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# THE DANGERS OF THE UNION

## *By Henry Wheaton*

## *Edited and With an Introduction by James E. Pfander**

From May to August 1821, Henry Wheaton published *The Dangers of the Union*, a series of eight essays defending the Supreme Court and Chief Justice John Marshall's then recent decision in *Cohens v. Virginia*.[1] Wheaton's essays appeared under the pseudonym "A Federalist of 1789"[2] and have been a subject of some interest to students of the Marshall Court. Professor G. Edward White, for example, features the Wheaton essays in his discussion of the pamphlet wars that broke out in the wake of the *Cohens* decision.[3] As Professor White notes,[4] the Wheaton essays sought in part to counter such "Richmond Junto" critics of

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* Professor of Law, University of Illinois. Thanks to Guy Ward, Jason Turner, and Bill Tapella for research assistance.

1. 19 U.S. (6 Wheat.) 284 (1821). For a more complete account of Wheaton's life and work, see Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291 (1985); Elizabeth F. Baker, *Henry Wheaton, 1785-1848* (U. of Pa. Press, 1937). Gerald Gunther first identified Wheaton as the author of the series on the basis of a review of Wheaton's papers in the Pierpont Morgan library in New York. For confirmation, see Letter from John C. Calhoun to Henry Wheaton, July 15, 1821, in W. Edwin Hemphill, ed., 6 *The Papers of John C. Calhoun* 259-60 (U. of S. Carolina Press, 1972) ("*Letter from John C. Calhoun*") (describing Calhoun's receipt of a note from Wheaton enclosing the "2d number of [A] Federalist of '89" and discussing strategies for its republication to counter essays in Virginia and Ohio criticizing the *Cohens* decision).

2. Wheaton explained his use of this pseudonym at the beginning of one of the early articles in the series: "To prevent any misconstruction of the political principles meant to be designated by the signature assumed by the writer of the following numbers, it may be proper to state that they are those which he entertains in common with the early advocates of our Federal Constitution, and have no reference to subsequent party distinctions."

3. See G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* in Paul A. Freund and Stanley N. Katz, eds., 3-4 *History of the Supreme Court of the United States* 521-22 (Macmillan Pub. Co., 1988) ("*The Marshall Court*").

4. Professor White portrays Wheaton's essays as entirely the product of Roane's attack. See id. (suggesting that Roane's attack nettled John Marshall and moved him to enlist Wheaton to counter the attack on *Cohens*). Although Wheaton spends a good deal of time replying to Roane, he does not appear to have initiated the series in response to the Roane essays. The first number of Wheaton's series appeared on May 8, 1821—before the initial number of the Roane series on May 25—and responds to other critics of *Cohens*. It was only in Wheaton's second number, which appeared in July after the Roane series had run its course, that he first took up the Roane critique.

the Marshall Court as Spencer Roane,[5] whose essays under the pen-name Algernon Sidney advocated a compact theory of the Union much at odds with the national vision of the Chief Justice.[6]

The Wheaton essays, reprinted here in their entirety in this and the next issue, deserve wider circulation. Of interest to historians, the essays also shed light on a variety of contemporary issues in federal jurisdiction. For Wheaton not only offers a cogent defense of the assertion of jurisdiction in *Cohens*, he also offers a fairly detailed account of Article III and the Eleventh Amendment. Of particular importance to federal courts scholars, Wheaton appears to have accepted a two-tier theory of federal judicial power similar to that advocated by Justice Joseph Story in *Martin v. Hunter's Lessee*.[7] Wheaton also reads the Eleventh Amendment, much like modern diversity theorists, as curtailing only those suits and proceedings against state parties in which federal jurisdiction depends on the alignment of the parties.[8]

Historians have treated Wheaton's work as virtually an official defense of *Cohens*;[9] certainly Wheaton's position as the Court's reporter at the time the essays appeared and his close relationship with Marshall and Story lends strength to such an interpretation.[10] But Wheaton's analysis deserves notice on its own terms as well. He was a well-known legal scholar and advocate: he played an important role in amending New York's con-

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A nice account of the place of Wheaton's essays in the newspaper debates over *Cohens* appears in W. Ray Luce, Cohens v. Virginia *(1821): The Supreme Court and State Rights, a Reevaluation of Influences and Impacts* 165-86, 193-231 (Garland Pub., 1990). As Luce explains, "Wheaton's essay started a veritable avalanche of long, detailed essays examining the case during the late spring and early summer of 1821," including two series of essays in Virginia in addition to those by Roane. Id. at 166.

5. For accounts, see Margaret E. Horsnell, *Spencer Roane: Judicial Advocate of Jeffersonian Principles* (Garland Pub., 1986); Note, *Judge Spencer Roane of Virginia: Champion of States' Rights—Foe of John Marshall*, 66 Harv. L. Rev. 1242 (1953).

6. Roane's five essays have been reprinted in William E. Dodd, ed., 2 *John P. Branch Hist. Papers of Randolph-Macon College* 78-183 (1905).

7. 14 U.S. (1 Wheat.) 304 (1816). For a powerful statement of the theory, see Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985) (arguing that Article III divides the subject matter jurisdiction of the federal courts into mandatory and permissive tiers).

8. For a nice overview of the current Eleventh Amendment debate, see William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. Chi. L. Rev. 1261 (1989).

9. See White, *The Marshall Court* at 522 (cited in note 3).

10. As reporter, Wheaton published many of the greatest opinions of the Marshall Court, including *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), *McColluch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

stitution; he was frequently mentioned as a possible nominee to the Court; and he published two works (*Elements of International Law* (1836) and *The History of the Law of Nations in Europe and America* (1845)) that quickly became classics in their field.

The Wheaton essays also demonstrate that the nature of constitutional government and the obligation of the states to accept federal definition of the scope of federal power were issues much on the mind of the day's political thinkers. To be sure, at the time Wheaton wrote, Congress had pasted over the slavery crisis with the Missouri Compromise of 1820. Yet Wheaton plainly understood that issues of state sovereignty would recur, and repeatedly emphasized throughout the essays that accepting the position of the Court's critics would mean the end of the Union. Ironically enough, the man who would later become the nation's leading apostle of interposition—John C. Calhoun—believed *Cohens* to have been rightly decided at the time and joined with Wheaton in developing strategies to republish Wheaton's defense of national authority.[11]

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*Editor's Note*:

The first four essays appear in this issue; the remaining four essays will appear in the next issue. Professor Pfander has retained the somewhat anachronistic spellings and modest misquotations in Wheaton's original essays. He has, however, corrected typographical errors and has also altered punctuation where the original was unduly confusing. Wheaton's footnotes appear as they did in the original with asterisks; Professor Pfander's explanatory footnotes have been numbered.

