Oliver Ellsworth His Central Role in the Establishment of Federal Sovereignty

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OLIVER
ELLSWORTH
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HIS CENTRAL ROLE
IN THE ESTABLISHMENT
OF FEDERAL SOVEREIGNTY

by
Edward Jayne

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Preface

In my childhood many decades ago my grandmother kept insisting that my lineal ancestor Oliver Ellsworth had been one of our nation’s truly great Founding Fathers. Later my mother picked up the cause, and as I matured as a teacher in the field of English, she persistently suggested that it might be interesting for me to apply my interpretive skills to explain his remarkable accomplishment. If I could totally dismember a poem or novel, it might be almost as easy to recombine Ellsworth’s wonderful accomplishment, since he had somehow done very important things. Nobody seemed to recognize this, but there was no doubt about his remarkable success.

To appease my mother’s persistence, I finally looked into Ellsworth’s various accomplishments, only to find that they were quite remarkable. I pored over his only biography, William Garrott Brown’s The life of Oliver Ellsworth, published in 1905, to find that indeed Ellsworth had played a pivotal role in our nation’s inception, and
that nobody seemed to have any idea how this might have happened—not even my mother and deceased grandmother, not even William Garrott Brown, whatever the merits of his research.

My brief article appropriately published by the Daughters of the American Revolution, was insufficient to provoke any interest in the issue, so I doubled down my research with heavy dependence on Farrand’s remarkable four-volume *Records of the Federalist Convention of 1787*, as well as Elliot’s *Debates* and several other texts by old-fashioned constitutional historians. After sustained inquiry, I was able to publish my 93-page paper, “An Accidental Conspiracy: The Early History of Judicial Review from the Constitutional Convention to the 1789 Judiciary Act and *Marbury v. Madison*.” Unfortunately, the *festschrift* in which it was published died aborning and, worse yet, my aging mother complained that my information was totally unclear to her.

Nowadays, a couple decades later, I find myself making comparable claims about Ellsworth’s remarkable accomplishment with my own assortment of grandchildren, and they seem impervious to the pedantry I flaunt to “explicate” constitutional history. As a result, I have taken the liberty to compile another relatively brief assessment, “Oliver Ellsworth’s Essential Role, etc.” in which I
have boiled down his pivotal achievement to nine components worthy of explanation, then suggested several reasons how and why his historic role might have been so completely ignored. This I have passed around among friends and relatives without trying to submit it for publication.

It was only this winter that it occurred to me that an even better approach would be to combine this recent essay with my earlier and more thorough piece under the original title, “Accidental Conspiracy.” The recent essay would feature a clear and relatively simple explanation of Ellsworth’s achievement, setting the stage for the judicious reader’s encounter with the larger text that remains more thorough in tracing the complex relationships involved among our nation’s Founding Fathers.

Unfortunately, much of this interaction goes unnoticed among most of today’s constitutional historians. Modern ideological preconceptions almost exclusively devoted to civil rights have so completely clouded earlier issues that what actually happened two hundred-thirty years ago has long since dissolved into the penumbra of ignored history.

Here, then, is a major fragment of “real” narrative—a far more interesting chain of events in my opinion than the
topical substitute taught in respectable universities. As compared to the poems and novels I have dissected in my career as an academic critic, I do take pride in having reconstructed my seventh generation great-grandfather's remarkable achievement toward the creation of the United States.
Introduction

Our nation’s Founding Fathers supposedly included Washington, Franklin, Jefferson, Hamilton, Madison and Adams, not to overlook the initial role of Paine in helping to encourage the American Revolution. A second tier of leaders included such eminent figures as George Mason, Richard Henry Lee, Edmund Randolph, and Patrick Henry of Virginia; James Wilson, Robert Morris, and Gouverneur Morris of Pennsylvania; John Jay of New York; John Dickinson of Delaware; William Paterson of New Jersey; John Rutledge of South Carolina; Samuel Adams of Massachusetts; and Roger Sherman of Connecticut.

Also from Connecticut but too often ignored was Oliver Ellsworth, whose depiction as an austere figure addicted to snuff gave him a comic aspect occasionally featured by historic accounts to offset the stern intentions of everybody else. Yet Ellsworth’s role was at least as important, if not more so.
Today Ellsworth’s official biography seems relatively devoid of interest in most of the appropriate encyclopedias. They list his having served in the Continental Congress, having been a judge both for the Continental Congress and on Connecticut’s state superior court, having participated in the Constitutional Convention until his unexplained departure three weeks before it was signed, having served in the Senate during Washington’s presidency, and having been the third chief justice of the Supreme Court without having provided any major decisions.

He is also now and again remembered for having authored the popular Letters to a Landholder supportive of the Constitution, for having dominated proceedings in Connecticut’s ratifying convention, and for having led a failed diplomatic mission to France in order to avoid naval warfare against Napoleon. Unfortunately, it can be added that Ellsworth’s journey to and from France was beset with heavy seas, and Ellsworth contracted an illness that obliged his withdrawal from public life. He died in 1806 at the age of sixty-two. This summary of his career is indeed accurate, but it falls short of telling the full story—a remarkable story that is almost entirely unknown today.

Listed here are nine reasons how and why Ellsworth played an essential role—
perhaps the most essential role of all—in the creation of the United States.

**Naming the Nation To Be**

*First,* and probably least important, it was Ellsworth who gave our nation the name of The United States. Preceding the Constitutional Convention, Paine, Jefferson, and others all spoke of the united states in generic terms such as “the unified states” or “the group of states.” At the Convention, delegates from the large states kept talking of the “nation,” but as a small-state delegate Ellsworth preferred the earlier description as a unified group rather than a single unit necessarily dominated by the large states. So why not describe the group as before, Ellsworth seems to have suggested, but with the article *the* imbedded in the name and with use of capital letters—“the United States”? On June 20, 1787, Ellsworth proposed this change in his very first recorded contribution at the Convention beyond having seconded a couple of motions by Sherman, his fellow Connecticut delegate.

Support for this official name turned out to be unanimous among fellow delegates. Later, while authoring the final draft of the Constitution, Gouverneur Morris added the words, “of America,” to produce the full wording accepted today, The United States of America. What seems remarkable about
Ellsworth’s contribution is that having provided the United States with its name he was as effective as anybody in having created a system of government suitable to its fullest implications.

The Connecticut Compromise

Second, Sherman, Johnson, and Ellsworth successfully promoted the so-called Connecticut Compromise that broke the deadlock between the large and small states about representation in Congress. The large states wanted proportional representation that would guarantee them a majority of legislators as compared to the small states. On the other hand, the small states wanted equal representation that gave them just as many representatives—two apiece—as the large states. The trade-off they finally made was a bicameral arrangement whereby the House of Representatives exercised proportional representation while the Senate exercised equal representation.

