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The Passive-Aggressive Virtues: Cohens V. Virginia and the Problematic Establishment of Judicial Power.

Mark A. Graber

THE PASSIVE-AGGRESSIVE VIRTUES: *COHENS V. VIRGINIA* AND THE PROBLEMATIC ESTABLISHMENT OF JUDICIAL POWER

*Mark A. Graber**

In his celebrated "Foreword" to the 1961 *Harvard Law Review*, Alexander Bickel coined the expression "passive virtues" to refer to certain jurisdictional doctrines or judicial "techniques" for "withholding ultimate constitutional judgment."[1] Warren Court Justices could dodge dangerous political altercations, Felix Frankfurter's former clerk declared, by making greater use of such devices as denials of certiorari, mootness, ripeness, desuetude, and statutory interpretation when they were confronted with seemingly intractable constitutional controversies. Bickel urged the use of these "passive virtues" for both normative and pragmatic reasons. Federal Justices should hesitate before invalidating the policies preferred by the people's elected representatives, he insisted, because judicial review was "a deviant institution in a democratic society."[2] Moreover, Bickel thought that prudent Justices rationed judicial rulings on constitutional matters in order to protect the Court's scarce political capital. Too many controversial decisions would expose "the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from."[3] This need to preserve judicial power justified certain deviations from otherwise binding canons of legal interpretation. In Bickel's view, Justices could strive for convenient results rather than doctrinal consistency only when they chose to avoid making constitutional decisions. "[T]he techniques and allied devices for staying the Court's hand," he concluded, "cannot themselves be principled in the

* Assistant Professor of Government, University of Maryland. Thanks to Wayne McIntosh, Eric Uslaner and Jim Gimpel for their advice and help.

1. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).
2. Id. at 47.
3. Id. at 75.

sense in which we have a right to expect adjudications on the merits to be principled."[4]

The Marshall Court made substantial use of similar legal techniques, which I describe as the "passive-aggressive" virtues. Federal Justices in the early nineteenth century frequently expounded on the constitutional controversies that divided the new nation, even when such expositions were not strictly relevant to the ultimate outcome of the case they were adjudicating. Contemporaries and future commentators note how Chief Justice John Marshall frequently "went out of his way" to discuss constitutional "issues not necessarily presented" by the fact situation before the Court.[5] Thomas Jefferson, in particular, complained bitterly that the "practice of John Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and censurable."[6] Nevertheless, anticipating Bickel's institutional concerns and recommendations, the Marshall Court frequently manipulated various federal statutes and jurisdictional grants in order to avoid handing down blunt judicial challenges to hostile political forces. Although Marshall penned many bold constitutional assertions, the tribunal he led hardly ever issued bold judicial orders. Strict Jeffersonians, old Republicans, and Jacksonians may have frequently been enraged by the tone of early Supreme Court opinions, but Marshall and his brethren rarely reached decisions that these political leaders could actually disobey.

Marbury v. Madison is the best known and quintessential example of how the Marshall Court used the passive-aggressive virtues to insulate controversial constitutional claims from direct political attack.[7] This paper discusses *Cohens v. Virginia*,[8] an ad-

4. Id. at 51.

5. David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* 67, 102 (U. of Chi. Press, 1985).

6. Jefferson to William Johnson, June 12, 1823. See *A Virginian's 'Amphictyon' Essays* in Gerald Gunther, ed., *John Marshall's Defense of* McCulloch v. Maryland 55 (Stanford U. Press, 1969).

7. The substantive portion of *Marbury* declared that the Jefferson administration was constitutionally obligated to deliver the disputed judicial commission to William Marbury. Marshall's opinion also implicitly condemned the Judiciary Act of 1802, the first important piece of legislation passed by the Jeffersonian majority in Congress. The Justices, however, did not order an unwilling executive to deliver Marbury's commission or declare unconstitutional any Jeffersonian measure. Through a dubious reading of both the Judiciary Act of 1789 and Article III, Section 2 of the Constitution, Marshall ruled that the Supreme Court lacked the necessary jurisdiction to issue the writ of mandamus that Marbury had requested. Significantly, the order in which Marshall resolved the legal issues presented by *Marbury* violates traditional judicial practice. Common law conventions dictate that a court without jurisdiction should simply deny jurisdiction and not express opinions on the merits of the case. Thus, as Jefferson repeatedly pointed out, the

ditional, less appreciated, instance of the passive-aggressive virtues in action. In the face of a sharp challenge from Virginia, the Marshall Court unanimously held that persons convicted of state crimes could appeal that judgment in federal courts. The Justices also ruled that the supremacy clause barred states from interfering in any way with congressional efforts to govern the District of Columbia. Nevertheless, in the spirit of *Marbury*, the Justices upheld a state court decision that fined two Maryland entrepreneurs for selling tickets to a congressionally sanctioned lottery. Although the Court decided every constitutional issue against the Old Dominion, the Justices ruled that the federal law authorizing the lottery did not preempt Virginia's ban on the sale of out-of-state lottery tickets. By adopting a highly implausible reading of the legislation establishing the Grand National Lottery, Marshall's opinion managed to conclude that congress had

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preliminary discussion of Marbury's right to a judicial commission was "obiter dictum," commentary not necessary to the actual resolution of the case. Jefferson to Hay July 2, 1807; Jefferson to Johnson, June 12, 1823, Jefferson to Jarvis August 28, 1820. See Charles Warren, 1 *The Supreme Court in United States History* 244-45, 249-55 (new and revised edition) (Little, Brown, and Company, 1926); Max Lerner, *John Marshall and the Campaign of History*, 39 Colum. L. Rev. 396 (1939); Charles Grove Haines, *Histories of the Supreme Court of the United States Written From the Federalist Point of View*, 4 The Sw. Pol. & Soc. Sci. Q. at 24(1923). For further discussion of Marshall's unusual proceedings in *Marbury*, see, e.g., James M. O'Fallon, *The Case of Benjamin More: A Lost Episode in the Struggle over Repeal of the 1801 Judiciary Act*, 11 Law and History Rev. 43 (1983); Sanford Levinson, *Law as Literature*, 60 Tx. L. Rev. 373, 389 (1982); Lerner, 39 Colum. L. Rev. 396, 408 ("every part of its [*Marbury*'s] reasoning has been repudiated even by conservative commentators and by later Supreme Court decisions"); William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 Duke L.J. 1; Susan Low Bloch and Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 Wisc. L. Rev. 301; Jerry J. Phillips, Marbury v. Madison *and Section 13 of the Judiciary Act*, 60 Tenn. L. Rev. 51 (1992); Currie, *The Constitution in the Supreme Court* at 66-69 (cited in note 5); George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815* at 199-201 (MacMillan, 1981). *Marbury* is not the only instance in which Marshall Court Justices denied jurisdiction, but expressed an opinion on the merits of the case. In 1809, Marshall declared that the Court would not decide *Fletcher v. Peck* because of a procedural defect, but he nevertheless indicated that he believed the Georgia statute at issue to be unconstitutional. C. Peter Magrath, *Yazoo: Law and Politics in the New Republic: The Case of* Fletcher v. Peck, 65-66 (Brown U. Press, 1966). Similarly, in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), Marshall denied jurisdiction while making known publicly his support of the Cherokees on the merits. *Cherokee Nation*, at 15-16. Marshall also encouraged Justices Story and Thompson to issue dissenting opinions that clearly demonstrated that a judicial majority would support the Cherokees in a properly presented case. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500, 516-18 (1969); Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* 30 (Oxford U. Press, 1987); Dwight Wiley Jessup, *Reaction and Accommodation: The United States Supreme Court and Political Conflict 1809-1835* 375-66 (Garland Publishing, 1987); G. Edward White, *The Marshall Court & Cultural Change* (abridged edition) 724-30 (Oxford, 1991).