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## NO. 1.
## (The American, May 8, 1821)

Whoever has reflected upon the public transactions of this country since the war of the revolution, must be convinced that we have degenerated in public virtue. Professions of patriotism, indeed, abound in the present time; but that disinterested love of country which marked our first efforts against the parent state is almost extinguished, or is smothered by the intrigues of corrupt faction. The encroachments which have been continually making

11. See *Letter from John C. Calhoun* at 260 (cited in note 1) (proposing republication of Wheaton's essays in Virginia at the "seat of the disease").

by unprincipled demagogues against that National Government which is the only sure guarantee of our republican institutions, and of private rights, as well as our shield against foreign aggression, have been viewed with so much supineness and indifference, or opposed with so little moral courage, by those whose duty it was to resist them, that I cannot help regarding those repeated attacks upon the authority of the Union as among the worst *signs of the times*. One of the most remarkable instances of this profligate daring on the part of the enemies of the National Government will be found in the recent attempt to resist the authority of the Supreme Court of the United States to determine, in the last resort, all questions arising under the Constitution and laws of the Union. One would think if there was any one prerogative of the Federal Government more undeniable than another, it was this. It is, in fact, the great conservative power of the Union.

We all remember Mr. CLINTON's denunciation of the General Government for its alleged attempt to force the sale of tickets in a lottery established by Congress, at the city of Washington, for local purposes, throughout the several states, in defiance of the laws of those states prohibiting such sale; when, in fact, Congress had not authorized their sale beyond the limits of the District of Columbia, nor had the President countenanced it, nor the courts of the Union at that time expressed any opinion upon the question. But it suited the views of Mr. Clinton to chime in with the language of certain state demagogues in other quarters, who affected great alarm for the rights of the states, because they were not permitted to trample those of the National Government and of individuals under their feet. This denunciation was peculiarly adapted to inflame the passions of the people of *Ohio*, who had been by base arts excited to hostility against one of the principal institutions of the government,[12] and whose favour it has been one of Mr. Clinton's chief objects to cultivate by all the means in his power, with a view to the "*all hail hereafter*." It was also intended to extort the applause of some of the leading politicians of Virginia, from whom we might have expected better things, but whose doctrines respecting the powers of the General Government I consider as most pernicious here-

12. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). See also *Message of His Excellency Oliver Wolcott, to the General Assembly of the State of Connecticut, at the Commencement of their Session* 12-26 (May, 1821) (on file with the Connecticut State Library) ("*Wolcott*") (responding in part to a resolution adopted by the State of Ohio to exert a penalizing tax upon the Bank of the United States).

sies, although supported by the subtlety of acute and ingenious minds.

The question which has recently been much agitated in that state respecting the appellate power of the Supreme Court of the United States in cases arising in the state courts respecting the laws and Constitution of the Union, is one of the most vitally important constitutional questions that has been discussed since the establishment of the present National Government. I feel all due respect for some of those gentlemen in Virginia; I doubt not they are perfectly sincere in the views they have taken of the Constitution? but at the same time I must frankly declare my impression that those views have arisen from an original anti-federal bias in their minds, and an undue jealously of the authority of the National Government, arising from the ill-judged acts of a former administration. That those views are entirely erroneous I am firmly convinced; but if they are correct, then are the Constitution, and laws, and treaties of the Union, *a dead letter.*

Very able political and professional men are satisfied that the whole argument against the jurisdiction of the Supreme Court has been completely demolished in the opinion delivered by Chief Justice MARSHALL, at the last term, in the case of *Cohens* against *Virginia*;[13] and certainly it bears the strongest marks of his acute and enlarged mind, which when it applies itself to the interpretation of the fundamental law, soars above the ordinary element of a judge and a technical lawyer, and displays the wisdom and skill of a great lawgiver. But there are some considerations of a more popular and obvious nature, which strike my mind as conclusive that the argument *against* the jurisdiction, however it may be entangled with metaphysical subtleties, must be fallacious and unsound.

I suppose no person will deny that the Constitution, laws, and treaties of the United States must be paramount to the laws of the particular States of the Union, or they are *nothing*: of course, I mean such laws and treaties as are made in conformity with the Constitution. This supremacy is expressly declared in the Constitution; and if it were not declared, it must necessarily be so, from the very nature of our federative government. Where there is collision and repugnancy, the parts cannot control the whole; the whole must control the parts: otherwise there would be worse confusion than if we had no General Government.

13. 19 U.S. (6 Wheat.) 264 (1821).

Assuming this to be undeniable, I should be glad if some gentleman better versed in these matters than I can pretend to be, would inform me how this supremacy can be asserted and enforced, in a legal and peaceable manner, but by exerting that very appellate power which is by some denied to the Supreme Court.

I can conceive of only two modes in which this object could be accomplished. One is, by doing what Congress has attempted to do in the Judiciary law of 1789,[14] giving the Supreme Court of the Union appellate jurisdiction in all cases arising in the State Courts involving the construction or application of the Constitution, laws, and treaties or the United States; Or the enactment of a law for removing from the State Courts all such cases, the instant the question under the Constitution, &c. arises, and *before* any trial or determination in the State Court respecting it.

I own that Chief Justice Marshall's opinion has satisfied me that the mode of dealing with this difficult subject which Congress has adopted is conformable to the constitution, and that there are besides some technical difficulties in removing this class of causes from the State to the National Courts, before a final decision in the former. If the cause were thus *evoked* from the state tribunal, before a final adjudication, it might turn out that no question under the constitution, &c, of the U.S. was involved in the cause, and it would be idle for the federal tribunals to take jurisdiction where they could not finally decide. So that this would be a most obnoxious interference with the jurisdiction of the state courts.

Be this as it may, it is perfectly clear that the supreme court must have authority to decide in all cases of repugnancy or collision between the State and National authorities, which can be at all the subject of judicial cognizance. These cases cannot be finally and conclusively determined by both state and federal tribunals. They cannot be exclusively determined by the state courts: for that would create as many clashing rules as there are States in the Union. Such a notion reduces the present national constitution to something less or worse than the old confederation. It makes it a mere *treaty* between independent powers. Every dispute respecting its interpretation must be the subject of negotiation: If that fails, there is no other resort than reprisals or war. Ohio has begun with reprisals? God grant that some other state may not resort to arms!

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14. 1 Stat. 73 § 25 (1789).

Let us suppose, that during the late restrictive system, all the custom-house officers in those parts of the country where it was unpopular had been sued in the state court for performing their duty under the embargo and non-intercourse laws. In vain would they plead the laws of congress in their justification. A prejudiced judge, and a jury inflamed with party feelings, pronounce judgment against them. They appeal to the highest tribunal of the state. The judgment is confirmed. Where can they resort for protection but to the superintending authority of that august tribunal to whom the protection of the constitution and laws of the union has been confided.