Ellsworth himself proposed the plan finally accepted whereby members of the House of Representatives would be elected by popular vote and members of the Senate would be elected by state legislatures. The interests of a state’s populace would presumably be emphasized in the House of Representatives, while the interests of its political leadership would be emphasized
in the Senate. Much later the Seventeenth Amendment rejected this arrangement in favor of using the popular vote for both the Senate and House of Representatives. Far more important, however, was the fact that the Constitutional Convention was on the brink of dissolving, and the Connecticut Compromise based on Ellsworth’s proposal was acceptable to a majority of delegates and thus kept the Convention alive. Without this compromise the Convention would have failed.

**Slavery in the Beginning**

*Third,* crucial to the success of the Connecticut Compromise was a less publicized compromise between the small northern states and the three states from the deep south—Georgia and the two Carolinas—which were prepared to abandon the Convention if slavery was not written into the Constitution. As a result, a trade-off was essential between the small northern states’ toleration of slavery in the Constitution and, more specifically, their support of a three-fifths-population count for slaves in southern states in exchange for the southern states’ support of the Connecticut Compromise. Without this secondary trade-off, the Connecticut Compromise was not possible and the Convention was effectively doomed.
It turned out that Georgia’s delegates voted against the Connecticut Compromise anyway, but this did not matter, since the two Carolinas provided just enough votes for the needed majority. All delegates from the small northern states cooperated with this tacit arrangement, but it was Ellsworth alone who actually accepted the distasteful obligation to stand before the Convention on August 17 and 22, the latter on his final day at the Convention, to remind fellow delegates of the need to write slavery into the Constitution. His words featured the importance of states rights, as explained by Madison: “Let every state import as it pleases. The morality or wisdom of slavery are considerations belonging to the states themselves.”

Ellsworth had no slaves of his own, but he actively promoted the compromise because it was crucial in the creation of the United States.

Committee of Detail

*Fourth*, because of his active role at the Convention, Ellsworth was elected to the Committee of Detail (described by Madison as the Committee of Five) with four other Convention delegates: John Rutledge of South Carolina, Edmund Randolph of Virginia, James Wilson of Pennsylvania, and Nathaniel Gorham of Massachusetts. Their
task on this Committee was to combine in a single preliminary draft of the Constitution the twenty-two resolutions that had been gathered from the Virginia Plan, the New Jersey Plan, the Pinckney Plan, and various other proposals along with amendments passed on the convention floor.

The rest of the Convention took a vacation from July 26 to August 6 while these five delegates spent ten days in confronting this solemn task. Later during the Convention they kept meeting with each other to incorporate new amendments into their basic draft of the Constitution. The only record of proceedings by the Committee of Detail during the initial ten-day period additional to the Constitution itself were the written rough drafts by Rutledge, Randolph and Wilson. However, it is important to note that these drafts alone are not a particularly useful indication of what individuals dominated proceedings, since the three identified as their authors might have done little more than serve as amanuenses for the others as they argued the words and ideas under consideration.

More indicative of the level of input by participants during the Committee of Detail’s sessions would have been their contributions to debate during the Convention afterwards to clarify their intentions while compiling the document. Ellsworth turns out to
have been the most outspoken during his seventeen days of attendance preceding his sudden departure from the Convention after August 24.

Having been silent for as many as three weeks after his arrival at the Convention, Ellsworth was reported by Madison to have made 53 contributions during his attendance after the Convention reconvened as compared to 49 contributions by Wilson, 30 by Randolph, 25 by Rutledge, and 20 by Gorham during the same period of days. In fact, Ellsworth spoke up more than anybody else on the floor except for Madison (55) and Gouverneur Morris (59). It is to be conceded that Ellsworth’s contributions were usually brief as recorded by Madison, but he was obviously trying to clarify the Committee of Detail’s intentions rather than proposing anything new that required greater elaboration.

In effect the brevity of Ellsworth’s remarks very likely suggests he had assumed the role on the floor of the Convention in explaining the implications of the choices made by the Committee of Detail, further suggesting that he himself played a major role in obtaining these results. Gorham’s contribution would seem to have been relatively modest, and Randolph’s later refusal to sign the Constitution because he suspected skullduggery was involved
would suggest his alienation from others on the committee—as might well have been justified in light of Wilson, Rutledge, and Ellsworth’s later contributions to debate. What can be seen in retrospect as having been a coordinated effort among these three delegates both during the Committee of Detail and during Convention afterwards would therefore be suggested, if not totally confirmed, by Madison’s Notes published in 1840, four years after his death.

**Federal Sovereignty Postponed**

*Fifth,* and perhaps most important, Ellsworth along with Rutledge and Wilson effectively postponed giving the federal government its sovereign authority over the rights of all the state governments. If they had written this authority into the Constitution, it would have been rejected at the Convention, to say nothing of the state ratifying conventions. Under the Articles of Confederation, our nation’s central government had lacked this authority, and during the Convention most of the delegates made it plain they were still unwilling to concede it. Ellsworth himself was actually quoted by Madison as having declared as late as August 20, “The U.S. are sovereign on one side of the line dividing the jurisdictions—the States on the other—each ought to have power to defend their respective sovereignties.”
However, an enforceable priority favorable to federal authority was obviously needed between state and federal government, and the review of state laws by Congress was no longer possible. Four times Madison had submitted an amendment on the floor of the Convention giving the national legislature the right of congressional review in revoking state laws found to be unconstitutional. When Madison first proposed his amendment it was quickly accepted with a unanimous vote, but it was later reconsidered and defeated three times in a row, the last time—after intensive politicking on the floor—by a single vote that made it obvious that the sides were deadlocked and nothing better was obtainable.

The possibility of substituting judicial review for congressional review had been mentioned among a few of the delegates off the floor of the Convention, but this was a brand new concept relevant to the issue of national sovereignty, and Ellsworth and the rest on the Committee of Detail seems to have excluded it from consideration during their meetings. Their reasoning was justified by the fact that it had not been mentioned in any of the resolutions submitted for inclusion in the Constitution. The question remains whether this omission might also have been considered useful in helping to
postpone the implementation of judicial review until a later time.

The stance of Wilson, Rutledge, and Ellsworth relevant to the possibility of judicial review seems to have become much more supportive by August 23, toward the end of the Convention. When it was proposed that one further attempt be made to add the congressional review of state laws to the Constitution, Madison resisted the suggestion, saying, “He had been from the beginning a friend to the principle; but thought the modification might be made better.”

In retrospect it seems more than likely that Madison used this particular word “modification” to refer to judicial review, since this was in fact the only feasible alternative to congressional review that was finally implemented. After two other delegates expressed their opposition to another vote upon congressional review, Wilson could not help himself and took the floor to insist on the need to impose federal authority in the judgment of state laws: “that the firmness of justices is not of itself sufficient. Something further is requisite.” Obviously, in light of his later efforts, he was suggesting an arrangement whereby state judicial decisions, regardless of the “firmness” of state justices in their loyalty
to the Constitution, could be examined and reversed at a higher level.