8. 19 U.S. 264 (1821).

not intended to authorize the sale of lottery tickets outside of the nation's capital.

Following Marshall, commentators have assumed that the last part of *Cohens* is devoted to an uninteresting discussion of the precise statutory powers Congress vested in the Corporation of Washington. Hence, the last eight pages of Marshall's *Cohens* opinion have received no scholarly attention.[9] In fact, the substantive part of the *Cohens* opinion conceals major constitutional issues that were central concerns of the Marshall Court. Virginia's effort to ban out-of-state lotteries was similar, if not identical, to Maryland's effort to tax out-of-state banks. Marshall's contemporaries were well aware of the constitutional connections between *Cohens* and *McCulloch v. Maryland*. Leading lawyers, including Attorney General William Wirt, publicly condemned the Cohens prosecution as inconsistent with the principles of national supremacy declared in the national bank case. By misrepresenting both Virginia and federal law, however, Marshall managed to decide *Cohens* in favor of Virginia without having to explain why Virginia could ban out-of-state lotteries, but Maryland could not tax out-of-state banks.

The Marshall Court's use of the passive-aggressive virtues suggests a new understanding of how and whether political considerations influenced that tribunal. Marshall's manipulation of Virginia and federal law in *Cohens* supports claims that he and his brethren were willing to twist legal authorities to reach predetermined results. As noted below,[10] Marshall could sustain Virginia's ban on the sale of out-of-state lotteries only by ignoring both the form and substance of his *McCulloch* opinion. The results the Marshall Court sought to achieve, however, were not always the policies preferred by the Adams wing of the Federalist party or the Nationalist wing of the Democratic-Republican coalition. In *Cohens* and *Marbury*, the court strained legal texts and precedents to reach judicial rulings that by their very nature could not be disobeyed by hostile political forces. Just as scholars believe that Marshall manipulated the Judiciary Act of 1789

9. "No scholarly attention," in this case, means *no* scholarly attention. A Lexus search found no discussion of whether the *Cohens* Court correctly decided that Virginia had the constitutional power to ban the Grand National Lottery. The lengthy discussions of *Cohens* in White, *The Marshall Court & Cultural Change* at 504-24 (cited in note 7), Albert J. Beveridge, 4 *The Life of John Marshall* 342-57 (Houghton Mifflin, 1919), W. Ray Luce, Cohens v. Virginia *(1821): The Supreme Court and State Rights, A Reevaluation of Influences and Impacts* (Garland Publishing, 1990), and Warren, *The Supreme Court in United States History* at 547-52 (cited in note 7), are also devoted almost exclusively to jurisdictional issues.

10. See footnotes 83-98 and the relevant text.

to avoid ordering Jefferson to hand over William Marbury's judicial commission, so Marshall seems to have deliberately misread federal law in order to avoid overturning Virginia's ban on the sale of out-of-state lottery tickets.

The Marshall Court's decision to sustain the Virginia law at issue in *Cohens* also calls into question basic assumptions about the development of judicial power in the United States. Constitutional historians and theorists blithely assume that the Marshall Court established the power to declare laws unconstitutional in *Marbury* and *Martin v. Hunter's Lessee*.[11] *Cohens*, in conventional analyses, was the decision that marked the end of the process by which judicial review was placed on a firm footing,[12] a "powerful answer," in Albert Beveridge's words, to opponents of federal judicial power.[13] In fact, the *Cohens* opinion bespeaks a tribunal painfully aware that it lacked the political power necessary to declare laws unconstitutional. As used by the Marshall Court in *Cohens* and *Marbury*, the passive-aggressive virtues were the means by which judicial power could be asserted without actually being exercised. Thus, when scholars look at what the Marshall Court did in *Cohens* and other cases instead of what the Justices said, the evidence indicates that judicial review was not well established by 1821. In what sense, after all, can a court be thought to possess the power to declare laws unconstitutional when the Justices consistently distort legal texts to get results that will not have to be enforced?

I. THE POLITICAL BACKGROUND

The contemporary neglect of *Cohens* stems partly from the apparent political insignificance of the case. *Marbury*, *McCulloch*, *Gibbons v. Ogden*, and other Marshall Court decisions played prominent roles in the central partisan and economic struggles of the early nineteenth century. *Cohens*, by comparison, seems to involve little more than two obscure entrepreneurs who were fined $100 for violating a minor state law.[14] Citizens of the early American republic, however, recognized that the Virginia ban on out-of-state lotteries and the Grand National Lot-

11. 14 U.S. 304 (1816).

12. See footnote 109 and the relevant text.

13. Beveridge, *The Life of John Marshall* at 343 (cited in note 9).

14. See Leonard W. Levy, *Marshall Court, 1801-1835*, in Levy, Karst and Mahoney, eds., *Encyclopedia of the American Constitution* 72 (MacMillan Publishing, 1986) ("trivial question"); Benjamin F. Wright, *The Growth of American Constitutional Law* 40 (U. of Chi. Press, 1967); Beveridge, *The Life of John Marshall* at 342 (cited in note 9) ("insignificant").

tery were important governmental policies. The stakes in *Cohens* were the future of Washington D.C. and the scope of congressional power over the new nation's capital. These issues were vigorously debated by the leading politicians and lawyers of the time. Indeed, the lawyers who argued *Cohens*, William Wirt, William Pinkney, Daniel Webster, David Ogden, Philip Barbour and Alexander Smyth, were at least as distinguished as the attorneys who had argued *McCulloch* two years previously.[15]

The persons responsible for framing and ratifying the constitution intended to make Washington D.C. "the vital center of national life."[16] Philip Freneau, an influential journalist of the young republic, hoped that Congress would "erect[ ] a city, which like Rome in her glory, may be called the strength of nations, the delight of the universe, the birth place of sages, and, if not the abode of gods, yet truly the nurse of heroes, statesmen and philosophers.[17] In order to realize this vision, the nation's capital was designed to express basic American political principles. Washington, James Sterling Young notes, "was a planned community. . .; planned for the same larger purpose of securing the institutions of power against the influence of historical fortuities; the product of that same revolutionary urge . . . which had inspired the Constitution of 1787."[18] National lawmakers moved quickly to ensure that Washington D.C. would embody the spirit of the new nation. George Washington devoted much of his presidential energies to the development of the capital city that bore his name.[19] John Adams, in his last annual address, urged Congress to "immediately exercise[ ]" its "powers over the District of Columbia." Repeating verbatim the words in a draft speech written by his Secretary of State, John Marshall, the second president maintained that the District must be considered "as the capital of a great nation advancing with unexampled rapidity in arts in commerce, in wealth and in population."[20]

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15. Wirt, Webster and Pinkney argued both cases.

16. James Sterling Young, *The Washington Community 1800-1828* at 17 (Columbia U. Press, 1966).

17. Kenneth R. Bowling, *The Creation of Washington, D.C.: The Idea and Location of the American Capital* at 4-5 and 246 (George Mason U. Press, 1991) (quoting Freneau).

18. Young, *The Washington Community* at 1-2 (cited in note 16). See Constance McLaughlin Green, *Washington: Village and Capital, 1800-1878* at vii (Princeton U. Press, 1962).