The case I have put has actually occurred in many instances. The officer acting under the authority of the union has appealed to its highest court; and if he has done no more than his duty, has been protected.[15]

Many parallel instances might be mentioned. What prevented the Bank of the U.S. from being expelled from the states by their taxing power, but the exertion of this salutary authority in the supreme court?[16] What prevents the whole machinery of the federal government from being stopped by the smallest state in the union, but the consciousness that this authority would be exerted, if they passed the limits which the constitution has prescribed. Were it not for this, the country would be inundated with paper money, made a tender for debts; the sacredness of private contracts would be sported with: one bad example set, in a moment of passion and excitement, by a particular state, would be followed by all the rest: and that scene of universal confusion and distress which succeeded the peace of 1783, and from which the present constitution redeemed us, would again overspread the land. I do not believe that it will be necessary that this power of the supreme court should be often exerted. It operates silently and imperceptibly like the voice of conscience; but it must sometimes be made audible and imperative in order to restrain the attacks which will be attempted upon the bulwarks of the constitution.

15. But see *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). In *Little*, the captain of an American frigate had captured a Danish vessel while acting under a presidential order issued pursuant to an act of Congress. The Court found the order to have been based upon an erroneous interpretation of the statute; therefore the seizure was illegal. The Court then held the captain personally liable: Presidential "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." Id. at 179.

16. See *McCulloch v. Maryland*, 22 U.S. (9 Wheat.) 738 (1824).

## NO. 2.
## (The American, July 10, 1821)

I have been prevented from continuing these numbers by circumstances beyond my control, but of no importance to the public. Since my last number, I have seen with pleasure its principles vindicated by that consistent and venerable patriot, Governor Wolcott, of Connecticut, who in his late message to the Legislature of that state[17] has fearlessly encountered the responsibility of denouncing doctrines supported by specious and plausible sophistry, and recommended by a show of temporary and local popularity, but utterly destitute of a foundation in truth and reason, and which, if they should be countenanced by the approbation of the American people, must ultimately end in the ruin of their liberty and happiness.[18] I have also read with attention, and I must say with disgust, the furious attack made by a writer under the signature of *Algernon Sidney*,[19] in the *Richmond Enquirer*, on the Supreme Court of the United States.[20] Although, I con-

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17. Wolcott at 12-26 (cited in note 12).

18. Id.

> Our National Constitution exhibits the only attempt which has ever been made to extend equal rights to the people of a great Country, and to restrain powerful communities, by the influence of reason exerted in the mild forms of judicial authority. . . . If this system cannot protect the weak against the strong; if it does not rely upon reason and law, and not upon force, it is nothing. . . .
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> As all the possible combinations of rights and interests cannot be foreseen, an important question of constitutional law, may be imagined to arise on a trial before a justice of the Peace in this State. His decision, it is well known, may be affirmed or reversed by the supreme court of errors, and afterwards the decision of the justice may be affirmed by the supreme court of the United States, yet it is impossible to perceive how any of these decisions would increase or diminish the power, or disturb or displace either of these jurisdictions in relation to each other, or in the least, disparage the dignity of the legislature of this State. The whole of the proceedings might exhibit nothing more than an ordinary case of a diversity of opinion, on a doubtful question of law, which had been judicially decided in the court of [last] resort. Such a case may however be imagined, as would afford a fit illustration of the peculiar moral excellence of our system of national government, in the protection of a humble individual, against the exercise of illegal and unconstitutional power.

Id. at 20, 22.

19. A leader of the English revolution and a martyr to the cause of republican government, Algernon Sidney was much revered by the founding generation in America. For an overview of his life and an analysis of his work and its influence on the framers, see Alan C. Houston, *Algernon Sidney and the Republican Heritage in England and America* (Princeton U. Press, 1991). Sidney was put to death in 1683 for his part in a plot on Charles II of England. In choosing Sidney's name for the series, Roane probably meant to invoke Sidney's support for republican principles and his opposition to centralized government. Roane had borrowed the name of one of Sidney's co-conspirators, John Hampden, in mounting his earlier attack on Marshall's decision in *McColluch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See Houston, supra at 274.

20. Spencer Roane [Algernon Sidney pseud.], *Virginia Opposition to Chief Justice Marshall: On the Lottery Decision*, Richmond Enquirer, May 25, 29, June 1, 5, 8, 1821,

fess, I felt some surprize that a writer who has undertaken, in the tone of authority, to instruct his fellow-citizens, and to correct the errors of the highest judicial tribunals of the country, had not even suspected that the command of his own temper might be a necessary qualification for his task, yet I have followed him through all his numbers, looking earnestly for that semblance of evidence and of argument which might have persuaded himself, at least, that his charges were not wholly destitute of foundation. But I have looked in vain.

Algernon Sidney has occupied ample ground, made broad and sweeping assertions, and alleged serious charges, both of criminal misconduct, and criminal intention, against judges as learned and able as any this country can boast. So heavy and aggravated are these charges even in his own opinion, that he takes merit to himself for wanting "no insurrections, no rebellions, no revolutions"[21]—for condescending to address his remonstrances to the people "in [their] primary and sovereign character,"[22] and merely beseeching them "in that character to correct the proceedings of [their] subordinate agents."[23] A high, co-ordinate department of the National government, in the regular discharge of its ordinary constitutional functions, has performed a duty which was expressly imposed upon it by law, and which it could not avoid. This duty has been performed conscientiously and diligently, without the possibility of a motive which could willfully lead astray; but it has not been performed to the taste of *Algernon Sidney*: and yet this moderate gentlemen is so very cool and temperate as to want "no insurrections, no rebellions, no revolutions,"[24] as only to invite the people "in [their] primary and sovereign character"[25] to correct these proceedings; that is, if I comprehend him, to reverse this decision, and to make it what he shall dictate.

To accomplish this design, he charges the Judges of the Supreme Court with completely negativing the idea that the American *States* have a real existence, as such;[26] with usurping a right to amend and alter the Federal Constitution at their will and pleasure;[27] with feigning cases for this purpose;[28] with erect-

reprinted in William E. Dodd, ed., 2 *John P. Branch Historical Papers of Randolph-Macon College* 78-183 (1905) ("*Roane*").

21. Id. at 79.
22. Id. at 78.
23. Id. at 78-79.
24. Id. at 79.
25. Id. at 78.
26. Id. at 80.
27. Id. at 80-81.

ing a petty corporation above the legislatures of the states,[29] and exalting an ordinance of the Common Hall of the city of Washington to the dignity of a statute of the United States;[30] with denying the competency of the state tribunals to enforce their own penal laws against their own offending citizens;[31] with claiming a right to bring the states before the court in all cases whatsoever, and that in the very teeth of several articles of the Constitution;[32] with giving this "monstrous and unexampled decision,"[33] without any apology, without the support of any statute to warrant it;[34] and with a climax of arrogance and absurdity, which will admit but of one higher grade, and that is to claim their powers by divine authority, and in utter contempt of the sovereign power of the people.[35]

These are among the many grave and serious crimes for which this writer has thought proper to arraign the Supreme Court of the Union before the people of Virginia. Mistaking himself, or hoping that his readers might mistake, "the venom of the shaft for the vigour of the bow," he has scattered opprobrious epithets throughout these extraordinary, I had almost said fantastic, accusations, with the heedless profusion of an unthinking prodigal, who, supposing the fund on which he draws to be inexhaustible, is entirely regardless of the occasion or the subject on which he wastes it.