Rutledge and Ellsworth immediately challenged Wilson’s proposal, as they already had on August 15 regarding the judicial review of federal law passed by Congress. Here, it seems, they wanted every aspect of the issue to be kept out of deliberations in order to avoid the rejection of judicial review comparable to the rejection of congressional review. Rutledge’s words were plain enough: “If nothing else, this alone would damn and ought to damn the Constitution. Will any state ever agree to be bound hand & foot in this manner?”

Ellsworth immediately followed with his next-to-last speech before his departure from the Convention, in which he limited his discussion to legislative and executive review with no suggestion of the possibility of judicial review. In retrospect, it seems more than likely that both Rutledge and Ellsworth fully agreed with Wilson’s insistence on the need for federal review, if possible through the use of the judiciary, but that they were convinced the issue was best postponed until after the Constitution had been ratified. Rutledge was meanwhile doing everything needed to revise the Constitution for the later imposition of judicial review, and it was Ellsworth who finally authored the Judiciary Act to impose judicial review.
Among the several amendments that turned out to be useful toward the later implementation of judicial review, Rutledge’s June 5 motion against permanent inferior federal courts necessitated giving federal status to state courts for this purpose, and his August 23 amendment requiring all state judges to declare their oath of allegiance to the Constitution made possible an appeals system whereby state laws could be reviewed by federal judges.

Also useful was the so-called “supremacy clause” suggested by the New Jersey Plan to establish the Constitution plus all treaties and federal laws as the supreme law of the land for all judges in every state. Luther Martin later promoted this clause in order to guarantee the independent sovereignty of state constitutions, and on August 23 Rutledge proposed it again with its full wording. As such the Committee of Detail later wrote it into Article VI of the Constitution. It clearly established the priority of the federal Constitution over all state constitutions and state laws, but without clarifying how this authority could be exercised.

The crucial expedient to make possible a postponement of the adoption of judicial review was provided by the “assignment clause” first mentioned in Article 9 of the Virginia Plan. The clause was later imbedded
in Article III, Section 2 of the Constitution: “with such Exceptions, and under such Regulations as the Congress shall make.” This gave Congress sufficient latitude at a later time both to grant state courts their authority subsidiary to the federal Supreme Court and finally, and just as important, to grant the federal Supreme Court its power of veto over state supreme court decisions. As Wilson, Rutledge, and Ellsworth must have realized from the beginning, any law to establish the appropriate hierarchy among these courts would necessarily include the procedures relevant to the operation of this hierarchy, and herein the principle of judicial review could be implemented if not exactly declared.

Interestingly, both Ellsworth and Wilson seemed sufficiently confident of support for the Constitution at their respective state ratifying conventions just a few months after the Convention to have taken the opportunity to speak favorably of the possibility of using judicial review in defense of federal sovereignty.

Here, then, was palpable evidence of exactly the “takeover” conspiracy that Randolph, Martin, and others sought to prevent. Wilson declared, “If a law should be made inconsistent with those powers bestowed by this instrument [the Constitution] in Congress, the judges,
as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the constitution predominates.” Similarly, Ellsworth declared, “If the states go beyond their limits, if they make a law which is a usurpation upon the federal government the law is void; and upright, independent judges will declare it to be so.” It was as simple as that—but something that could not have been mentioned at the Constitutional Convention itself.

**Senate Majority Leader**

_Sixth_, having been elected to the very first session of the U.S. Senate, Ellsworth quickly assumed the role of its de facto Senate Majority leader, and indignant reports of fellow senators such as Maclay and Burr made it plain that Ellsworth’s leadership verged on legislative tyranny. Not surprisingly, his first and most important task (“Senate Bill Number 1” of the first session of the U.S. Senate) was to write the Judiciary Act and obtain its passage as mandated by the Constitution’s assignment clause.

Some senators vigorously opposed the bill, Maclay, for example, having described as “a vile law system, calculated for expense and with a design to draw by degree all
law business into the Federal courts.” Other senators were more cooperative with Ellsworth, most notably Paterson, his college friend and fellow delegate at the Convention, but the overwhelming consensus among everybody involved, including Madison, who was serving in the House of Representatives, was that Ellsworth was the single dominant author of the Act.

What Ellsworth achieved almost entirely on his own was of crucial importance to the functional success of our nation:

- He established a functional vertical hierarchy of federal and state courts,
- He confirmed the authority of the Supreme Court at the very top, and
- He installed all state courts, no matter how small, within the system below. Without exception these courts retained their status and authority at their respective levels, and their decisions relevant to the Constitution were subject to appeal to the state supreme courts, and then, if challenged, to the nation’s Supreme Court itself.

The most important component of the Act was Section 25, which included exactly two sentences—a short one introduced by
somebody else that had little impact followed by a gargantuan 307-word sentence that could only have been composed by Ellsworth himself to obscure the law in the very act of putting it into effect:

[Be it enacted,] That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be reexamined, and reversed or affirmed by the Supreme Court of the United
States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceedings upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

Truly, the sentence speaks for itself. Its original draft seems to have been in the handwriting of a clerk, but its principal author—very likely its only author—was undoubtedly Ellsworth, as confirmed by its intentional complexity. Section 25 established the unique principle that any state law decided by a state supreme court could then be appealed to the federal Supreme Court if and only if the state supreme court has rendered a positive judgment.
Significantly, if a state supreme court rejected a law or lower court decision, its judgment could not be appealed to the federal Supreme Court. Only when a state supreme court arrived at a favorable decision that was appealed to the Supreme Court could the latter reverse this decision. This seemingly limited use of judicial review entailed what might have seemed a major compromise at the time. It imposed federal sovereignty, and at the same time it conceded states’ rights on a limited basis. It assigns to state courts alone the power to originate legal action ultimately decided by the federal Supreme Court, and it gives state supreme courts first opportunity to negate a law that might otherwise be appealed for adjudication at a higher level.

In other words all of the state courts’ negative decisions stand as decided without any opportunity for higher appeal. Only positive decisions can be negated. The arrangement seemed to enlarge the authority of state courts as compared to federal courts, though the federal advantage later became plain as legal precedents accumulated over future years.

More inclusively, Section 25 provided exactly the enabling feature for federal sovereignty that had been missing from both the Articles of Confederation and the Constitution itself. As was the case with
judicial review, federal authority as a whole was accordingly limited in the beginning, but it has steadily mounted from the cumulative impact of its multitude of interactive decisions over the twenty-two decades that have followed. Exactly who conceived of this arrangement? With no other candidates to be suggested, one must assume Ellsworth played a singular role in imposing this compromise, and probably without any clear idea how it would advance upon itself.

