proceeding could be sustained upon principle. A final judg­ment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided

court as to strip it of the offensive form of a mandate. In this case it might have been brought down to what probably the 25th section of the judiciary act meant it should be, to wit, an alternative judgment, either that the state court may finally proceed, at its option, to carry into effect the judgment of this court, or, if it declined doing so, that then this court would proceed itself to execute it. The language, sense, and operation of the 25th section on this subject, merit particular attention.... [I]n cases brought up from the state courts; the framers of that law plainly foresaw that the state courts might

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refuse; and not being willing to leave ground for the implication, that compul­sory process must be resorted to, because no specific provision was made, they have provided the means, by authorizing this court, in case of rever­sal of the state decision, to execute its own judgment.... It is true, that the words of this section are, that this court may, in their discretion, proceed to exe­cute its own judgment. But these words were very properly put in, that it might not be made imperative upon this court to proceed indiscriminately in this way; as it could only be necessary in case of the refusal of the state courts[.]...

*QUESTIONS*

1. The political significance of the *Martin* decision may be understood better by considering the consequences of an opposite conclusion: What if the Supreme Court could *not* review state court decisions that construed provisions of the Constitution of the United States? Justice Story contended that the exercise of this right of appellate review was not a "dangerous act of sovereign power." Clearly, Spencer Roane, Chief Judge of the Virginia Supreme Court of Appeals did not agree. What theories of state sovereignty and national-state relations informed Story's and Roane's positions?
2. Note that the Supreme Court sent its order directly to the Virginia trial court, the District Court of Shenandoah County, in Winchester, thereby avoiding further conflict with the Virginia Court of Appeals. It is believed that the trial court enforced the ruling favoring Martin that the Supreme Court had affirmed on appeal (Sheldon Goldman, *Constitutional Law: Cases and Essays,* 2nd ed. [New York, NY: Harper & Row, 1991], p. 166). If the trial court had refused to enforce the Supreme Court's ruling, what recourse would have been available to the Supreme Court?
3. Justice Oliver Wendell Holmes Jr. once observed: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States" *(Collected Legal Papers* [New York, NY: Harcourt Brace, 1920], p. 295). Does this mean that the Supreme Court's decision in *Martin* is more

important than its decision in *Marbury?* Is not *Martin* more constitution­ally defensible—textually, structurally, and logically—than *Marbury?* If so, why was *Martin* so much more controversial than *Marbury?*

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1. *Martin v. Hunter's Lessee* was written by a Republican justice, Joseph Story. John Marshall formally recused himself because he had been involved in both the abortive attempt to resolve this dispute out of court and because he and his brother, James, had contracted to pur­chase a large portion of the contested land from Fairfax's heirs. Nevertheless, Marshall worked actively behind the scenes to advance Martin's appeal and to influence Justice Story's opinion. Justice Story spoke for a majority that included four other Jeffersonian Republican justices. Is it not curious that Jeffersonian Republicans would vote counter to states' rights?
2. Analyzing the doctrines, propositions, and arguments constituting the *Martin* decision, the late constitutional scholar Robert G. McClosky wrote: "This opinion contains, in more or less explicit statement, practically all the major items in the bag of tricks the Marshall Court was to use in future years against the minions of dis­union" *(The American Supreme Court,* 2nd rev. ed. [Chicago, IL: University of Chicago Press, 1994], p. 40). Identify the items in the Marshall Court's "bag of tricks."

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|  | ***JUDICIAL REVIEW OF STATE ACTIONS*** |
| **Cohens v. Virginia**  **6 Wheaton 264 (1821)** |

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Between 1819 and 1823, Thomas Jefferson issued repeated warnings against what he called the "consolidating tendency of the Court and Congress." In 1820 he wrote, "The Judiciary of the United States is the subtle corps of sap­pers and miners constantly working underground to undermine the founda­tions of our confederated fabric. They are construing our Constitution from a coordination of a general and special government to a general and supreme one alone." In 1821 he added, "The Legislative and Executive branches may sometimes err, but elections and dependence will bring them to rights. The Judiciary branch is the instrument which, working like gravity, without intermission, is to press us at last into one consolidated mass." Whether the Supreme Court would continue to "undermine" Jefferson's view

that the Constitution retained a confederate form of government became an issue in a case that reached the Supreme Court in 1821.

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On May 3, 1802, Congress, pursuant to the authority granted to it in Article I, section 17, of the Constitution, enacted a law organizing the District of Columbia as a corporate body politic, and authorizing it to conduct lotter­ies for the purpose of raising money to finance civic improvements.