Had I no other object than merely to vindicate the Supreme Court, it would be sufficient to say that these charges are all and each of them founded on the grossest misrepresentation. Not only are they unwarranted by the opinion in the case of *Cohen* against *Virginia*, which is so palpably traduced, but there are many of them expressly, and all of them simultaneously, contradicted by it.

The Judges of that court have not negatived (either expressly or by implication) the idea that the American States have a real existence, but have proceeded on the idea that they are great, powerful, and essential parts of that general system, which the American People have adopted for the preservation of their happiness, their liberty, and their very existence.

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28. Id. at 93, 171.
29. Id. at 81.
30. Id. at 82.
31. Id. at 81.
32. Id. at 81-82.
33. Id. at 82.
34. Id. at 82-83.
35. Id. at 84.

They have not usurped the right to alter and amend the Federal Constitution at their will and pleasure. Had they claimed such a right, they would have proved themselves fitter subjects for bedlam than the bench they would have disgraced. So far from making such absurd, extravagant, and traitorous pretensions they have, on all occasions, manifested the most profound reverence for that sacred charter of our liberties, and the most explicit obedience to its mandates.

They have not feigned cases for this, or for any other purpose. The authority Algernon Sidney quotes in support of this serious charge, makes directly against him, and shows the watchful jealousy with which the court guards against any attempt of the kind which might possibly be made, for Mr. Justice JOHNSON did not say, as he is made to say by A.S.,[36] that *Fletcher v. Peck*[37] was a feigned case. That distinguished Judge could not permit himself to make an assertion so totally unsupported by any evidence in his possession. He expressed the suspicions he had entertained, suspicions which, though destitute of proof, had produced a consequent reluctance to give any opinion in the case; but added, that "[m]y confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court."[38]— And yet, upon such testimony as this, Algernon Sidney has the hardihood to assert, that the court feigned cases for its sinister purposes.

The Judges have not erected a petty corporation above the legislatures of the *States*, nor have they exalted an ordinance of the Common Hall of the city of Washington to the dignity of a statute of the United States. No part of the opinion in the case of *Cohens* against *Virginia*, no expression it contains can possibly be tortured into the slightest justification of these daring assertions. No weight is ascribed to this or to any other act of the corporation. But laws cannot execute themselves: they must be executed by agents, and the question, how far the act of the agent may be authorized by the law, must necessarily enter into the consideration of every case in which the validity of those acts is to be examined. Algernon Sidney may reject such considerations, but no Judge can permit himself to disregard them.

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36. Id. at 93 n.*d*.

37. 10 U.S. (6 Cranch) 87 (1810).

38. Id. at 147-48 (Johnson, J., dissenting in part).

It is not true that the opinion in question denies the competency of the State Courts to enforce their own penal laws against their own offending citizens. This competency has not been drawn into question. Neither on this, nor on any other occasion, has so wild and extravagant a notion, as questioning this competency would be, found its way to the judicial department of the United States. But the constitution is, and was intended to be, a shield for the protection of those who execute laws made in pursuance of it, and the infliction of a penalty on such persons, by state authority, or by any other authority, is a violation of the constitution. The court supposes that the constitution has provided a remedy for such a case, and this opinion is denounced as a denial of the competency of the courts of the states to enforce their own penal laws against their own citizens. Is it not wonderful that the same spirit which construes any subordination of the state governments to the Union into an extinction of those governments, should also construe the assertion of a right to protect the constitution of the Union from violation into a denial of the right of the State Courts to punish their citizens offending against their own laws?

The Judges have not claimed a right, in the teeth of several articles of the Constitution, to bring the States before the Supreme Court in all cases whatsoever. They disclaim any such right, but believe themselves bound to take cognizance of any case brought before them, so far as the Constitution or laws of the United States may be involved in it. They are not "hungry after jurisdiction," but they cannot decline it when it is clearly given to them by the Constitution, without committing a crime against the Constitution, and without violating their oaths.[39] But they have manifested, on more than one occasion, an anxiety to avoid taking cognizance of causes not absolutely forced upon them by their duty and their oaths, and always look with critical eyes into every record that comes before them, in order to see whether they have jurisdiction upon its face. If they find it not, the cause is instantly dismissed, even though the parties are willing to waive the defect. Such was the fate of the cause which was carried up from the Court of Errors of this state in order to test the legality of the grant to Chancellor Livingston and Mr. Fulton of the exclusive right to navigate our waters with steam boats.

39. Here, Wheaton refers to dicta in *Cohens* in which Marshall describes the obligation of a court to exercise its jurisdiction: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 19 U.S. (6 Wheat.) 264, 404 (1821). For an update, see David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985).

If the decision in the case of *Cohens* against *Virginia* be, what Algernon Sidney, in his own peculiarly happy and select diction, has been pleased to denominate it—"monstrous and unexampled"[40]—it is yet not true that it was made without *apology*, and without the support of any statute. The 25th section of the judiciary act of 1789, in express terms comprehends the case; and this writer himself, in one of his subsequent Numbers, forgetting this rash assertion in the first, admits that it does confer the jurisdiction he controverts.[41] If indeed the Court has reached a "climax of arrogance and absurdity" which will admit of but one higher grade,[42] it is to be regretted that the task of correcting its errors, and changing its course, has not devolved on one who would execute it more fairly, more temperately, more rationally, and consequently with a better prospect of success: On one who would entitle himself to some share of our confidence by stating truly and candidly the opinion he censures, and supporting his censures by arguments drawn from the Constitution.

Not contented with arraigning the constitutional principles contained in this opinion, Algernon Sidney is dissatisfied with its form and structure. Besides its more important defects, it is, he says, unusually "tedious [and] tautologous."[43] It is no part of my design to discuss the merits of this opinion in point of style and composition. I confess I am not so fastidious a critic as Algernon Sidney; but if we recollect the great mass of important business which loads the docket of the Supreme Court, the intricate questions and able discussions to which the attention of the Judges must be directed, even while preparing opinions in causes which have been previously argued; we ought not to be surprized at the defects, if there be defects, in the diction, the arrangement, or the length, of any opinions they may deliver. It is not elegance of style, but soundness of decision, at which they ought chiefly to aim. But I believe this writer stands alone in denying to this paper every essential quality of style which should be regarded in drawing up the solemn judgment of a court of justice: and I cannot avoid observing that this hypercritic censures the tediousness

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40. *Roane* at 82 (cited in note 20).