It is also important to recognize that Ellsworth’s sentence afforded the federal government its sovereignty over state governments in all matters of law relevant to the Constitution. As such it is arguably the single most important feature of the Constitution—except of course that it is paradoxically nowhere to be found in this document. Instead, its guarantee of federal sovereignty was relegated to a barely decipherable segment of verbiage that was hardly mentioned in debate upon the passage of the Judiciary Act in either the Senate or House of Representatives. It was almost as if its neglect was the product of avoidance as a shared goal among everybody involved. Nobody seemed to mind that Section 25 entailed obvious tautology, since it secured the final authority of the Constitution, while the Constitution guaranteed the rule of federal law as spelled out by Section 25.
Niggling issues such as this could be ignored once the task had been completed—a constitution defended by a mere federal law that everybody depended on but nobody quite understood.

It accordingly seems probable that Section 25 was written to be overlooked, and, if and when it was specifically examined, it was sufficiently confusing to be ignored. It was buried in the text, positioned twenty-fifth in sequence among the sections, and its most cursory inspection discloses almost breathtaking stylistic demands compared to the Constitution’s lucid prose style in its final draft by Gouverneur Morris.

Ellsworth himself was able to write with clarity as exemplified in his Landholder series, and it cannot be ignored that he had participated in the early authorship of the Constitution. Even the rest of the Judiciary Act is relatively lucid. However, in having authored the second sentence of Section 25 in its entirety, Ellsworth obtained exactly the needed results, as seems to have been his intention. For in fact the Judiciary Act involved controversial issues that were still potentially disastrous to the establishment of the federal government two years after the Constitutional Convention. Not only did it impose a vertical hierarchy giving a crucial role to state courts, but it also went one step further in Section
by using this hierarchy to impose a compromise that guaranteed effective federal sovereignty despite the concerns of a formidable minority of anti-nationalist Americans. What might be described as judicious obscurity was therefore in order, and with such effectiveness that even today there are scholars who mistakenly ascribe the achievement of judicial review to Chief Justice Marshall’s 1803 *Marbury v. Madison* decision rather than the Judiciary Act.

**Simultaneous Successes**

*Seventh,* Madison obtained passage of the Bill of Rights in the House of Representatives at about the same time as Ellsworth obtained passage of the Judiciary Act in the Senate. Then the two of them switched roles. Ellsworth sponsored Madison’s Bill of Rights in the Senate at the same time as Madison sponsored Ellsworth’s Judiciary Act in the House of Representatives. It seems more than likely that this presumably coincidental occurrence was coordinated, for in fact the two acts complemented each other. The Judiciary Act established federal authority to reject state laws at odds with federal laws, and the Bill of Rights specified individual freedoms as well as state and local decisions that could not be infringed on by federal authority vested in the Supreme Court. Each of these Acts both limited and helped to define the other.
Senate Leadership

Eighth, Ellsworth’s dominant role in the Senate was essential to the success of Washington’s two terms in office. As the nation’s vice president for eight years, John Adams was the presiding officer of the Senate, and in his opinion based on having observed Ellsworth’s performance in the Senate, he was “the firmest pillar of Washington’s administration.”

Among Ellsworth’s accomplishments, he obtained the passage of Hamilton’s complete economic program for funding the national debt, assuming state debts, and establishing a United States bank. The only modifications were limited to the minor suggestions by Ellsworth himself. He also initiated the strategy of sending the Jay mission to England in order to avert war. It was a novel idea that had not occurred to Washington.

All in all, Ellsworth’s dominance in the Senate guaranteed its full support of Washington’s policies despite increasing factionalism elsewhere in the government. So it was probably the biggest mistake in Ellsworth’s career to become Chief Justice of the Supreme Court. Without his presence, the Senate could no longer anchor Federalist policy, and as much as anything this weakness may be recognized as having
contributed to the limited success of the Adams presidency. In the words of Adams to his wife Abigail on March 5, 1796, “Yesterday Mr. Ellsworth’s Nomination was consented to as Chief Justice, by which we loose [sic] the clearest head and most diligent hand we had.”

**Napoleon’s Gift**

*And ninth,* Ellsworth’s contribution as the third Chief Justice of the Supreme Court turned out to be relatively inconsequential, overshadowed by that of his successor, John Marshall. It might accordingly seem to have been a blessing that Ellsworth was chosen to lead a delegation to France in 1800 in order to negotiate a treaty (or “convention”) with Napoleon, thereby ending undeclared naval hostilities between France and the United States. Just as the Jay mission had patched up relations with England, Ellsworth’s mission was intended to obtain similar results with France.

Ellsworth and Napoleon seem to have been impressed with each other, Napoleon having said when he first saw Ellsworth, “We must make a treaty with this man.” Napoleon was reported to have become even more impressed with Ellsworth’s fellow envoy, William Davie, but whatever the relationship, the final treaty seemed to give Napoleon everything he wanted with
few concessions to American interests. American public response was furious, compounding its anger about Adams’ use of the Alien and Sedition Act. As a result the Federalists were readily defeated in the 1800 election. In bad health because of his voyage to France, Ellsworth retired from national politics at the same time as the Federalist Party was driven from politics, and he ceased to play a major role in our nation’s history.

Why, then, can this particular episode with Napoleon be included among Ellsworth’s major contributions to the creation of our nation? Just three years later, Napoleon was confronted with a variety of major decisions, and despite mounting antagonism with Jefferson’s administration, he all of a sudden made a spontaneous gift of the Louisiana Purchase to the United States. The cost of $15 million he charged was very little compared to the value of the territory even at that time. The United States actually doubled in size, and the total expenditure amounted to approximately four cents per acre.

Of course there is no way of proving this, but the possibility seems more than likely that Napoleon had in mind Ellsworth, Davie, and the rest of the U.S. mission when he made this gift. They had bestowed on him a generous treaty, and he in turn just might have reciprocated with an enormous transfer
of land to the United States. Napoleon’s personal gifts to Ellsworth at the Ellsworth Homestead in Windsor, Connecticut, are modest but tasteful, suggesting at least the possibility of mutual respect that just might have doubled our nation’s total size at the time.

Having provided the United States with its name, Ellsworth was as successful as anybody in having unified the nation’s system of government suitable to its name.

**Why Has Ellsworth’s Role Been Forgotten?**

First and foremost, Ellsworth tended to be aloof in his relations with others. His hostile fellow Senator McClain described him as being obstinate, conceited, and, worst of all, uncandid—in fact just about the most dishonest man he had ever met. He was constantly parlaying in back halls additional to his speeches before the Senate. Ellsworth also seemed almost a caricature of himself much of the time—tall, stiff, arrogant, and addicted to snuff, traces of which could usually be seen on his clothing.

As Adams explained with a backhanded compliment in the letter to his wife already quoted,

Though Ellsworth has the Stiffness of Connecticut: though His Air and Gilt are not elegant: though he cannot
enter a Room nor retire from it with the Ease and Grace of a Courtier: Yet his Understanding is as sound, his Information as good and his heart as steady as any Man can boast.

Ellsworth’s problem was that many of his contemporaries had comparable understanding without a similar deficiency in the graces. Ellsworth could effectively carry a debate, sometimes with extraordinary aggressiveness, and he could just as effectively collaborate with fellow delegates at the Convention and with fellow Senators in Congress. However, his personal relations with others seem to have been standoffish unless he was negotiating political choices at the time.