19. See Bowling, *The Creation of Washington, D.C.* at 208-34 (cited in note 17).

20. John Adams, *Fourth Annual Address* in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents 1789-1897* at 59 (Government Printing Office, 1896). See Marshall to John Adams, November 17, 1800. Although some Old Republicans dissented, Congress remained committed to building a worthy capital city throughout the first quarter of the nineteenth century. A House Committee in 1810, for

Unfortunately, the new nation's capital was chronically short of resources of all kinds. As W. Ray Luce notes, "limited population and a small tax base made it necessary to tap non-district resources."[21] One solution Congress authorized in 1792 was a lottery. The first lottery was held in 1793 for "the improvement of the Federal City." Tickets were sold to citizens throughout the United States. Even George Washington bought a chance.[22] In 1812 and again in 1820, Congress delegated to the Corporation of Washington the power to hold lotteries, subject to the approval of the President of the United States, "for effecting any important improvements in the city."[23] Subsequent lotteries, most of which failed miserably, were designed to finance the building of schools, a city hall, a federal penitentiary and a canal to Maryland.[24]

This use of lotteries to fund major public projects was a common political practice in the late eighteenth and early nineteenth centuries. As is frequently the case at present, the colonies and original states found lotteries a less painful device than taxation for extracting necessary revenue from a reluctant citizenry. Lotteries helped American communities finance military defenses during French and Indian War, build and repair public buildings (including the building which housed Congress during the Washington administration), establish schools, hospitals, poorhouses and orphan asylums, organize towns and rebuild cities, raise money, and fund internal improvements.[25] Purveyors of lottery tickets also provided many needed financial services for the cash-starved early republic. "Lottery offices," Luce points out, "were among the most important financial institutions in the nation. Much of the nation's capital accumulation came from lotteries, and most lottery offices performed a variety of financial and banking services."[26]

The good citizens of Virginia proved as susceptible to the blandishments of lotteries as other Americans living in the early

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example, noted that "the founding and erection of so extensive a city as the permanent seat of empire for the United States, must obviously require the aid of vast resources." Green, *Washington: Village and Capital* at 32 (cited in note 18).

21. Luce, Cohens v. Virginia at 77 (cited in note 9). On the debt problems of the nation's capital, see Green, *Washington: Village and Capital* at 40, 90 (cited in note 18).

22. See Ezell, *Fortunes's Merry Wheel: The Lottery in America* 102 (Harv. U. Press, 1960).

23. 3 U.S. Statutes at Large 588 (1820); 2 U.S. Statutes at Large 726 (1812).

24. For a discussion of Washington's sad experience with lotteries, see Ezell, *Fortune's Merry Wheel* at 100-08 (cited in note 22).

25. Id. at 28-160.

26. Luce, Cohens v. Virginia at 1 (cited in note 9).

national period. Lotteries were used to provide funds for the founding of the Virginia colony, educational institutions and civic improvements.[27] John Ezell's study of early American lotteries found that "[i]n both numbers and amounts of grants for internal improvements," Virginia "led the nation."[28] Prominent Virginians encouraged these sweepstakes as a means for raising public and private revenue. George Washington was an active participant in several lotteries; Thomas Jefferson relied on a public lottery to save Monticello; Bushrod Washington, Patrick Henry, George Mason and George Wythe served as lottery directors.[29] By the late 1810s, the Virginia legislature was authorizing three to four lotteries a year.[30]

Still, not all Virginians were enchanted by games of chance. More religious elements opposed lotteries on principle. Other citizens were concerned with shady practices. Suspicion of lotteries heightened in the revolutionary period when the Fairfax interests won substantial prizes in the Fairfax lottery. Determined to prevent future frauds, the Old Dominion in 1769 and in 1779 passed laws that required all state lotteries to have a variety of safeguards to secure prizes and honest dealings.[31] Still, such laws did little to slow down lottery activity in Virginia. More significantly, the Cohen brothers were not convicted for engaging in any fraudulent practice.

Virginians developed more principled objections to lotteries when their community did not get its share of the take. Starting in 1813, the state passed a series of laws requiring lottery agents to pay an ever increasing fee for a license to sell out-of-state lottery tickets.[32] In 1819, Virginia enacted a flat ban on out-of-state lotteries. "The Last of the Republicans" dutifully informed readers of the *Richmond Enquirer* that "the act forbidding the sale of foreign lottery tickets" would "preserve[ ] the morals of our people from the effects of a pernicious gambling." Still, "The Last of the Republicans" and his fellow Virginians were more concerned with "preventing the moneys of our people from going into the

27. See Ezell, *Fortune's Merry Wheel* at 4-9, 37-38, 64, 72, 78, 115-17, 120, 130-31, 154-55 (cited in note 22).

28. Id. at 130.

29. Id. at 78, 115-16, 168-70. When seeking support for the lottery that would ease his debts, Jefferson observed that "between the years 1782 and 1820," he had "observed seventy cases, where permission [to hold a lottery] has been found useful, by the legislature." Jefferson to Madison, February 17, 1826.

30. Luce, Cohens v. Virginia at 15-19 (cited in note 9).

31. Id. at 21-22.

32. Id.

coffers of other states."[33] Luce's study of the *Cohens* case found that the Virginia legislature regarded their ban on out-of-state lotteries "as necessary to stop a cash outflow that paid for other state's internal improvements when similar Virginia projects faced financial difficulties."[34]

Six months after the ban on out-of-state lotteries was enacted, Philip and Mendes Cohen were arrested for selling tickets to the Grand National Lottery in defiance of Virginia's ordinance. A local Virginia Court found the brothers guilty as charged and fined them $100. For reasons that may have been more political than pecuniary, the Cohens immediately asked the United States Supreme Court to void their conviction.[35] The Justices quickly agreed to place that appeal on their docket. Indeed, Marshall and his brethren decided to examine whether Virginia could ban the sale of D.C. lottery tickets before the Virginia court had issued its final ruling in *Cohens*.[36]

The Marshall Court's decision to hear *Cohens* set off an immediate political firestorm. The Virginia legislature declared that federal Justices had "no rightful authority under the Constitution to examine and correct the judgment for which the Commonwealth has been cited," and ordered the state lawyers to limit their argument before the federal bench to the jurisdictional issue.[37] Leading Virginia politicians wrote vigorous essays denouncing the Court's attempt to take jurisdiction in *Cohens*.[38] Much of the controversy centered on whether the Supreme Court had the constitutional jurisdiction necessary to hear appeals from state criminal convictions. Yet, as their relative indifference to the Court's decision in *Martin v. Hunter's Lessee* indicated, Virginians did not get excited over abstract jurisdictional questions when no substantive interest of their state was at

33. *The Last of the Republicans*, Richmond Enquirer (Jan. 25, 1821).

34. Luce, Cohens v. Virginia at 23 (cited in note 9). See White, *The Marshall Court & Cultural Change* at 504 (cited in note 7).

35. The relatively lenient penalty meted out by the Virginia Court supports suggestions that *Cohens* was a "feigned" case, set up to test the constitutional reach of the congressional power to govern D.C. As Luce notes, Washington lottery tickets constituted only a small portion of the Cohens' business. Luce, Cohens v. Virginia at 80-81 (cited in note 9). See Beveridge, *The Life of John Marshall* at 343, 345-46 (cited in note 9). Moreover, months after they were fined for selling D.C. lottery tickets, the Cohen brothers were freely advertizing the sale of lottery tickets authorized by Maryland in the *Richmond Enquirer*. See *Washington Monument Lottery*, Richmond Enquirer (Nov. 21, 1820).

36. Luce, Cohens v. Virginia at 80-81 (cited in note 9).

37. White, *The Marshall Court & Cultural Change* at 505 (cited in note 7); Luce, Cohen v. Virginia at 121-22 (cited in note 9); Warren, *The Supreme Court in United States History* at 547-48 (cited in note 7).