41. See, e.g., id. at 138.

> [The Supreme Court] take[s] the famous ground that is taken by the twenty-fifth section of the judicial act of Congress, namely, that a state court deciding in favor of an act of Congress is always right but always wrong when it decides against it. Nay, that act, I had almost said that absurd and ridiculous act, allows an appeal to the federal court in the last case, and denies it in the first.

Id.

42. Id. at 84.

43. Id. at 88.

of an opinion of eleven columns, whilst he fills more than twenty-six in discussing the same question; that he arraigns the offence of tautology in a series of numbers containing more repetitions than I can readily enumerate; and that this lucid order leaves the reader perplexed and puzzled to arrange in his own mind the points which have been discussed. But it is nothing new to think our neighbor blind because a mote is perceived in his eye, whilst we are confident in the perfection of our own vision though obscured by a beam.

## NO. 3
## (The American, July 23, 1821)

To the gross and unfounded accusations against the Supreme Court already noticed, I must be permitted to add some others which equally mark the peculiar spirit of malignity in which the strictures of *Algernon Sidney* are written.

Without wasting a moment on his singular reasoning respecting the word "protection,"[44] or a still more singular conclusion drawn from that reasoning, I shall proceed to his assertion that the prosecution of the *Commonwealth of Virginia* against *Cohens* might have been carried to a higher court in that State than the one in which it originated.[45] Not professing to understand the peculiar judicial system of Virginia, I shall not enter into any controversy with this writer respecting the exposition of their statutes; nor should I notice this assertion at all, but for the invidious object with which it was made. For this reason only, I shall venture to remark, that in the case of *Bedinger* against *The Commonwealth*, reported in *Call's Rep.* words not very unlike those contained in the particular statute on which Algernon Sidney has pronounced so confidently, were construed by the Court of Appeals of that state not to confer appellate jurisdiction, and the Judges express themselves in language strongly applicable to the case of *Virginia* against *Cohens*—I am also informed by some gentlemen of the bar, in whose information I place great confidence, that no case whatever has occurred in which this jurisdiction has been exercised; that there is no instance in Virginia, since the case cited from *Call's Reports*, of an appeal from the judgment of a court rendered in any criminal prosecution whatever. This fact goes far to show the universal understanding on the subject, and there are many circumstances attending the case which add to its influence.

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44. Id. at 91-92.
45. Id. at 92.

Cohens, the defendant,[46] prayed an appeal from the judgment against him, which the Borough Court of Norfolk refused to allow, upon the ground, expressly stated on the record, that "cases of this sort are not subject to revision by any other court of the commonwealth."[47]

The attention bestowed by the legislature of Virginia upon this case, and upon the writ of error issued to remove it to the Supreme Court of the United States, is well known throughout the whole country. The report of the committee to whom the subject was referred—the amendments offered to that report—the resolutions ultimately adopted—have all long been before the public. In no one of these papers was the idea suggested that the writ of error was premature, and that the cause ought to have been carried to a higher State tribunal before it was brought to the Supreme Court of the United States. In debate, so far at least as the debates have been published, it was never suggested. I presume the legislature of Virginia, like that of every other State, abounds with lawyers whose practice would necessarily lead to an intimate acquaintance with this subject. Yet in scraping together all sorts of incongruous matter to cast odium on this proceeding, the idea that the judgment had not been given by a court of the last resort never entered into any of the wise heads who had undertaken to examine this subject. Could it even be supposed that this material circumstance had escaped the "optics keen" of the gentlemen of the Virginia bar, their Court of Appeals is known to have been in session at the same time with the legislature. Far be it from me to insinuate that the members of that court would sully "the pure ermine" of which Algernon Sidney talks so much,[48] by taking the lead, or mingling in the questions which agitate and inflame mere party politicians. Without derogating from the calm and mild dignity, which is, I doubt not, the attribute of that high tribunal, it must be supposed that in the frequent conversational discussions produced by the occasion, the idea that the case was cognizable in a higher court would have been intimated had it been entertained. Had it been intimated, it must have reached the ears of the legislature: and had it reached their ears, it would have been urged by the counsel of Virginia at the bar of the Supreme Court. The legislature instructed their counsel to object to the jurisdiction; yet this ground

46. Actually, the case involved two Cohens—brothers P.J. and M.J. Cohen. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 265 (1821).

47. Id. at 290.

48. See, e.g., *Roane* at 79, 83, 84 (cited in note 20).

of objection, which, if well founded, would have been fatal, was neither suggested by Virginia nor by her counsel.

When these circumstances come to be considered, the decision of Algernon Sidney, however confidently and peremptorily pronounced, may well be doubted. But, be this as it may, however this question may be settled hereafter, the mind of that man must be of no ordinary structure, who, in such a case, can permit himself to say, that the Supreme Court considered the Court for the Borough of Norfolk as the highest tribunal of the State in which the cause was cognizable, not because such had been the decision of the State Court itself; not because such appeared to be the opinion of Virginia and her counsel; but "for the purpose of giving themselves jurisdiction:"[49]—who could permit himself suggest that this was "a feigned case:"[50]—who could assert, in opposition to the very fact on which he founds the assertion, that "[a] practice of that kind is not without example in that high court:"[51]—who could add that "[s]uch a practice may be, also, very convenient to the supreme court, in furthering its favorite object of expounding the Constitution, in the gross, and settling, by anticipation, the real causes which may come before it."[52] The fitness of such a mind for the discussion of a great constitutional question, or the candour and fairness of the criticism it has dictated upon the decision of that question by the competent tribunal, requires no comment.

In stating the points on which the motion to dismiss the writ of error was supported, one was said by the Court to be, "[t]hat a State is a defendant;"[53]—which is asserted by Algernon Sidney not to be "a candid or accurate statement of the objection."[54] But all who are conversant with the usage of courts of justice, know well that a point is often, with perfect proprietary, stated briefly, without mentioning various qualifying circumstances which may form subdivisions of the general question. But in the passage quoted, the court do not make their own statements, but, in terms, refer to the points as made by the counsel for Virginia. Mr. *Barbour*, after urging that the jurisdiction, if given, was original, and not appellate, said, "my last proposition is, that, considering the nature of this case, and *that a State is a party*, the judicial power of the United States does not extend to the case,

49. Id. at 92.
50. Id.
51. Id.
52. Id.
53. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 376 (1821).
54. *Roane* at 94 (cited in note 20).

and that, therefore, this court cannot take jurisdiction at all."[55] And he again states, in the same connexion, that without reference to the particular character of the case, "the judicial power of the United States does not extend to it, on account of the character of one of the parties; in other words, because one of the parties is a State."[56]

This argument was published in the *Richmond Enquirer*, before Algernon Sidney wrote. If it could not have prevented his asserting that the statement made by the court "[was] not a candid or accurate statement of the objection,"[57] ought not both candour and accuracy to have induced him to erase these epithets, when he read the statement actually made by the court on proceeding to consider the objection? That statement is in these words: "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."[58] The court then take a comprehensive view of the arguments which had been urged, and state them in their full force.

