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Before the Court: The Future of National
Unity

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Two hundred years ago, in the landmark case of *Cohens v. Virginia* (1821), the future of our Constitution, the aspirations of national unity, and the status and role of the federal judiciary itself, were before the Supreme Court. We have seldom seen in one case the coalescence of so many issues fundamental to the integrity of our constitutional system.

The stakes for America could not have been higher. If the Supreme Court could not exercise appellate authority over state court decisions, then each state would be free to interpret federal legislation and the Constitution as it wished. In theory, there might be as many interpretations of the Constitution as there were states. Patently, national unity would be but a pipe dream.

The Cohen brothers, members of a prominent Baltimore banking family, had been convicted in a Virginia court for violating the state's law prohibiting the sale of lottery tickets. The Cohens appealed to the U.S. Supreme Court, on the assertion that the law authorizing the sale of lottery tickets had been enacted by Congress, which meant that the state law was invalid since it conflicted with a federal law.

Five years earlier, in *Martin v. Hunter's Lessee* (1816), the Court had held, over the objection of the high court of Virginia, that it enjoyed appellate

authority over a state court decision in cases involving civil suits. Despite its loss, the Commonwealth of Virginia clung to claims of state sovereignty and refused to honor the Court's decision in *Hunter's Lessee*. Now, in *Cohens*, Virginia continued to insist that the Supreme Court could not review state court decisions involving criminal law. Virginia, it was plain, was challenging the concept of federal supremacy, clearly stated in Article VI of the Constitution, the principle of national unity, and the status of the Supreme Court as the nation's High Tribunal.

Chief Justice John Marshall, a lifelong Virginian, nonetheless held for the Court that states are not independent sovereignties, but rather members of one great nation—a nation endowed by the Constitution with a government competent to achieve all national objects. “The exercise of the appellate power over those judgments of the state tribunals which may contravene the Constitution or the laws of the United States, is, we believe, essential to the attainment of those objects.”

Marshall's magisterial opinion, one of his finest for its vivid imagery and enduring reminder of our national unity, settled the authority of the nation's High Tribunal to review decisions by state courts in both civil and criminal cases. “The mischievous consequences” of Virginia's argument, Marshall wrote, “would prostrate the government and its laws at the feet of every State in the Union. Each member will possess a veto on the will of the whole.”

The potential of each state to subordinate the federal government, as envisioned by Virginia, prompted a strong response from the Chief Justice. “No government ought to be so defective in its organization, as not to contain the means of securing

the execution of its laws against other dangers than those which occur every day."

With the decision in *Cohens*, the structure of judicial power created by the Marshall Court was completed. Chief Justice Marshall's opinion settled forever the authority of the Supreme Court to hear appeals from state courts when a federal issue was involved, and it restated the supremacy of the Union. It also rounded out the role and scope of judicial power in the development of our nation. The authority of the judicial branch to enforce the Constitution against both the national and state governments became an accepted part of American constitutional law.

In *Marbury v. Madison*, Marshall established the principle of judicial review. In *McCulloch v. Maryland*, Marshall articulated the doctrine of implied powers as an essential tool for congressional governance. In *Cohens v. Virginia*, Marshall confronted the assertion of state sovereignty and the compact theory of the Constitution which purported to support it and drove them both from the field of judicial conversations. He wrote: "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."

Justice Oliver Wendell Holmes, a century after *Cohens v. Virginia* was delivered, noted its significance in the annals of American constitutional law. "I do not think," he declared, "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 declarations as to the laws of the several states."

The landmark nature of *Cohens v. Virginia* lay in the Court's settlement, over Virginia's objection, of the appellate jurisdiction of the Supreme Court. Though defeated in its primary objective, Virginia did prevail

in its prosecution of the Cohen brothers for selling lottery tickets within the state. Indeed, Chief Justice Marshall held that the law authorizing the sale of lottery tickets applied only to the District of Columbia. If it had desired, he emphasized, Congress could have authorized a national lottery, but it did not. Thus, the statute under which the Cohens were convicted was upheld. It may be said, then, that Virginia won the battle, but lost the war.