38. Luce, Cohens v. Virginia at 84-87, 93-116 (cited in note 9).

stake.[39] The *Cohens* appeal disturbed the Old Dominion because Virginians were committed to excluding out-of-state lotteries, and more importantly, feared that Congressional power over the District of Columbia would be used to limit their state's prerogatives. Luce notes that "a virtually unanimous opposition existed against the claim that the District lottery law superseded any state regulation."[40] A judicial decision overturning the Cohens conviction, a state senate committee reported, would "establish[ ] the District of Columbia" as "the law giver of the whole confederacy."[41]

Virginia's fear that the Court would void their ban on out-of-state lotteries was well founded. The *Niles Register* published a letter written by the leading lawyers of the early Supreme Court Bar which concluded that "the legislature of no individual state in the union, can, constitutionally prohibit the sale of tickets in the lotteries established in the City of Washington, under the authority of congress." "This is a lottery," William Pinkney, Thomas Emmet, David B. Ogden, Walter Jones, and John Wells declared, "authorized by congress for the purpose of making important improvements in the city which may be styled the national city, in the improvement of which the nation is concerned." For this reason, the lawyers maintained that "it would be monstrous if any state legislature could impede the execution of a law made for national purposes, relative to a district over which the national legislature have the exclusive right of legislation."[42] Although Hezekiah Niles purported not to endorse the letter's content,[43] his comment in his *Niles Register* recognized that the issues before the Court were virtually identical to those raised by *McCulloch*. "The supreme court of the United States," Niles opined, "if consistent with its own doctrines about the bank, will certainly sanction those maintained in the opinion [of the lawyers]."[44]

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39. See White, *The Marshall Court & Cultural Change* at 743-44 (cited in note 7) (noting that "newspapers did not find . . . the *Martin* case worth commenting on"); Luce, Cohens v. Virginia at 25 (cited in note 9).

40. Luce, Cohens v. Virginia at 111 (cited in note 9); see *The Last of the Republicans* (cited in note 33).

41. Luce, Cohens v. Virginia at 84-87, 92, 97, 100-01, 110, 146-47, 183-184, 229-30 (cited in note 9).

42. *Niles Register* at 3 (Sept. 2, 1820).

43. *Niles Register* at 3 (Sept. 2, 1820). Niles did indicate that the constitutionality of the Virginia ban on the sale of out-of-state lottery tickets pitted "some eminent Lawyers in Virginia" against "a number of the most eminent lawyers in the United States." *Ibid.*

44. *Niles Register* at 3 (Sept. 2, 1820). On the influence of *Niles Register*, see Norval Neil Luxon, *Niles' Weekly Register: News Magazine of the Nineteenth Century* (Louisiana

Attorney General William Wirt reiterated these themes when defending the national lottery before the Supreme Court. The lottery, Wirt informed the Justices, was a consequence of "Congress, in its national character, providing the means of adding necessary improvements to the national capital." The supremacy clause of the constitution, he declared, prohibited states from interfering with the means the federal government had chosen for developing the District of Columbia. As Wirt noted, "what Congress in the legitimate exercise of its powers has made it lawful to sell, the State cannot make it unlawful to buy."[45] David Ogden, counsel for the Cohen brothers, also emphasized principles identical to those that Chief Justice John Marshall laid down two years previous in *McCulloch*. If, he declared,

> Congress have a right to raise a revenue, for any national purpose, by establishing a lottery, they had a right to establish this lottery, and no State law can defeat this, any more than the exercise of any other national power."[46]

Although counsel for Virginia had been instructed by the state legislature to limit their argument to the jurisdictional issue, Alexander Smyth and Philip Barbour managed to incorporate into their presentation an attack on the constitutional reach of the Grand National Lottery. Using for jurisdictional cover the claim that a law passed "for the local purpose of Washington" was not "a law of the United States" under Article III,[47] Virginia's lawyers told the Justices that Congress had no power to force the sale of lottery tickets on unwilling states. "The act of Congress under which this lottery has been authorized," Smyth declared, "is not an act passed in execution of any of those specific powers which Congress may exercise over the States."[48] In his view, "[w]hen Congress legislate exclusively for Columbia, they are restrained to objects within the District."[49] Should the

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State U. Press, 1947); Beveridge, *The Life of John Marshall* at 309, 312 (cited in note 9) ("the most widely read and influential publication in the country").

45. *Cohens*, 19 U.S. at 440 (argument of the Attorney General). See *Cohens* at 432-33 (argument of Mr. D.B. Ogden).

46. Id. at 433 (argument of Mr. D.B. Ogden). Ogden's comment that "[l]ottery tickets are an article of commerce, vendible in every part of the Union," id. at 432 (argument of Mr. D.B. Ogden) suggests that he may have thought the Virginia law violated the commerce clause. Neither Wirt nor Ogden, however, specifically referred to the commerce clause in their argument before the Court.

47. Id. at 342-44 (argument of Mr. Smyth).

48. Id. at 332 (argument of Mr. Smyth).

49. Id. at 336 (argument of Mr. Smyth).

Court rule otherwise, Barbour added, Virginia will have "lost all power of regulating the conduct of her own citizens."[50]

Barbour and Smyth followed orders and left after the Justices ruled that federal courts possess the jurisdiction necessary to reverse state court convictions, but their departure did not end the debate over whether the Cohen brothers had been legally fined. The Justices invited Daniel Webster to represent Virginia and defend state bans on the sale of D.C. lottery tickets. Webster, in the least nationalistic presentation of his career, reiterated the states' rights position that Congress had no constitutional power to force lottery tickets on unwilling states. Unlike Barbour and Smyth, however, Webster offered a statutory defense of Virginia's policy. Making a claim that had only been hinted at previously, Webster insisted that the Cohen brothers were not protected by federal law. Congress, he claimed, had not intended that D.C. lottery tickets be sold outside of Washington.[51]

II. THE DECISION

The main body of *Cohens* declared that states enjoy no sovereign immunity from federal judicial processes. The Marshall Court unanimously ruled that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case."[52] Contrary to a literal reading of Article III, Section 2[53] and explicit statements in *Marbury*,[54] the Justices found that Congress could constitutionally vest the Supreme Court with the power to hear

50. Id. at 296 (argument of Mr. Barbour).

51. *Cohens* at 434-37. One wonders whether Webster was invited to participate in *Cohens* in part because he willingly emphasized a non-constitutional grounds for upholding Virginia's ban on out-of state lotteries. The Marshall Court did not solicit substitute counsel in *Marbury* and *Worcester v. Georgia*, 31 U.S. 515 (1832), when government officials failed to make an appearance.

52. *Cohens*, 19 U.S. at 383. See *Cohens* at 377-92.

53. "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 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."