How jaundiced must be that eye which can perceive in this proceeding an unworthy and silly attempt to elude an argument which could not be answered, by an "uncandid and inaccurate statement" of that argument!

It is not in the conduct of the Supreme Court that we are to look for examples of this unworthiness or folly.

But too much time has already been bestowed on the temper with which Algernon Sidney addresses the public. I forbear, therefore, to produce further specimens of it, and shall proceed to subjects of deeper and more extensive interest.

It is scarcely possible to suppose that the extreme bitterness of this writer can proceed from personal resentment. His hatred is directed against the judicial authority of the Union; and the judges are too much dispersed over the country to be, many of them, even known to the same individual. His feelings then, are political, not personal. When we reflect on the immense importance of the judicial department to the government of the Union—that it is an instrument indispensable to the preservation of the constitution, and the peaceable execution of the laws—that, being separated from the busy and active part of society, and from the other departments of the government, it is without

55. See *Wheaton's Reports*, Vol. 6, p. 302.
56. *Cohens*, 19 U.S. at 302-03.
57. *Roane* at 94 (cited in note 20).
58. See *Wheaton's Reports*, vol. 6, p. 378.

political influence; and, being without patronage, is without power—that its members are not, like those of our courts, at the same time, members of a Council of Revision having a direct agency in the enactment of laws—that no selfish motives are enlisted in its defence, and that its fate depends on the good sense and patriotism of the country; when we compare its intrinsic importance with its intrinsic weakness—we can be at no loss for the motives to which these incessant and virulent attacks are to be ascribed. These envenomed arrows, aimed at the most vulnerable, and not the least vital part of the national government, are not shot at random. A mind of keen perception, looking steadfastly at its object, must perceive that, if a main pillar be crushed, the whole fabric will tumble into ruins. The opinion asserted, and the principles advanced throughout these Essays, though not avowing hostility to a union of the States in direct terms, are not to be misunderstood. They undermine and sap its very foundation. No sagacious enemy of the Union will ever avow his purpose, nor unfurl the banners of dismemberment. "DISSOLUTION OF THE UNION," "DEATH TO THE CONSTITUTION," will not be openly inscribed on the standard he raises: he will march to the combat under some other and more popular colours; he will seize some principle dear to the American heart, and, while pressing on to the overthrow of the government, will profess to limit his operations to the defence of that principle.

Such a principle is "STATE RIGHTS." By every honest American, the States, and their rights, must ever be held sacred. His heart warms instinctively at their name; and feelings, not unlike those which are aroused when the domestic fire-side is invaded, are excited in his bosom when they are threatened. It is a passion which is universal, as well as spontaneous; not requiring the slow process of reasoning for its efficacy. The sentiment of national patriotism, which pervades the whole Union, is comparatively cold and inert. This local patriotism which attaches us to our State institutions is closely connected with all the associations of our youth, with the memory of the past, and the hopes of the future. He who appeals to it, appeals to all that is most dear to our prejudices and our affections.

On another account, it is well adapted to promote the purposes of those who are hostile to our present national system. The line of demarcation between the powers vested in the general and the local governments, is not always so distinct as to be clearly perceived. It is not a mathematical, but a moral line. There are points in it on which the soundest understandings may

receive different impressions, and the most upright minds take different directions. It is easy to excite jealousies on those points, and to press those jealousies to a dangerous extreme. STATE RIGHTS, therefore, STATE SOVEREIGNTY, and STATE INDEPENDENCE, are the magic words which present themselves to every individual who is discontented either with his government, or with his own situation in it. They are the ready weapons offered to every hand; and the manner only in which they are wielded can determine whether they are seized for offensive or defensive war.

But strong as is our devotion to our local governments, determined as is our resolution to maintain them in their just integrity, it is not the only passion which ought to animate the American bosom. We cannot consider ourselves solely as Virginians, New-Yorkers, or Pennsylvanians.—We are also Americans.— In this, our great and national character, we are known to the world, and are respected by the world. In this character we achieved our Independence, and in this alone can we preserve it. The gallant deeds of arms performed by our countrymen as Americans, and which adorn the annals of our revolution and of our more recent contests with foreign nations, dwell upon our memories and are cherished in our recollections. Not only our fame and reknown, but our safety, and consequently our liberty, depend upon this character. Maintaining it we are invulnerable, parting with it we become the sport and the prey of mightier powers. Who then would be willing to break the cement which binds us together? Who would consent to see an enemy, or a jealous rival in a neighbouring State? If every feeling of kindness and affection, if all the tender recollections of ancient friendship, of common dangers and common blessings could be effaced, who would willingly encounter the hazard of such a state of things.

Reason then, and that sober reflection, which I trust will always compose a part of the character of our countrymen, demand imperatively, the preservation of our national union. Reason, the history of the world, the human character, and our own experience, all combine to demonstrate that it can be preserved only by a national government, possessing sufficient powers to maintain itself, and to accomplish the purposes of its institution.—An alliance of sovereign states, however strict, is but an alliance still; and may be dissolved, or varied, at the will of every member, without any other penalty than the imperfect one

provided by the law of nations[59] for the infraction of treaties. To the sure preservation of our federal union, a GOVERNMENT is necessary; and a controul over its different members, so far as its powers extend, is inseparable from the very idea of government. The complete sovereignty and the complete independence of the parts, is incompatible with a government for the whole; and this complete independence of the States is only another term for their separation from each other.

The Union, then, is to be maintained, as well as the independence of the States; and these conflicting principles are to be reconciled with each other. The American people sought to reconcile them; and have, for this purpose, framed a government, for themselves collectively, and for the different States into which they are divided. On the former of these governments they have conferred great and specific powers. The extent of these powers is to be measured, not by our several theories, but by the instrument which confers them. In trying the legitimacy of any controverted act, we ought not to bend the constitution to our theories, but ought to adapt our theories to the constitution. Let this course be pursued in the questions now before the public.

## NO. 4
## (The American, July 26, 1821)

The question discussed in the essays to which I have referred, is, the jurisdiction of the Supreme Court of the United States, in a case where a State has prosecuted a citizen, for an act done in pursuance, as he alleges, of a law of the United States. He pleads the act of Congress in his defence; and on a case agreed, submitting the operation and validity of the act of Congress to the Court in which the suit was brought, judgment is rendered against him, and the cause is brought, by writ of error, before the Supreme Court. The Supreme Court has affirmed that it has jurisdiction in such a case: Algernon Sidney denies it.