There is little evidence of Ellsworth having had close friendships with fellow public servants beyond his college companion Paterson and his mentor Sherman. At times he worked closely with such figures as Wilson, Rutledge, and Madison, yet Madison was quoted as having said toward the end of his life that despite his high respect for Ellsworth there had never been any exchange of letters.

In 1789 Washington traveled into New England and actually visited Ellsworth’s home in Windsor, Connecticut, but he only spent “near an hour” with him and
his family and then traveled on to spend the night elsewhere. The most memorable aspect of Washington’s visit was his having supposedly dandled Ellsworth’s twin sons Billy and Harry on his knees while singing the “Ballad of Derby Ram.” In retrospect, this short a visit was both an honor and insult after the cooperative relationship between the two both during and after the Constitutional Convention.

Secondly, there is little record of Ellsworth’s speeches and publications except for the Landholder series. Madison made an effort to summarize his remarks on the floor of the Convention preceding the Committee of Detail, but he increasingly tallied Ellsworth’s contributions rather than spelling them out. Likewise, there was no record whatsoever for the crucial ten days Ellsworth spent with the Committee of Detail, nor was there adequate record of Ellsworth’s speeches and motions during the eight years he spent in the Senate.

Moreover, because the Senate provided Washington with automatic support, modern historians focus on the story of his two terms in office relevant to what was happening elsewhere in his administration, most notably the House of Representatives. Nor does there seem to have been any record of Ellsworth’s negotiations with the French in 1800. He seems to have thrived during
private consultation free of public scrutiny, but as a result his historic contribution is more difficult to ascertain in retrospect. We are left with little more than a sampling of his prose except for the transcript of his defense of the Constitution at the Connecticut Ratifying Convention, his energetic 1787 Letters to a Landholder, written in defense of the Constitution, and his tortuous exercise in obscurity in Section 25 of the Judiciary Act. In sum, Ellsworth’s contribution was insufficiently documented compared to that of his more prominent contemporaries.

As a third explanation, neither the American public nor its historians enjoy the thought that conspiracy and opportunistic trade-offs might have played a major role at the very inception of our nation. Ellsworth’s historic contribution unfortunately featured more than one such transgressions, most obviously in promoting slavery in order to implement the Connecticut Compromise and then in excluding judicial review from the Constitution so it might be added once the Constitution was fully ratified. Nor is it comfortable for orthodox American historians to recognize that the enabling act that secured federal sovereignty was nothing more than a law slipped into passage with almost no debate whatsoever.

What later generations wanted to emphasize about the origins of our nation
were the clean and principled achievements of such figures as Washington, Franklin, and Jefferson, not the often disingenuous interplay among Ellsworth, Wilson, Rutledge, and even Madison, all of whom were more directly involved in the formation of our nation’s constitutional government.

The fourth and perhaps most important explanation is that Ellsworth became a favorite of antebellum Southern statesmen such as Clay and Calhoun because of his defense of slavery at the Constitutional Convention as well as his restricted application of judicial review that limited the origin of constitutional issues to state courts and with only the positive rulings of state supreme courts subject to repeal by the Supreme Court. At first this might have seemed a minor concession to the small states, but it was later considered essential among states rights proponents.

Before the twenty-ninth Congress, Calhoun actually praised Ellsworth along with Sherman and Paterson for having created the United States as a federal instead of a national government: “But to the coolness and sagacity of these three men, aided by others not so prominent, do we owe our present constitution” (Brown, 165). Unfortunately, Calhoun spoke as a southern leader, and among the slave states Ellsworth’s judicial compromise
was considered useful to the extent that it encouraged the toleration of slavery without federal intervention. If, for example, state supreme courts avoided making positive decisions relevant to slavery, nothing could be appealed to the Supreme Court. Significantly, the Constitution drafted by the southern states during the Civil War duplicated the original Constitution except in having increased both its defense of states rights and the legalization of slavery, two of the issues that could be rightly or wrongly identified with Ellsworth’s intentions.

And fifth, Ellsworth’s judicial priorities ceased to be considered important after the Civil War. With the victory of the union armies, the North imposed the Fourteenth Amendment, requiring all state and local laws to abide by the Bill of Rights as finally interpreted by the Supreme Court. As a result, the initial effort of Ellsworth, Madison, and others to secure a viable balance between states’ rights and federal authority ceased to have much relevance to our nation’s future. Initially, the Bill of Rights (Madison’s contribution) had been intended to protect state and local authority as well as individual rights against federal intrusion such as might have occurred through the Supreme Court’s application of judicial review (Ellsworth’s contribution).
However, the Fourteenth Amendment inverted this arrangement supportive of state and local independence by permitting the Supreme Court’s use of judicial review to enforce the Bill of Rights at every level of government. At first interactive on a complementary basis, judicial review and the Bill of Rights were accordingly integrated on an entirely new basis once judicial review could be used to guarantee the Bill of Rights against state and local government as well as the federal government.

Of course vestigial traces of federalism are everywhere to be observed even today, but with the passage of the Fourteenth Amendment the primary concern shifted from interstate relations to an emphasis on individual and corporate rights as protected by the authority of the Supreme Court. This expanded defense of individual freedom brought to the fore such issues as the pursuit of civil rights, but it also enlarged the possibilities for corporations on presumably the same basis because of their supposed “personhood.” The expansion of their operations on a national scale as interpreted by the Supreme Court permitted heavy industrialization and a centralization of banking to an extent not even Hamilton might have anticipated. Railroads, factories, and Wall Street speculation became important to our nation’s destiny, as did enlarged immigration, rapid urbanization, labor unions, the later export of factories
abroad, and inevitably the relentless growth of the federal government to deal with all the problems both directly and indirectly involved—wars, depressions, and the like. Needless to say, none of this had been fully anticipated at the time of the Constitutional Convention.

It might be said in retrospect that Ellsworth performed a kind of jujitsu in having exerted the right pressure exactly when and where needed to keep the Constitutional Convention alive, then in having drafted an effective Constitution, that could later be given its teeth, and finally in having probably doubled the size of our nation, not that this was his intention at the time. Then again Ellsworth might be said to have served our nation in the capacity of a midwife whose delivery skills could later be ignored by future mainstream historians insistent on an uplifting narrative of national achievement. Infant America was what primarily mattered, not the intricate procedures brought into play by those who delivered it. As a result, Ellsworth’s pivotal contribution turned out to be what might be described as a useful embarrassment best overlooked in favor of the visible and more inspiring contribution of his illustrious contemporaries.