54. *Marbury*, at 174 ("if congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance"), at 175 ("the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original").

appeals from cases in which a state was a party.[55] The Chief Justice also examined and brusquely rejected Virginia's claim that the Eleventh Amendment prohibited federal courts from adjudicating an appeal from two citizens of Maryland who were convicted of a criminal offense by a Virginia Court. The constitutional ban on extending "[t]he Judicial power of the United States . . . to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State," he ruled, did not bar federal jurisdiction when a state initiated a suit or criminal prosecution against a citizen of another state.[56] Finally, Marshall reaffirmed the judicial power to declare state laws unconstitutional that Justice Story had previously defended in *Martin v. Hunter's Lessee.* Letting localities resolve constitutional controversies for themselves, his unanimous opinion asserted, "would prostrate . . . the government and its laws at the feet of every state" by giving "each member . . . a *veto* on the will of the whole."[57]

The *Cohens* Court also endorsed Attorney General Wirt's broad construction of the congressional power over the District of Columbia. All exercises of that power, the Justices held, were federal laws "bind[ing] all the United States."[58] Thus, Congress had the authority to enforce throughout the nation the rules it made for the governance and improvement of the nation's capital. "The act incorporating the City of Washington," Marshall wrote, "is, unquestionably, of universal obligation."[59] For this reason, the Chief Justice and his brethren insisted that all congressional efforts to improve the District of Columbia preempted inconsistent state laws. Any attempt by a "State to defeat the loan authorized by Congress" for financing public buildings in the nation's capital, they declared, "would have been void."[60]

Nevertheless, although the Supreme Court rejected every constitutional argument that Virginia's lawyers presented, the Justices sustained Virginia's ban on the sale of out-of-state lottery tickets. Interpreting the 1812 Amendments to the charter of the City of Washington as Webster had suggested, Marshall's unanimous opinion held that Congress had not intended to re-

55. *Cohens*, 19 U.S. at 392-405. For discussions of the conflict between *Marbury* and *Cohens*, see Currie, *The Constitution in the Supreme Court* at 100-01 (cited in note 5); White, *The Marshall Court & Cultural Change* at 516 (cited in note 7).

56. *Cohens*, 19 U.S. at 405-12.

57. Id. at 385, 413-23.

58. Id. at 424.

59. Id. at 447.

60. Id.

quire lottery sales outside of the District of Columbia. In order to reach this dubious conclusion, Marshall painted a deceptive picture of Virginia policy and ignored the history of lotteries in the nation's capital. Moreover, both the form and substance of the *Cohens* opinion differ dramatically from Marshall's *McCulloch* opinion penned two years earlier. Had Marshall in *McCulloch* reasoned from the principles that he used in *Cohens* to demonstrate that Congress did not intend to authorize ticket sales in unwilling states, the Chief Justice would have sustained Maryland's power to tax the national bank.

A. *COHENS* AND THE LOTTERY

The Marshall Court maintained that Congress regarded the governance of Washington as "a local subject," and hence, did not authorize the sale of lottery tickets outside the District of Columbia. Implicitly recanting his previous assertion that Congress must consider the District of Columbia "as the capital of a great nation" when governing that metropolitan center,[61] Marshall repeatedly described the powers granted to the Corporation of Washington as "local in nature." His opinion in *Cohens* insisted that "[t]he proceeds of these lotteries . . . are raised by laws whose operation is entirely local, and for objects which are also local."[62] Restricting the lottery to the nation's capital would not doom the lottery to failure, in his view. "[T]he City of Washington," *Cohens* proclaimed, was "the great metropolis of the nation, visited by individuals, from every part of the Union."[63] Marshall also claimed that the very text of the statute authorizing the lottery demonstrated that Congress did not believe the lottery would have any "extra-territorial operations."[64] "Had Congress intended to establish a lottery for those improvements in the City which are deemed national," he stated, "the lottery itself would have become the subject of legislative consideration."[65] Instead of being entrusted to a private corporation, Marshall continued, the lottery "would be organized by law, and agents for its execution would be appointed by the President, or in such other manners as the law might direct."[66]

History confounds Marshall's repeated assertion that the congress which sanctioned the Grand National Lottery thought a

61. See notes 22 and 27 and relevant text.
62. *Cohens*, 19 U.S. at 446.
63. Id. at 444.
64. Id. at 442.
65. Id. at 445.
66. Id. See generally, *Cohens*, 19 U.S. at 446-47.

measure so named was nevertheless a local affair.[67] As noted above,[68] early American political leaders believed that the development of their nation's capital was a vital national concern. Hence, even efforts to raise funds for the most pedestrian civic purposes were considered of national importance. Moreover, the Corporation of Washington often used lotteries to raise revenues for improvements that were not entirely local. One lottery was held to raise money for a federal penitentiary. The Grand National Lottery was intended to provide funds for building a canal between Maryland and Washington. The proceeds of the first lottery held in the nation's capital were earmarked for general improvements, without reference to national or local institutions. Unlike later lotteries, that lottery was directly authorized by Congress. Nevertheless, no evidence exists that the national legislature intended to limit the purposes for which lotteries could be used by vesting the power to hold lotteries in the Corporation of Washington. Indeed, although the original parties to *Cohens* agreed that "the lottery . . . was duly created by the . . . Corporation of Washington,"[69] the Grand National Lottery was, in fact, directly authorized by Congress on May 6, 1812.[70] That counsel for Virginia, the Cohen brothers or the United States did not correct this error suggests either a gross oversight or, more likely, a consensual understanding that whatever powers Congress had to hold lotteries for the benefit of the District were given in full to the Corporation of Washington.

Persons familiar with the nation's capital in 1819 knew that Washington D.C. was not an urban center capable of sustaining the Grand National Lottery and its $50,000 worth of advertized prizes. Few early nineteenth century visitors used Marshall's words, "the great metropolis of the nation," to describe that capital city. Rather, as one commentator notes, "Washington . . . was then a new, raw, unfinished, swampy village of vexing vistas, . . . and few of the citizens could afford to meet the requirements of the building code."[71] Charles Dickens described "spacious avenues that begin in nothing and lead nowhere; streets, mile long,

67. The *Cohens* opinion never mentions the Grand National Lottery by name.

68. See notes 23-27, 49-53 and relevant text.

69. *Cohens*, 19 U.S. at 289.

70. 2 U.S. Statutes at Large 728 (1812). See Luce, Cohens v. Virginia at 77 (cited in note 9). (noting that the Cohen brothers were arrested for selling tickets to a lottery directly authorized by Congress); Ezell, *Fortune's Merry Wheel* at 106 (cited in note 22).

71. Marshall Smesler, *The Democratic Republic, 1801-1815* 23 (Harper & Row, 1968); Haskins and Johnson, *Foundations of Power* at 74-78 (cited in note 7).

that only want houses, roads, and inhabitants."[72] The nation's capital in 1800 had fewer than 400 residences, most of which were "small miserable huts," and only 233 residents had a net worth of more than $100.[73] Most of the immigrants to that city in the following years were "indigent . . ., their hopes fastened on a merciful sovereign, a bountiful treasury, and public jobs."[74] These citizens obviously could not buy enough tickets to guarantee that the Grand National Lottery and other such ventures would be profitable. National officials and visiting dignitaries were also unlikely marks for lottery vendors. Persons with official business in the nation's capital typically left immediately after, if not before, their duties were finished.[75] For these reasons, the Court's decision to let Virginia ban the sale of D.C. lottery tickets was one of several events that forced Congress to abandon lotteries as a means of raising revenue.[76]

Marshall must also have known that Congress had no qualms about authorizing private associations to raise money for national projects. Communities in the young republic routinely farmed out to private corporations the power to make public improvements. *Charles River Bridge v. Warren Bridge*[77] assumed national importance, in part, because most civic enterprises in the new nation were performed by private corporations with special charters from local governments.[78] The national government was similarly willing to delegate important public powers to private parties. Marshall's opinion in *McCulloch* sustained congressional power to vest a private corporation with the power to control the nation's money supply. If ultimate control is the defining feature of a corporation, then the Bank of the United States was significantly more private than the Corporation of Washington. The President had the right to veto any lottery proposed by Washington officials, but the national government could select only twenty percent of the persons who sat on the Board of the national bank.[79]

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72. Charles Dickens, *American Notes and Pictures from Italy* 116 (Oxford U. Press, 1957); David L. Lewis, *District of Columbia: A Bicentennial History* 15-19 (W.W. Norton & Company, 1976); Young, *The Washington Community* at 21-26, 41-48 (cited in note 16).