On January 1, 1820, the State of Virginia enacted a law making it a crime to buy or sell lottery tickets other than those authorized by the state. Six months later, on information provided by William H. Jennings, brothers and professional lottery agents P. 1 and J. M. Cohen were indicted in the Norfolk Borough Court for selling District of Columbia lottery tickets to Jennings at their office in Maxwell's wharf, contrary to the Virginia law. The Cohens defended on the grounds that the federal law authorizing the D.C. lottery made their action legal and that the Virginia law did not apply to the sale of D.C. lottery tickets. Their defense was rejected by the Quarterly Session Court for the Borough of Norfolk, and the Cohens were convicted and fined $100. They petitioned for a writ of error to the Supreme Court of the United States under Section 25 of the Judiciary Act of 1789. The State of Virginia moved to dismiss the writ for want of jurisdiction.

*HIGHLIGHTS OF SUPREME COURT ARGUMENTS*

BRIEF FOR THE COHENS

* This Court has already determined in *Martin v. Hunter's Lessee* that it may exercise jurisdiction in any appellate form.
* The District of Columbia is a creature of the Constitution and acts of Congress relative to it must be determined by it and must be laws of the United States.
* Since the adoption of the Constitution there is no such thing as a sov­ereign state, independent of the union. The people are the sole sovereignty of this country.
* No one objects to a state enforcing its own penal laws; all that is claimed is that in executing them, the state should not violate the paramount laws of the United States.

BRIEF FOR VIRGINIA

* The Supreme Court lacks jurisdiction over this appeal because this is not a case arising under the Constitution, as witnessed by the plain language of Article III, section 2.
* The legislation authorizing the District of Columbia to conduct lotteries extends only to the boundaries of the District; it is not part of the laws of the United States and consequently is not a part of the supreme law of the land.
* Consistent with the rule in *Marbury v. Madison,* when a state is a party to litigation, the Supreme Court's jurisdiction must be original, not appellate.

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* This is a criminal case, in which the laws of a sovereign and indepen­dent state have been violated. Because the state is one of the parties to a crimi­nal prosecution, it is not amenable to any judicial power without its consent.
* Since enactment of the Eleventh Amendment, immediately after this Court's decision in *Chisholm v. Georgia,* it is clear that this Court cannot take jurisdiction over a case in favor of a citizen of another or a foreign state. It fol­lows logically that this Court can never take jurisdiction in favor of a citizen against his own state.

***SUPREME COURT DECISION: 5-0* MARSHALL, C.J.**

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

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?...

The counsel for the defendant in error have ... laid down the general proposition, that a sovereign indepen­dent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not req­uisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sover­eignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surren­der is made. If, upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impar­tiality it confides.

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.

If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declara­tion, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; any thing in the consti­tution or laws of any State to the con­trary notwithstanding."..,

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express arid important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union, on the great sub­jects of war, peace, and commerce, and on many others, are in themselves limi­tations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is con­ferred on Congress than a conservative power to maintain the principles estab­lished in the constitution. The mainte­nance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of juris­diction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the State governments to that constitu­tion; the great purpose for which juris­diction over all cases arising under the constitution and laws of the United States, is confided to the judicial depart­ment; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the

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United States, is cognizable in the Courts of the Union, whoever may be the parties to that case....

After bestowing on this subject the most attentive consideration, the Court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

It has been also contended, that this jurisdiction, if given, is original, and can­not be exercised in the appellate form.

The words of the constitution are, "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. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction."

This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this Court is original; if the case arise under a consti­tution or a law, the jurisdiction is appel­late. But a case to which a State is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then,

becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to rec­oncile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

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In one description of cases, the juris­diction of the Court is founded entirely on the character of the parties; and the nature of the controversy is not contem­plated by the constitution. The charac­ter of the parties is every thing, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contem­plated by the constitution. In these, the nature of the case is every thing, the character of the parties nothing. When, then, the constitution declares the juris­diction, in cases where a State shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate—the conclusion seems irresistible, that its framers designed to include in the first class those cases in which jurisdiction is given, because a State is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law....

The constitution declares, that in cases where a State is a party, the Supreme Court shall have original juris­diction; but does not say that its appel­late jurisdiction shall not be exercised in cases where, from their nature, appel­late jurisdiction is given, whether a State be or be not a party. It may be con­ceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate

there; but where, from its nature, it can­not originate in that Court, these words

ought not to be so construed as to

require it. There are many cases in which it would be found extremely diffi-

cult, and subversive of the spirit of the constitution, to maintain the construc­tion, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this Court....

It is most true that this Court will not take jurisdiction if it should not: but it is

equally true, that it must take jurisdic-

tion if it should. The judiciary cannot, as the legislature may, avoid a measure

because it approaches the confines of

the constitution. We cannot pass it by because it is doubtful. With whatever

doubts, with whatever difficulties, a

case may be attended, we must decide it, if it be brought before us. We have no

more right to decline the exercise of

jurisdiction which is given, than to usurp that which is not given. The one

or the other would be treason to the

constitution. Questions may occur which we would gladly avoid; but we

cannot avoid them. All we can do is, to

exercise our best judgment, and consci­entiously to perform our duty. In doing

this, on the present occasion, we find

this tribunal invested with appellate jurisdiction in all cases arising under

the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one....

We think, then, that, as the constitu­tion originally stood, the appellate juris­diction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to a consideration of the 11th amendment....