Nevertheless, Ellsworth’s ingenuity was essential to the cause. When the Constitutional Convention took place, our
forefathers were entangled in a seemingly inextricable conflict of interests among quarrelsome ex-colonies. However, their efforts led to a single powerful state—the most powerful in the world by the mid-twentieth century. Whatever his intentions, and to whatever extent he was able to fulfill them, Ellsworth played a central role in having made this happen. His success was in having established a functional unity among these states preceding their full unification obtained by the Civil War. To the extent that this political achievement depended on effective manipulation, it was Ellsworth as much as anybody who performed this necessary task.
I. An Accidental Conspiracy

In 1914 the constitutional historian Horace Davis proposed what seemed a self-evident thesis that the Constitution’s lack of any reference to the Supreme Court’s power of judicial review in determining the acceptability of both state and federal legislation resulted from the tacit rejection of such a process by most Convention delegates. Simply enough, if they did not mention judicial review, they did not want it. These delegates presumably did this in order to minimize the power of the courts over both state and local governments, thus effectively limiting their Constitutional authority to what had already been conferred by the Articles of Confederation. Just as important, without judicial review the federal government lacked full authority over state governments, and it seems this was entirely acceptable to most of the delegates.

In 1938, Charles Beard challenged Davis’s thesis by documenting how the
majority of these delegates advocated judicial review at one time or another in their careers. If they supported judicial review before or afterwards, Beard argued, they cannot be assumed to have opposed it during the Convention. Seeking a compromise between Davis and Beard’s position, Edward Corwin correctly observed in 1963 that the doctrine of judicial review existed in ovum during the mid-seventeen eighties (Doctrine, 623), suggesting that most, if not all, delegates were still groping for answers about the possibility of implementing it. Whatever doubts they might have had about judicial review during the Convention abated once it was implemented.

Charles Haines shared Corwin’s thesis and even went so far as to hint the possibility of a conspiracy among some of the delegates with a better sense than others of how judicial review might be used to guarantee federal sovereignty. Without venturing to identify these delegates, he proposed as early as 1932 that there had been method in their silence:

Those who favored judicial review of legislation frequently arrived at their judgments because of inarticulate assumptions or partisan political views as to government and law and seldom analyzed clearly the grounds for their judgments . . . The fact of
the matter is that judicial review of legislation was adopted as a practical device to meet a particular situation by shrewd men of affairs who knew what they wanted and who seldom expressed clearly the reasons which prompted their conclusions. (American Doctrine, 204-5)

This it seems is probably the case, but unfortunately nobody has tried to reconstruct the effort to adopt judicial review by these “shrewd men of affairs” during the first two years of our republic.

Today, many constitutional historians continue to share Beard’s assumption that judicial review was taken for granted at the Convention and therefore did not need to be written into the Constitution. As a result, many have argued, judicial review only came into effect when Chief Justice John Marshall adopted it in justifying his 1803 *Marbury v. Madison* decision. Many of the delegates might have been aware of the possibility of review at the Convention, but its potential benefits very gradually came to their attention over subsequent years, and without any overt conspiracy having been involved.

As Thomas Reed Powell has recently explained, quoting Topsy from Uncle Tom’s Cabin, “It [judicial review] just ‘grewed’” (Vagaries and Varieties, 3). With marvelous
serendipity Hamilton indeed argued the benefits of judicial review in chapters belatedly added to *The Federalist*, and its recognition could be detected in portions of the Judiciary Act and early Supreme Court decisions, but not until *Marbury v. Madison* was it put to use. As a result, the single most important instrument of federal sovereignty cropped up almost of its own accord as an afterthought by the Supreme Court almost two decades after the Constitution was adopted.

The alternative view has never been seriously explored that judicial review was sought by some of the Convention delegates from the beginning and was only excluded from the Constitution to improve its chances of ratification. Leonard Levy, who subscribes to the notion of judicial review’s belated discovery, does mention this possibility of conspiratorial supposition but quickly rejects it because it “lacks evidentiary basis,” and because such a postponement strategy would have provided too “precarious a foundation” for constitutional law as intended by our founders (Levy, 99). In fact, most delegates at the Convention were almost entirely ignorant of the concept of judicial review when they drafted the Constitution and may be expected not to have sought a system of government whose authority would later be enforced by a legal procedure they did not
fully understand. As what turned out to be the cornerstone of constitutional law, judicial review was therefore formulated and put into play for the first time by Marshall when he established the right of the Supreme Court to veto federal laws found incompatible with the Constitution.

Stealth Politics

What I try to demonstrate to the contrary is that a close examination of Madison’s Convention proceedings does in fact provide ample evidence that a small group of delegates shaped the Constitution to permit the later adoption of judicial review, but that they did this without promoting any specific provision for judicial review. Moreover, they probably did this to avoid both its explicit rejection by the Convention as a whole and/or the rejection of the entire Constitution at state ratifying conventions.

Like Madison’s ill-fated notion of congressional review, judicial review would have been perceived as a nationalist strategy to produce centralization at the cost of state sovereignty, and this was in fact exactly what happened. As it stands, the Constitution barely gained passage in several of the ratifying conventions, and passionate debate on the issue of judicial review might well have tipped the balance against its acceptance. Delegates supportive
of judicial review at the Convention were fully aware of this likelihood, so it was their prudent choice to resort to a postponement strategy.

Many other delegates did in fact oppose judicial review, and, as both Corwin and Levy have insisted, most of them were only beginning to fathom its potential use as an instrument of federal sovereignty. Among these, many sought alternatives that would substitute for judicial review. Their repeated effort was to minimize, if not prevent, the use of the judiciary as an agent of national centralization. However, resulting from the federalist compromise wrought at the Convention, each of their obstructive measures was later modified to reinforce the principle of judicial review. Rutledge and Ellsworth, for example, began as small-state delegates opposed to enlarging the federal judiciary, but soon they reversed themselves and worked even more effectively toward its creation. The “temporary” status of federal courts later became permanent anyway, while the postponement in their creation led to the Judiciary Act, a law which established the absorption of state courts into a national court system dominated by the Supreme Court.

Others who reversed themselves included Sherman, Wilson, Madison, and even Martin, who aggressively sought to
prevent the implementation of judicial review. Similarly, Rutledge’s June 5 amendment dispensed with permanent inferior federal courts in order to defend state sovereignty, but it also led to an invaluable two-year delay in the creation of “temporary” federal courts, as proposed by Madison and Wilson to prevent their total elimination. In turn, Madison and Wilson wanted to discourage the participation of state courts in the federal judiciary, but the two-year delay imposed by their compromise was essential for letting this happen.

**Consequences, Intended or Not**

The “temporary” status of federal courts later became permanent anyway, while the postponement in their creation led to the Judiciary Act, a law that brought about the absorption of state courts into a national court system dominated by the Supreme Court. It turns out that the imposition of judicial authority from below established a vertical conduit by which it could be even more effectively imposed from above. Martin’s July 17 amendment to grant independent authority to state justices bound by state constitutions was later revised in the supremacy clause to guarantee the loyalty of these justices to a federal appeals process. Martin refused to sign the Constitution based on this issue, but within a few years became one of the Constitution’s
most enthusiastic supporters, nicknamed the “Federal Bulldog” by Jefferson because of his ardent support once it had been launched. In all such instances, tactical victories to postpone if not reject judicial review helped to set the stage for its later implementation. Each hostile proposal was promoted to discourage the enlargement of the federal judiciary, but in time each led to exactly the opposite results. And with good cause. The Constitution would have been just as ineffective as the Articles of Confederation in justifying the rejection of state law incompatible with federal authority unless the Supreme Court could be granted the full and necessary powers of judicial review. In the final analysis these powers were what mattered, and the maze of legal contradictions they necessitated was of subsidiary importance.