73. Young, *The Washington Community* at 22, 26 (cited in note 16).

74. Id. at 25-26.

75. Id. at 47-57.

76. Ezell, *Fortune's Merry Wheel* at 106 (cited in note 22).

77. 36 U.S. 420 (1837).

78. Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Lippincott, 1971).

79. An Act further to amend the Charter of the City of Washington, 2 U.S. Statutes at Large 721, 726 (1812); An Act to Incorporate the Subscribers to the Bank of the United States, 3 U.S. Statutes at Large 266, 269-70 (1816).

B. *COHENS* AND *MCCULLOCH*

The Marshall Court ignored more basic commonalities between *Cohens* and *McCulloch* than the congressional willingness to vest the Bank of the United States and the Corporation of Washington with important public powers. The Virginia law at issue in *Cohens* was virtually identical in form to the Maryland law at issue in *McCulloch*. Both Maryland and Virginia sought to insulate local practices from out-of-state competition. Maryland taxed all banks not chartered by that state. Virginia prohibited the sale of all lottery tickets not approved by the state. Neither state singled out national financial institutions for special treatment.[80] The federal laws authorizing the national bank and Grand National Lottery were also identical in one important respect. Both measures failed to specify when or whether the federal policies they established preempted inconsistent state legislation. Nevertheless, Marshall painted a very different picture of the laws that were challenged in *McCulloch* and *Cohens*, and the issues those laws raised.

The Marshall Court mischaracterized Virginia's law as a general ban on lotteries and Maryland's law as a specific attack on the Bank of the United States. *Cohens* describes the Virginia ban on the sale of out-of-state lottery tickets as "a law to punish the sale of lottery tickets in Virginia,"[81] and a "penal law[ ] of a State, . . . not levelled against the legitimate powers of the Union, but hav[ing] for [its] sole object the internal government of the country."[82] Nowhere did Marshall indicate that the Virginia law was not a law of general application, but a measure specifically directed against the efforts of other jurisdictions to raise needed revenues. *McCulloch*, by comparison, explicitly asserts that Maryland's banking policies were "levelled against the legitimate powers of the Union." "[T]his is a tax on the operations of the bank," the Chief Justice declared, "and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution."[83] Just as Marshall's *Cohens* opinion never hints that Virginia banned only out-

80. Dwight Jessup suggests that Maryland's tax on out-of-state banks was intended to protect local banks and was not designed to discriminate specifically against the national bank. State restrictions on "foreign" banks passed after the summer of 1818, however, were directed specifically against the national bank. See Jessup, *Reaction and Accommodation* at 186-87 (cited in note 7).

81. *Cohens*, 19 U.S. at 444.

82. Id. at 443.

83. *McCulloch*, 17 U.S. at 436-37

of state lotteries, so his *McCulloch* opinion never hints that Maryland taxed all out-of-state banks.

Although the Virginia and Maryland laws at issue in *Cohens* and *McCulloch* were almost indistinguishable, Marshall answered different legal questions when deciding those two cases. His *Cohens* opinion rests on a question of statutory interpretation. The Court, Marshall insisted, must first determine whether Congress had authorized the Corporation of Washington "to force the sale of these lottery tickets in States where such sales may be prohibited by law."[84] Because the Justices ruled that the Cohen brothers acted without federal statutory authorization, they did not consider the extent to which Virginia could constitutionally interfere with Congressional efforts to improve the nation's capital. *McCulloch*, however, ignored the analogous statutory question. At no point did Marshall's opinion discuss whether the statute that established the Bank of the United States granted that corporation any immunity from state taxation.[85] Instead, the Chief Justice devoted the entire second half of *McCulloch* to the question *Cohens* deferred, "whether the State of Maryland may, without violating the constitution, tax that branch [of the national bank]."[86]

Marshall's contemporaries recognized that the principles of national supremacy that the Justices announced in *McCulloch* should have compelled the Court to declare unconstitutional the Virginia law at issue in *Cohens*.[87] If, as Marshall proclaimed in the national bank case, "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government,"[88] then Virginia had no right to ban the sale of tickets to a lottery authorized by congress under its power to govern the District of Columbia. Nevertheless, by juxtaposing a statutory question in *Cohens* that *McCulloch* never considered, Marshall managed to decide the former case in favor of Virginia without weakening the precedential force of the latter decision.

Marshall never explained why Virginia could ban congressional lotteries even though Maryland could not tax the national

84. *Cohens*, 19 U.S. at 441.

85. Indeed, *McCulloch* does not locate the source of the bank's immunity from state taxation. See Currie, *The Constitution in the Supreme Court* at 165-67 (cited in note 5); White, *The Marshall Court & Cultural Change* at 552 (cited in note 7).

86. *McCulloch*, 17 U.S. at 425.

87. See notes 49-53, above, and the relevant text.

88. *McCulloch*, 17 U.S. at 436.

bank. The Justices in *Cohens* demanded that "the intention" to exempt the lottery from state penal laws "be clearly and unequivocally stated,"[89] but the Court in *McCulloch* implied that the national bank enjoyed an immunity from state taxation unless Congress said otherwise. The Justices also did not require in subsequent cases that federal legislation plainly forbid local regulation of the same subject matter. In both *Gibbons v. Odgen* and *Brown v. Maryland*,[90] Marshall voided state laws that were not "clearly and unequivocally" banned by national statutes.[91]

Marshall's famous assertion in *McCulloch* that "the power to tax involves the power to destroy"[92] does not justify granting the national bank any special immunity from hostile state laws. The power to prohibit also involves the power to destroy, but the *Cohens* Court implied no immunity from state bans on the sale of lottery tickets. Moreover, many early nineteenth century politicians favored a national bank that was subject to some state laws. Andrew Jackson insisted that he might have rechartered the Bank of the United States had that corporation waived its judicial immunity to all forms of state taxation.[93] Finally, modern jurists similarly reject Marshall's claim that "the power to tax involves the power to destroy." Justice Felix Frankfurter described the phrase as a "seductive cliche";[94] Justice Oliver Wendell Holmes, Jr., maintained that "[t]he power to tax is not the power to destroy while this Court sits."[95] If, as Marshall proclaimed in *McCulloch*, the "court disclaims all pretensions . . . to inquire into" matters of "degree,"[96] then his *Cohens* opinion suggests that the federal judiciary should have let Congress determine what state taxes the national bank would and would not be exempt from.

The legal distinctions between *Cohens* and *McCulloch* may have been tenuous, but the political differences between the two cases were clear. President Monroe, ex-President Madison and a strong bipartisan legislative coalition were on record as backing the Bank of the United States. Two weeks before *McCulloch*

89. *Cohens*, 19 U.S. at 443.

90. 25 U.S. 419 (1827).

91. *Gibbons*, 22 U.S. 1, 209-22 (1822); *Brown*, 25 U.S. at 446-49; see Robert Kenneth Faulkner, *The Jurisprudence of John Marshall* 86-87 (Princeton U. Press, 1968).

92. *McCulloch*, 17 U.S. at 431.

93. Andrew Jackson, *Veto Message*, in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* 579-80, 586-88 (Government Printing Office, 1986).

94. *Graves v. O'Keefe*, 306 U.S. 466, 489 (1939) (Frankfurter, J., concurring).

95. *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 233 (1928) (Holmes, J., dissenting).