The distinction between the right to examine and revise a judgment, and the subsequent decision on its merits, is so plain and obvious that one would think, it need only be mentioned to be at once admitted. Yet this writer, as if determined that the most self-evident truth, when asserted by the Supreme Court, shall not remain uncontradicted, has been extravagant enough to deny even this plain distinction. It is too apparent for argument,

59. See Henry Wheaton, *Elements of International Law* (Lea & Blanchard, 3d ed. 1846); Henry Wheaton, *The History of the Law of Nations in Europe and America* (Gould, Banks & Co., 1845).

that a court may and must exercise jurisdiction over the question whether a judgment has or has not violated the constitution, before it can decide that question either affirmatively or negatively. Inquiry must precede decision; and if inquiry be forbidden, it is as much forbidden when the constitution has, as when it has not been violated. Yet Algernon Sidney, as if confident in the possession of superhuman powers of intellect, and as if he were capable of maintaining, at the same time, the affirmative and negative of the same question, denies that the Court can enter upon the inquiry, and denies that this denial implies an affirmative of the proposition that, if the constitution be violated, it contains within itself no remedy for the mischief.

But I will not dwell on such absurd paradoxes. In opening his argument, this writer more than insinuates that the Court has considered the necessity of this power as an excuse for usurping it. "Several modes of amending the constitution," he says, "being provided therein, the Supreme Court ought not, on the mere plea of danger, to interfere. This is always the tyrant's plea, and was the plea of the infamous ship-money judges, mentioned in my first number."[60]

This imputation on the Court, which, in many other places, is still more distinctly and broadly asserted, is so often repeated, and constitutes so large a portion of the essays I am reviewing; is so highly favoured and so fondly cherished in them, that were it to be passed over in silence, the reader might be seduced into the suspicion that it had some foundation in fact. It might be thought scarcely possible that a writer, who supposed himself to be addressing a rational public, would be perpetually engaged in refuting an argument which was never advanced, and contesting a proposition that was never made. Yet it is most certain that the Supreme Court, so far from adopting this idea, has expressly repudiated it.

After stating, with truth and with luminous perspicuity, the situation in which the national government would be placed by the establishment of the principles for which the State of Virginia contended, the court add:

> If such be the constitution, it is the duty of the Court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this Court to say so; and to perform that task which the American people have assigned to the judicial department.[61]

60. *Roane* at 93 (cited in note 20).
61. *Cohens*, 19 U.S. at 377.

So far from suggesting the idea that powers not delegated are to be assumed by construction, the court affirm the contrary; and the whole opinion proceeds upon the hypothesis, that the constitution is neither to be enlarged, nor contracted, but taken as it is. The triumph gained by disproving a proposition which was never advanced, which is entirely disclaimed, and which forms no part of the controversy, is a miserable triumph; and will never be sought for from those who are believed to possess the independence and the intellect to think for themselves.

If, as contended by the Supreme Court, this question of jurisdiction entirely depends on the words of the constitution, we must resort to those words in order to determine it. The section which enumerates the cases in which jurisdiction is given to the tribunals of the Union, commences thus: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[62] The section proceeding with its enumeration, describes different cases, in some of which, jurisdiction depends on the nature of the case; in others, on the character of the parties: but the clause just quoted is that which was supposed to authorize the national legislature to give jurisdiction to the Supreme Court in the case of *Cohens* against *the State of Virginia*. The court supposed, that where a defendant justifies under an act of Congress, and places his defence entirely on that act, his case arises *under a law of the United States*; and that the jurisdiction which is expressly given in such case by the judiciary act of 1789, is constitutionally given.

As the words which contain this grant of power have no allusion to *parties*, but only describe the *case*, and as they give jurisdiction in *all cases* coming within the description, containing no exception of any party whatever, the court (it seems) did not think itself at liberty to insert an exception which the constitution had not made, but held itself bound by that instrument as it stands. Indeed, such an interpolation would have been wholly unjustifiable. Had the enumeration stopped here, and had no jurisdiction been conferred in consequence of the character of the parties, could we have listened for a moment to any man who would persuade us that the character of the parties was in any manner to influence the question as to what cases were included in the clause? And yet it will not surely be pretended that the subsequent part of the section can have the effect of weakening

62. U.S. Const. Art. III, § 2.

that part which has been quoted. A grant of additional jurisdiction cannot deduct from that which was previously granted.[63]

It is vehemently contended by Algernon Sidney, if I understand him, that the clauses of the constitution which give jurisdiction to the courts of the Union, in consequence of the nature of the case, are restrained and limited by those which give it in consequence of the character of the parties; and that those persons only who have a right to bring their suits in the national courts, whatever may be the nature of the controversy, have a right to claim the judgment of those courts in cases to which the constitution has expressly extended their jurisdiction, without any reference to the character of the parties.

If any proposition coming from that quarter could surprize me, this would. I should have thought it too extravagant to be hazarded by the wildest zealot of faction. The constitution enumerates the several classes of cases to which the judicial power of the Union shall extend, in terms as clear and distinct as our language affords. These cases have no connexion with, or dependence on, each other; and when either of them arises, it forms of itself, without other auxiliary, a distinct and substantive ground of jurisdiction. A case arising under a law of the United States, is one case; a case arising under a treaty, is another; a case between citizens of different states, is a third. Should we not be overwhelmed with astonishment to hear a man say that a case arising under a law of the United States would not be cognizable in the courts of the Union, unless it also arose under a treaty? Is it a less obvious and glaring misconstruction of the constitution, to say that a case arising under a law of the United States will not be cognizable in the courts of the Union, unless the parties between whom it arose were citizens of different states? Might it not, with at least as much semblance of propriety, be contended that citizens of different states could not come into the federal courts, unless their cases arose under the constitution, laws, or treaties of the Union? Most certainly it might. The words of the section no more make cases arising under the constitution, laws,

63. In treating the two categories of jurisdiction over cases and controversies as independent sources of federal judicial power, Wheaton joined the company of Marshall and Story as well as that of the nation's first attorney-general. Edmund Randolph offered a similar account of the two categories of jurisdiction in his 1790 report to Congress on the Judiciary Act of 1789. See *Report of the Attorney-General to the House of Representatives*, in Maeva Marcus, ed., 4 *The Documentary History of the Supreme Court of the United States, 1789-1800* at 163 (Columbia U. Press, 1992) ("[C]ases . . . between any persons or bodies whatsoever . . . are not without the reach of the judiciary power of the United States. For the subsequent descriptions of persons and bodies, spread, instead of contracting the jurisdiction.").

or treaties of the United States dependent upon the character of the parties, in order to attribute those cases to the federal jurisdiction, than they make cases between citizens of different states, dependent for the same purpose on the character of the controversy. If any distinction could be drawn between them, it would be in favour of that class of cases which is first in importance and first in the enumeration. And yet what a clumsiness in the use of language does the construction, which would exclude either from the federal jurisdiction, impute to the framers of the constitution! How little they merit the imputation the public well know. Of all human compositions, their work may be cited as a model of perspicuity and precision.