As I shall try to demonstrate, there was in fact a small minority who recognized the potential benefits of judicial review sooner than the rest. Such delegates as James Wilson, William Paterson, and John Dickinson already had more than ordinary expertise in colonial law, and four others had ample experience as judges under the Articles of Confederation. These included from Connecticut John Rutledge, Roger Sherman, William Samuel Johnson, and, not least, Oliver Ellsworth. Careful examination
of Madison’s records of the Convention suggests that this small nucleus of delegates fell into adopting a tacit, loosely coordinated strategy to prepare the grounds for judicial review at the same time as they prevented its discussion on the floor of the Convention as well as possible to prevent its rejection. This seemingly counter-productive tactic was used on what might be described as a conspiratorial basis in order to facilitate judicial review’s later adoption once the Constitution had been accepted by state ratifying conventions.

When the Committee of Detail was chosen to draft the Constitution based on resolutions already accepted, three of its five members, Wilson, Rutledge, and Ellsworth, belonged to this small nucleus who supported judicial review, and as a majority these three probably sought to exclude judicial review from discussion at the Convention, thereby preventing its rejection and setting the stage for its later adoption in order to guarantee adequate sovereignty.

By late August, Rutledge and Johnson gained the passage of additional amendments for this purpose, and Wilson quickly and perhaps spontaneously tried to cap their successes by proposing an amendment overlooked by constitutional historians that would in fact have installed judicial review in the Constitution itself. Two
years later, in the first session of the U.S. Senate, Ellsworth led debate in obtaining the passage of the Judiciary Act, in which a long and impossibly complicated sentence buried in Section 25—almost certainly drafted by Ellsworth himself—that mandated judicial review more or less as had been intended at the Convention.

**Questionable Coincidences**

Was it entirely a coincidence that the Constitution’s wording in its description of the judiciary, by most accounts the vaguest portion in the entire document, was said by Gouverneur Morris to have been the most jealously defended by unnamed delegates who undoubtedly belonged to the group in question? Or that Madison warned against judicial review when Johnson and Wilson proposed their amendments on August 27? Or that Robert Yates, another Convention delegate experienced as a judge, wrote a series of pamphlets after the Convention in which he vigorously warned against the threat of the Constitution as a potential judicial takeover? Or that George Mason, Edmund Randolph, and Luther Martin, fellow delegates who actively participated in Convention proceedings relevant to the creation of the judiciary, likewise warned of a judicial takeover at their respective state ratifying conventions?
On the other hand it cannot be overlooked that both Wilson and Ellsworth vigorously defended judicial review at their state ratifying conventions, and that Ellsworth, once having been elected to the Senate and became its de facto majority leader, initiated proceedings to put judicial review into law the very day that the first Congress convened in 1789. Yet there has been no systematic effort to trace the origins of judicial review as the outcome of a postponement strategy despite the obvious contradictions that persist in otherwise trying to explain these origins. As a result, the most interesting and perhaps the most important chapter in American constitutional history has by and large been overlooked.
II. The Origin of Judicial Review

The use of judicial review to impose the authority of federal courts over both state and federal law was unknown, even unthinkable, at the time of the Constitutional Convention. Judicial review was just beginning to be recognized as a power of state courts, but not as a power of federal courts to overturn both state and federal laws. The relatively primitive authority of courts to overturn particular laws in favor of others was just coming into practice, but this experience offered little preparation for the use of judicial review as an instrument of federal sovereignty. This was an entirely new application of judicial review, and we should not be surprised that convention delegates were unaware of its full potential use.

In fact, the issue of judicial review had arisen as an issue only a few times in the decade preceding the Constitutional Convention, most notably in New Jersey’s
*Holmes v. Walton* case decided in 1780. However, no record of opinion was transcribed for *Holmes v. Walton*, and it turns out that its justices were falsely accused of having resorted to judicial review (Crosskey, 948; Berger, 40; and Levy, 93).

The implications of judicial review were almost as nebulous in other relevant cases, including *Trevett v. Weeden* in 1786, *Bayard v. Singleton* in 1787, and the Ten Pounds Case of 1786-87. Moreover, these precedents applied to the exercise of judicial review in state courts rather than an integrated hierarchy of state and federal courts. The authority of state courts to resolve contradictions among state laws, either in or between particular states, was an entirely different matter from a more inclusive application of judicial review involving the power of a federal court to veto laws based on their accord with a federal constitution. Without the structure and hierarchy provided by federal authority, the full impact of judicial review exercised by the Supreme Court over state laws could hardly be anticipated.

**English Precedents**

Preceding the Revolutionary War, colonial laws could be appealed to England's Privy Council for a final determination, but there was no clear and binding precedent in
English legal history for the veto of laws passed by Parliament itself. England’s common law tradition emphasized Parliament’s freedom to pass laws almost completely without judicial constraint. And of course there was no precedent for the veto of laws in conflict with a written constitution, since no such constitution existed. English courts had therefore been limited to a subordinate role in choosing among laws pertinent to given cases, and their decisions could be reversed upon Parliament’s passage of new and more relevant laws.

Not surprisingly, the problem was comparable in the former American colonies after the Revolutionary War. Of course, state constitutions and the Articles of Confederation served as written constitutions, but both state and national courts continued to play subordinate roles to their respective legislatures. Congress appointed Federal courts, and Congress had full authority to rescind their decisions. As a result, their assignment was limited to the adjudication of particular cases without permanently overturning any laws in favor of others. The modest independence they possessed in exercising judicial review was treated as a vestigial benefit from the successful effort of the seventeenth century English jurist, Sir Edward Coke, to emphasize common law precedents. However, by
the end of the eighteenth century, Coke’s limited use of judicial review was considered archaic, and Blackstone’s bias in favor of parliamentary authority was accepted as the appropriate means of fostering democracy both in Europe and the New World.

**American Modifications**

In codifying a loose alliance among the American states, the Articles of Confederation took this established principle of legislative dominance to an unprecedented extreme. Our nation’s sovereignty was almost exclusively vested in Congress, executive authority was all but eliminated, and the national judiciary was reduced to subordinate status as an appendage of legislative government.