96. *McCulloch*, 17 U.S. at 423.

was handed down, an overwhelming congressional majority defeated an attempt to repeal the national bank's charter.[97] Marshall recognized that powerful political actors would support a judicial decision upholding the national government's power to incorporate a bank. Critics of *McCulloch*, he wrote Justice Bushrod Washington, "have no objection to a decision in favor of the Bank since the good patriots who administer the government wished it, and would probably have been seriously offended with us had we dared to have decided otherwise."[98] Indeed, Marshall probably knew that Maryland would not challenge an adverse decision. *McCulloch* was an arranged case, litigated with the full cooperation of state officials. Governor Charles Ridgley informed the Maryland legislature that he had negotiated "an amicable arrangement" with the bank. If the Supreme Court decided the case in favor of Maryland, the bank would cooperate fully with Maryland's laws; if Maryland lost, "no further steps [would be] taken . . . against the bank."[99]

Marshall had no analogous reason for thinking that Virginians would respect a decision in favor of the Cohen brothers. Virginia had already hinted at defiance by instructing counsel in *Cohens* not to argue the merits of their state's ban on the sale of out-of-state lottery tickets. National officials would not have insisted that Virginia accept an adverse ruling. "Major losses and unmeasurable confusion," Ezell notes, had sapped congressional support for lotteries.[100] Marshall was aware of the risks inherent in challenging Virginia's prerogatives without strong backing from the national government. A year after he handed down *Cohens*, Chief Justice found a statutory excuse to avoid voiding Virginia's ban on the entry of free blacks. "As I am not fond of butting against a wall in sport," he informed Story, "I escaped on the construction of the act."[101] Marshall's contemporaries

97. See Gerald Gunther, *Introduction* in Gerald Gunther, ed., *John Marshall's Defense of* McCulloch v. Maryland 4-6 (cited in note 6); Bray Hammond, *Banks and Politics in America: From the Revolution to the Civil War* 251, 259 (Princeton U. Press, 1957); A.I.L. Campbell, *"It is a* constitution *we are expounding": Chief Justice Marshall and the "necessary and proper" clause*, 12 J. of Legal Hist. 190, 199-200, 215-16; Jessup, *Reaction and Accommodation* at 187-91 (cited in note 7); White, *The Marshall Court & Cultural Change* at 544 (cited in note 7).

98. Marshall to Washington, March 27, 1819 (quoted by Jessup 1987, p. 196). See *A Virginian's 'Amphictyon' Essays* in Gerald Gunther, ed., *John Marshall's Defense of* McCulloch v. Maryland at 72 (cited in note 6) ("I am willing to acquiesce in that particular case").

99. Jessup, *Reaction and Accommodation* at 191 (cited in note 7).

100. Ezell, *Fortune's Merry Wheel* at 106 (cited in note 22).

101. Marshall to Story, September 26, 1823. See Jessup, *Reaction and Accommodation* at 258 (cited in note 7).

thought the Justices used the same tactic in *Cohens*. The Court's ruling in favor of Virginia, a prominent Ohio attorney declared, was designed to "allay the apprehensions" that the adverse decision on the jurisdictional issues was bound to generate in the Old Dominion.[102]

III. THE PASSIVE-AGGRESSIVE VIRTUES

Cohens v. Virginia was not a sound or principled decision. The Justices ignored the national purposes of the Grand National Lottery and discounted evidence that a lottery confined to the nation's capital would be a dismal failure. Defying Herbert Wechsler's future injunction that judicial decisions "be genuinely principled,"[103] Marshall conveniently neglected to explain why the broad principles of national supremacy he relied on in *McCulloch* did not entail that the Corporation of Washington or its duly authorized agents were constitutionally empowered to sell tickets to a congressionally sanctioned lottery in every state of the Union. Indeed, Marshall never acknowledged that Virginia and Maryland had passed virtually identical laws burdening out-of-state entrepreneurs. Instead, the Chief Justice treated Virginia's policy as a general ban on all lotteries while regarding Maryland's policy as a tax specifically directed against the Bank of the United States. Marshall also interpreted differently identical provisions of federal laws. The congressional bills chartering the national bank and authorizing the Grand National Lottery did not explicitly provide for any protection against hostile state measures. Nevertheless, the Chief Justice assumed that the Bank of the United States was exempt from unfriendly local laws while denying that the more public Corporation of Washington enjoyed a similar immunity from state legislation.

The structure of *Cohens* provides the last and most subtle example of how Marshall used the passive-aggressive virtues in his constitutional opinions. The *Cohens* opinion first considers whether the Supreme Court had the jurisdiction necessary to adjudicate the dispute between Virginia and the Cohen brothers. Only then did Marshall decide the dispute in favor of Virginia. This ordering is hardly unusual. Courts routinely determine jurisdiction before considering the substantive merits of a case. In *Marbury*, however, Marshall answered the questions presented

102. Luce, Cohens v. Virginia at 122 (cited in note 9) (quoting Charles Hammond); see id. at 79, 121-22, 241-42.

103. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15 (1959).

by the case in the reverse order. He first asked whether Marbury had a right to his commission and then considered whether the Supreme Court had the jurisdiction necessary to issue the writ of mandamus that Marbury had asked for. Thus, both the *Cohens* and *Marbury* opinions are structured so as to maximize the number of controversial constitutional and political issues Marshall could address before deciding the actual case before him in favor of the forces most hostile to the Court.

Chief Justice Marshall's use of the passive-aggressive virtues in *Cohens*, *Marbury* and other cases sheds new light on the old controversy over the relative influence of law and politics in early Marshall Court practice. This debate too often seems indistinguishable from partisan squabbles over the relative constitutional worth of Hamiltonian Federalism and Jeffersonian Republicanism. As a result, disputes over Marshall's legal technique frequently boil down to differences over the substantive merits of his decisions. Scholars who would have voted for John Adams in the election of 1800 assert that Marshall Court decisions were faithful to the constitution and only the constitution. George Haskins and Herbert Johnson's Federalist history of the early Marshall Court maintains that Marshall "buil[t] a rule of law that stood apart and was distinct from the vagarities of changing politics and the expediences of the moment."[104] Scholars who would have voted for Jefferson, by comparison, insist that the Marshall Court distorted constitutional doctrine to suit the political preferences of the Justices. Vernon Parrington's Jeffersonian history of American political thought describes Marshall as "a judicial sovereign who for thirty-five years molded the plastic constitution to such form as pleased him."[105]

The Marshall Court's treatment of the Grand National Lottery suggests a more institutional, less partisan, understanding of the Chief Justice's willingness to tailor legal opinions to suit his political goals. Marshall was more concerned with politics than modern Federalists have thought, but often in a different way than contemporary Jeffersonians have claimed. *Cohens* and *Marbury* reveal a court desperately eager to influence political

104. Haskins and Johnson, *Foundations of Power* at 286 (cited in note 7). See Faulkner, *The Jurisprudence of John Marshall* at 217-23 (cited in note 91); Beveridge, *The Life of John Marshall* (cited in note 9); Warren, *The Supreme Court in United States History* (cited in note 7).