If cases arising under the constitution, laws, or treaties of the United States, must also arise between parties who have a right to claim the federal jurisdiction independent of their case, does not the same principle apply to cases of admiralty and maritime jurisdiction? I should be glad to understand how these classes of cases are to be distinguished from each other. I should be glad to be informed by what rule, other than the "*Sic volo, sic jubeo*" of arbitrary caprice, they are to be distinguished. So that upon this construction, a prize cause, or a suit for seaman's wages, could not be brought in the District Court, unless the parties were citizens of different states, or aliens; and the Court of Admiralty, which, if I mistake not, still exists in Virginia, although I believe it is seldom drawn down from the clouds, might once more have an active being, and the prerogative of our own Governor as "admiral of the navy" of this state might be something more than an empty pageant.

But, to speak with a seriousness becoming the subject, there is nothing, nothing even plausible, nothing which can impose on the most unthinking, in this new and wild notion, that separate classes of cases, perfectly distinct in their description of character, shall be blended together, and forced by arbitrary construction into a mutual dependence on each other. If this may be done, there is an end of the constitution. It becomes what Algernon Sidney pleases to make it.

This rule, then, if it can be called one, must be abandoned; and we must adhere to the constitution, which expressly extends the jurisdiction of the national courts to all cases arising under the constitution and laws of the United States,[64] without any exception of parties.—After reviewing this section, the court say, "[a] case in law or equity consists of the right of the one party as

64. U.S. Const. Art. III, § 2.

well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."[65] The court proceed:

> The jurisdiction of the Court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.
>
> The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent State is not suable, *except by its own consent.*[66]

The court then contend that this consent has been given. Having before shown that it was given in the letter of the constitution, the opinion next proceeds to show that the spirit of the instrument conforms to its letter. The general object and purpose of the American people in framing their government, as evidenced by their history, by their situation and circumstances, and by the text of the constitution itself, are brought into view; and the arguments with which the counsel for Virginia sought to maintain the exception on which they rested their motion to dismiss the writ of error, are fairly and fully considered. A course of demonstration, complete in every link of the chain of reasoning, and which has not yet been fairly met, and I venture to say never will be, is thus concluded:

> 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.[67]

This language certainly cannot be misunderstood; and it is too clear for controversy that the court found their opinion on the letter of the constitution, and on the express grant of jurisdiction in the very case which the words of that instrument plainly

65. *Cohens*, 19 U.S. at 379.
66. Id. at 379-80 (emphasis added).
67. Id. at 392.

import. The learned counsel who was instructed to object to this jurisdiction, contended that an exception not expressed must be implied from the nature of the government and the spirit of the constitution. It is professedly for the purpose of meeting that argument, that the nature of the government is considered. The court do not analyze the constitution for the purpose of extracting from its spirit something which may supply any omissions in its words, but for the purpose of showing the entire accordance between its spirit and its words; and that equal violence would be done to both by implying an exception, not expressed, to words importing a general grant. Yet Algernon Sidney affects to consider these arguments as being urged by the court to show the necessity and propriety of taking jurisdiction where it was not given; of taking it by implication. In a laborious criticism on separate sentences, which are almost uniformly tortured and perverted from their true and plain sense, he continually repeats, either that the mischievous effects arising from his construction might not be real, or that, if real, the constitution ought to be so amended as to prevent them. He continually represents these arguments of the court, not as defending the literal construction of the constitution as it now exists, but as asserting a right to alter it.

Why is this done? Would these willful misstatements be made by a man whose object was truth rather than victory? Would they be addressed to readers who were not believed to be predisposed to take any course which a chosen leader might mark out for them, and to swallow every *nostrum*, however nauseous, which he might prepare? But I trust he is mistaken.—Surely the reading public of Virginia must be too intelligent, enlightened, and independent, to be classed with the abject and deluded followers of "the veiled Prophet."

Algernon Sidney labours to show that the principle for which the counsel of Virginia contended in the Supreme Court, is correct. He labours to show that one sovereign cannot be amenable to the tribunals of another without his own consent;[68] and that, in cases of compact neither party is at liberty to construe the agreement to the exclusion of the other.[69] In support of these

68. See, e.g., *Roane* at 80 (cited in note 20) ("It is an anomaly in the science of government, that the courts of one independent government, are to control and reverse the judgments of the courts of another.")

69. See, e.g., id.

> That is no federal republic, in which one of the parties to the compact, claims the exclusive right to pass finally upon the chartered rights of another. In such a government there is no common arbiter of their rights but the people. If this

propositions, he heaps authority on authority, and piles quotation on quotation, till he supposes his principles to be surrounded with an impassable rampart. But all this is a work of supererogation. These propositions have never been controverted by any body; and the Supreme Court admits in terms, the general proposition that a sovereign, independent state is not suable, except by its own consent;[70] and avowedly relies on the constitution itself to prove the consent of Virginia in the particular case then under consideration. Neither has the court been so absurd as to contend that when two independent powers enter into a compact, which does not impair that independence, either of them is at liberty to expound it to the exclusion of the other. The judges are not yet sufficiently ripe for Bedlam to maintain such a proposition.

The difficulty lies, not in proving the truth of these abstract propositions, but in applying them to the question under discussion. *Hic labor, hoc opus est*: and so far as Algernon Sidney has attempted the achievement, he has, in my humble apprehension, totally failed. The basis of his whole argument appears to be the complete sovereignty and independence of the several states. This is his *postulatum*, his great principle to which every thing is to be accommodated, his lever with which the world is to be moved. Do the words and spirit of the constitution impugn this complete independence? Do they limit, restrain, and modify it? Then they must be so tortured and misconstrued as to be reconciled to it. The government of the several states must stand in the same relation to that of the Union, as any one independent power of the world stands to another: as France to Britain, or Prussia to Sweden.

If this proposition be true, there is an end of the controversy, and an end of the Union. If it be not true, there is an end of the argument of Algernon Sidney.

On this point, Algernon Sidney and the Supreme Court of the U. States are admitted to be in direct opposition to each other. The Court considers our Union, not as an alliance of independent sovereigns, but as a GOVERNMENT, instituted by the PEOPLE of this country for certain great purposes, deemed by them all important; and endowed for the accomplishment of these purposes with certain great powers and authorities, which

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power of decision is once conceded to either party, the equilibrium established by the constitution is destroyed, and the compact exists thereafter, but in name. Id.

70. *Cohens*, 19 U.S. at 380.

are expressed in the charter by which it is created.[71] In the exercise of these powers, this government is, necessarily supreme, and is expressly declared to be so. The existence of such a government is incompatible with the complete, unlimited sovereignty of the states. The question, therefore, must always be, not whether a particular act of this supreme legislature be consistent with state sovereignty, but whether it is authorized by the constitution.

71. See id. at 380-81.