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was pro­posed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amend­ment. It does not comprehend contro­versies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its cred­itors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the Court in those cases, because it might be essential to the preservation of peace. The amend­ment, therefore, extended to suits com­menced or prosecuted by individuals, but not to those brought by States....

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A writ of error is defined to be, a com­mission by which the judges of one Court are authorized to examine a

record upon which a judgment was given in another Court, and, on such examination, to affirm or reverse the same according to law.... A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of any thing which is withheld from him, not when its operation is entirely defensive....

Under the judiciary act [of 1789], the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re­examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an indi­vidual, and the Court, rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole pur­pose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit com­menced or prosecuted against the State whose judgment is so far re-examined....

It is, then, the opinion of the Court, that the defendant who removes a judg­ment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the constitu­tion or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the posses­sion of a thing which he demands....

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 hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a con­trary construction to words which seem to require it; and on the incompatibility of the application of the appellate juris­diction to the judgments of State Courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

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Let this unreasonableness, this total incompatibility, be examined.

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. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individu­als or governments within the American territory. 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.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legisla­ture? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the consti­tution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such uncon­stitutional law? Is it so very unreason­able as to furnish a justification for con­trolling the words of the constitution?

We think it is not. 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.

The propriety of entrusting the con­struction of the constitution, and laws made in pursuance thereof, to the judi­ciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this politi­cal axiom, that the federal Courts should either possess exclusive jurisdic­tion in such cases, or a power to revise the judgment rendered in them, by the State tribunals....

Let the nature and objects of our Union be considered; let the great fun­damental principles, on which the fabric stands, be examined; and we think the result must be, that there is nothing so

extravagantly absurd in giving to the Court of the nation the power of revis­ing the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question then must depend on the words themselves: and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter....*

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We come now to the third objection ... that the judiciary act [of 1789] does not give jurisdiction in the case....

If the 25th section of the judiciary act be inspected, it will at once be per­ceived that it comprehends expressly the case under consideration....

In the enumeration of the powers of Congress, which is made in the 8th sec­tion of the first article [of the Constitution], we find that of exercising exclusive legislation over such District as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union: for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the District, they necessarily preserve the

character of the legislature of the Union; for, it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The 2d clause of the 6th article declares, that "This constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land."

The clause which gives exclusive juris­diction is, unquestionably, a part of the constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pur­suance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exer­cised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them....

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.

*COMMENTS*

1. Two days after handing down the *Cohens* opinion, and after hearing arguments on the merits in the case, Chief Justice Marshall held that the May 3, 1802, act of Congress authorized the sale of lottery tickets only within the District of Columbia's boundaries. Consequently, the measure was local in nature and did not interfere with the penal laws of Virginia making it a crime to sell lottery tickets in that state.
2. Virginia officials perceived the state's stake in this case to be sub-

stantial. Counsel for Virginia argued, among other things, that if the Virginia law prohibiting the purchase of non-Virginia lottery tickets was stricken down, Congress would be able to devise all sorts of methods for impairing the revenue raising capacities of the states, as well as depriving the states of their authority to enact legislation pro­tecting the morals of their people. Many Virginia officials and news­papers were outraged by Chief Justice Marshall's assertion in *Cohens* of federal judicial authority to review the decision of a state court. An anonymous doggerel that circulated in Virginia conveys the pre­vailing outrage against *Cohens:*

*Jammu POWERS 111*

Old Johnny Marshall what's got in ye

To side with Cohens against Virginny.

To call in Court his "Old Dominion."

To insult her with your foul opinion!

I'll tell you that it will not do

To call old Spencer [Roane] in review.

He knows the law as well as you.

And Once for all, it will not do.

Alas! Alas! that you should be

So much against State Sovereignty!

You've thrown the whole state in a terror,

By this infernal "Writ of Error."

(Cited in Leonard W. Levy, *"Cohens v. Virginia," in Encyclopedia of the American Constitution,* 4 vols., eds. Leonard W. Levy, Kenneth L. Karst and Dennis J. Mahoney [New York, NY: Macmillan], 1:307)

Despite the unpopularity of the *Cohens* decision, because Marshall had ruled that Congress had not intended that District of Columbia lottery tickets be sold outside of the District and the consequent affirmance of the Cohen brothers' convictions, Virginia was left with no Court order to disobey or to resist.

*QUESTIONS*

1. The Cohen brothers invoked Section 25 of the Judiciary Act of 1789 to appeal their state court convictions to the Supreme Court of the

United States. Review the Court's decision in *Marbury v. Madison.* Why were the Cohens able to invoke the Judiciary Act after the

Supreme Court's decision in *Marbury?*

1. In response to the outcry against the Court's decision in *Cohens,* Chief Justice Marshall wrote to Justice Story:

For Mr. Jefferson's opinion as respects this department, it is not dif­ficult to assign the cause. He is among the most ambitious, and I suspect among the most unforgiving of men. His great power is over