105. Vernon Louis Parrington, 2 *Main Currents in American Thought: The Romantic Revolution in America: 1800-1869* 21-22 (Harcourt, Brace, World, 1927); Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 Harv. L. Rev. 340, 356 (1982); Haines, 4 Sw. Pol. & Soc. Sci. Q. 1 (cited in note 7); Lerner, 39 Colum. L. Rev. at (cited in note 7).

debate, but astutely aware of its political limitations. Marshall and his colleagues relied on the passive-aggressive virtues to overcome the Court's institutional difficulties. The main body of their opinions proclaim broad principles of constitutional law. The last sections, however, decide the case on a fairly narrow and questionable statutory or jurisdictional basis, typically in favor of powerful government officials. *Marbury* declares that the president is not above the law, but, on very dubious grounds, finds that the Court lacks the jurisdiction necessary to order the president to perform his legal duties. *Cohens* declares that federal courts have the power to reverse state court convictions, but, on very dubious statutory grounds, finds no reason to reverse the judgment of the state court in the case before the court.[106]

The central role that the passive-aggressive virtues played in Marshall Court jurisprudence challenges the conventional view that *Marbury* "establish[ed] the power of judicial review."[107] This common assertion is correct if the power of judicial review is defined as the power to utter such declaratory sentences as "it is, emphatically, the province and duty of the judicial department, to say what the law is."[108] By this definition, however, every person who can assert "the death penalty violates the eight amendment" also has the power to declare federal and state laws unconstitutional. Presumably, students of the court have something more than minimal verbal dexterity in mind with they speak of judicial review. Power typically consists of something like the ability to "get [someone] to do something that [they] would otherwise not do."[109] A court possesses power, in this

106. For that matter, *Gibbons v. Ogden* suggests that states have no constitutional power to regulate interstate commerce in the absence of federal law, but, on very dubious statutory grounds, finds that the state regulation at issue in that case was preempted by federal law. See *Douglas v. Seacoast Products*, 431 U.S. 265, 278-79 n.13 (1977) (citing and discussing numerous criticisms of how Marshall interpreted the Enrollment and Licensing Act of 1793).

107. Currie, *The Constitution in the Supreme Court* at 66 (cited in note 5). Thus, many constitutional histories discuss the cases from *Marbury* to *Cohens* under such headings as "The Establishment of the Right to Decide." Robert G. McCloskey, *The American Supreme Court* 26-53 (U. of Chi. Press, 1960); Wright, *The Growth of American Constitutional Law* at 33-54 (cited in note 14) ("The Establishment of Judicial Supervision").

108. *Marbury*, 5 U.S. at 177.

109. Robert A. Dahl, *The Concept of Power* in Bell, Edwards, and Wagner, eds., *Political Power: A Reader in Theory and Research* 80 (Free Press, 1969). A vigorous debate exists over the precise nature of power. Scholars point out that persons also exercise power when they control political agendas or control of cultural resources so as to get others "to act and believe in a manner in which [they] otherwise might not." See John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* 15 (U. of Ill. Press, 1980).

view, only to the extent that judicial decisions (or the threat of judicial decisions) inspire or cause government officials and citizens to forego or abandon those practices the Justices believe are illegal or unconstitutional.

When examined from this political perspective, the series of decisions from *Marbury* to *Cohens* cannot be said to have firmly established the practice of judicial review in the United States. Marshall Court opinions may have announced bold principles of constitutional law, but in cases where the Justices feared hostile political forces, they used the passive-aggressive virtues to avoid issuing rulings that might antagonize the judiciary's more powerful opponents. John Marshall challenged the constitutional pretensions of Jefferson in *Marbury* and Virginia in *Cohens*. He did not, however, order his bitter rivals to perform actions that evidence suggests neither Jefferson nor Virginia were prepared to do. The Marshall Court tended to declare laws unconstitutional only when, as was the case in *McCulloch* and *Gibbons v. Ogden*, national and local forces could be trusted to support that tribunal's decision.[110]

Significantly, the few Marshall Court efforts to exercise judicial power in the absence of strong national support were ignored by local officials. Georgia refused to enforce *Worcester v. Georgia*, Kentucky refused to enforce *Green v. Biddle* and New Jersey refused to enforce *New Jersey v. Wilson*.[111] Early nineteenth century politicians failed to comply with federal court orders so frequently that just before *Cohens* was handed down, an Ohio legislator committed to taxing the national bank asked how, in light of the general disrespect for judicial rulings at the time, their state could "be condemned because she did not abandon her solemn legislative acts as a dead letter upon the promulgation of an opinion of that tribunal?"[112] Marshall's last letters acknowledged the impotence of the court and his apparent failure to institutionalize his constitutional vision. "I yield slowly and reluctantly," he confessed shortly before he died, "to the conviction that our constitution cannot last."[113]

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110. For a discussion of the political support for *McCulloch*, see footnotes 99-101 and the relevant text. For discussions of the political support for *Gibbons*, see Wallace Mendelson, *New Light on* Fletcher v. Peck *and* Gibbons v. Ogden, 58 Yale L.J. 567 (1949); Beveridge, *The Life of John Marshall* at 445-50 (cited in note 9).

111. See Jessup, *Reaction and Accommodation* at 159 (cited in note 7) (*Wilson*), 221-31 (*Green*); 363-64, 369-71 (*Worcester*).

112. Annals of the Congress of the United States, Sixteenth Congress, Second Session, p. 1697. See Beveridge, *The Life of John Marshall* at 332 (cited in note 9).

113. Marshall to Story, September 22, 1832. See Faulkner, *The Jurisprudence of John Marshall* at 224-25 (cited in note 91).

The Marshall Court's experience with judicial review in *Marbury*, *Cohens* and other cases cries out for a more political understanding of how and when that power was established in the United States. Rather than focus exclusively on judicial opinions, students of the court must emphasize the broader struggles between the partisan forces that supported and opposed the federal judiciary at different times in American history. Judicial opinions and legal ideas will undoubtedly play a significant role in this analysis. A tribunal that did not assert the power of judicial review would not have gained the power of judicial review. Judicial opinions and practices may also have enhanced the prestige of the Court, thus making defiance more costly for hostile political actors. Still, the crucial question constitutional historians must ask is who those opinions influenced. A revised political history of the Supreme Court must identify the political forces that promoted the Supreme Court as an the ultimate interpreter of the American constitution and explain why these influential politicians supported John Marshall's institutional ambitions.

Such a political history will probably find that the series of decisions from *Marbury* to *Cohens* only began the process by which the Court established the power to declare federal and state laws unconstitutional.[114] Revisionist accounts of judicial review might emphasize the influence from 1810 to 1828 of a powerful nationalist coalition sympathetic to Marshall Court jurisprudence,[115] President Andrew Jackson's decision to strengthen the federal court system in the wake of the nullification controversy[116] and the attempt of mainstream Jacksonian politicians in the 1850s to have courts take the responsibility for deciding the constitutional status of slavery in federal territories.[117] Indeed, scholars may find that the power of judicial review was firmly established in the United States only during and after Reconstruction. Late nineteenth century tribunals benefitted from the widespread "cult of the court" among Gilded Age

114. Indeed, the process probably begins with Lord Coke's challenges to the British crown, certain features of colonial charters, James Otis's use of rights, and early state and federal exercises of judicial review.

115. Madison, in particular, proved to be a strong supporter of judicial review. See Jessup, *Reaction and Accommodation* at 410-11 (cited in note 7).

116. Ellis, *The Union at Risk* 185-87 (cited in note 7).

117. Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford U. Press, 1978); Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 Minn. L. Rev. 16 (1953); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Studies in American Political Development 35 (1993).

elites[118] and the emergence of a "state of courts and parties."[119] Enjoying the support of powerful political forces, post-Civil War Justices could abandon the passive-aggressive virtues. Waite and Fuller Court opinions did not simply announce that the constitution protected the freedom of contract, they ordered hostile state officials to refrain from interfering with the right of workers and employers to establish the terms of labor in the economic market. Despite conventional descriptions to the contrary, the Marshall Court was unable to engage in similarly authoritative conduct.

118. See Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Princeton U. Press, 1942); Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Cornell U. Press, 1960); Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedman, and John F. Dillon Upon American Constitutional Law* (U.C.L.A. Press, 1954).

119. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* 39-42 (Cambridge U. Press, 1982).