According to Article IX of the Articles of Confederation, framed in 1778, the jurisdiction of national courts was restricted to admiralty disputes, and Congress appointed these courts for deciding particular cases. For settling disputes among the states, Congress appointed temporary joint courts with judges from all the states involved. However, like Parliament, Congress enjoyed the power of final appeal:

The united states in congress assembled shall also be the last resort on appeal in all disputes and differences . . . that . . . arise between two or more states concerning
boundary jurisdiction or any other cause whatsoever” (Commager, 113; italics added).

This meant that Congress, whenever it pleased, could revoke decisions of the temporary federal courts that it had created.

Only with the political ferment of the early 1780s was it discovered that parliamentary authority alone was insufficient to defend both property rights and legal precedent from the pressure politics of angry populist majorities. As a result, such statesmen as Washington, Hamilton, and Madison wanted to resurrect an executive authority that would be less autocratic than British royalty but strong enough to offset the vulnerability of state legislatures to populist factions. To reinforce this executive authority, they felt it necessary to impose a federal veto over state laws and to create a permanent judiciary able to participate in the veto of federal law. Judicial review would not be implemented per se, but Supreme Court justices would participate along with the President on a Council of Revision entrusted with rejecting unconstitutional federal laws. Nowhere was it suggested that this power might be given to the courts alone or that it would extend to the veto of state laws as well.

However, such a veto was desperately needed. Most of our nation’s political and
economic difficulties under the Articles of Confederation resulted from the central government’s lack of sovereignty over separate states. Without genuine coercive power, it was unable to collect fiscal levies, settle interstate lawsuits, or eliminate trade wars and unfair interstate tariffs. It could not establish effective diplomatic relations with England, nor could it prevent France and Spain from annexing western lands. Among the states, it could not stop Rhode Island from printing and circulating a worthless paper currency, and it was forced to resort to military invasion when the Shays’ rebellion erupted in western Massachusetts. Countless other possibilities could be imagined of decisions by state legislatures that would be entirely at odds with federal authority.

Washington, Hamilton and Madison felt the only way to eliminate these problems was to unite the ex-colonies in a stronger federation than had been established by the Articles of Confederation—as much as possible in a single nation. Madison emphasized this necessity both in his June 26 speech to the Constitutional Convention and in Number 10 of The Federalist. To impose centralization, Madison argued, the first priority was to bring both state and federal legislative bodies under more effective control, but the structures he
proposed excluded judicial review. He wanted to check Congressional excesses by combining the executive and judicial branches in a Council of Revision with sufficient power to veto unacceptable federal laws, and he wanted to check the excesses of state assemblies by giving Congress the power to veto unacceptable state laws. Federal legislature would predominate over state legislatures, and the authority of the executive branch in combination with the judicial branch would be imposed as the ultimate and highest stage in this hierarchy.

Madison accordingly explained in his correspondence with Jefferson, Washington, and Edmund Randolph preceding the Constitutional Convention, he felt the single most useful, if potentially controversial, modification in the Constitution would be to give Congress the authority to veto state laws in conflict with the laws and treaties of the federal government (Papers, IX, 318, 368–71, and 382–88). To guarantee federal sovereignty, he proposed, Congress should be able to review all laws passed by state legislatures and to declare null and void those of them found in conflict with federal policy. In a speech at the Convention on June 8, Madison once again emphasized the absolute necessity of this veto power:

This prerogative of the General Govt. [the congressional veto of state laws]
is the great pervading principle that must control the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system (1 Farrand, 165).

Equipped with the power of review, Congress could impose a consistent rule of law upon the nation as a whole without entirely curtailing the autonomy of particular states. In turn, Congress would be held responsible to a Council of Revision composed of the President and chosen members of the Supreme Court.

**Council of Revision**

Just as Congress could reverse state laws, the Council of Revision could reverse laws passed by Congress. With the help of this tandem combination of veto powers, both the rule of law and a modicum of federal sovereignty could be guaranteed despite populist control of legislative assemblies at the state and federal levels. The egalitarian benefits of legislature could be retained at both levels, but these would be effectively offset by giving central government final authority over state governments and by establishing at the federal level the power of veto vested in the President and judiciary.
These two central features of Madison’s plan—the congressional veto of state laws and the veto of federal laws by a Council of Revision—were respectively incorporated into Articles 6 and 8 of the Virginia Plan which Randolph submitted to the Constitutional Convention as early as May 29, 1787. However, both were decisively rejected by fellow delegates afraid of a nationalist takeover at the expense of states rights. The Council of Revision was defeated by significant margins on June 4, June 6, July 21, and August 15. On the other hand congressional review was unanimously accepted on May 31, but on June 8 it was reconsidered and heavily defeated, with only Virginia, Pennsylvania, and Massachusetts voting in the affirmative. Twice again, on July 17 and August 23, it was introduced for reconsideration, but in both instances it was defeated by comparable margins. The very delegates assembled to establish a stronger national government thus decisively repudiated the core of Madison’s plan. However, Madison himself remained convinced that effective centralization was impossible without imposing adequate constraints upon state and federal legislatures, and that this was only possible by imposing congressional review.

**New Strategy**

With the defeat of Madison’s strategy, an entirely different strategy emerged at the
Convention whereby judicial review might later be implemented to substitute for congressional review. This entailed granting the Supreme Court the power to review and veto (or “negative”) both state and federal laws, thus vesting in the Supreme Court alone the authority of both Congress and the Council of Revision as described by the Virginia Plan. In the case of state laws, state supreme courts would first exercise judicial review at their level of authority, and then, for whatever laws accepted by these courts as being constitutional, an appeal could be made for a final determination by the federal Supreme Court. Though such an arrangement might seem more attenuated, its advantages would include a significant reduction in the number of state laws submitted to review at the federal level and an improved balance between state and federal sovereignties. State laws could only be appealed to the Supreme Court after their acceptance by state courts, so state as well as federal judiciaries would play a role in their rejection.

However, as earlier indicated, this use judicial review to help defend national sovereignty was unknown at the time. There were no available European precedents, and convention delegates who sought to impose judicial review only gradually came to recognize their objectives and how they might be implemented. They also recognized
that if judicial review were submitted to a vote at the Convention, it was just as likely to be defeated as Madison’s plan for congressional review. Even if judicial review were accepted and incorporated into the Constitution, its threat to states rights would probably have led to the rejection of the Constitution at state ratifying conventions the following year. As earlier indicated, it is my thesis that these delegates therefore strove to exclude judicial review from debate, postponing its adoption until Congress established inferior federal courts subsequent to the ratification at state conventions as specified by Article III. Once these inferior courts were installed, judicial review could be imposed in transition from state to federal courts.

At first these delegates resorted to a strategy of omission, leaving gaps in the description of the judiciary to be filled at a later time, but toward the end of the Convention they added seemingly inconsequential wording whose interpretation both encouraged and justified the inclusion of judicial review once the time came to establish these intermediate courts. Especially important was the amendment Wilson proposed on August 27 that would have fully incorporated judicial review into the Constitution itself. After Wilson withdrew his amendment, John Dickinson proposed a substitute amendment with
portions of Wilson’s wording that was in fact used to justify the establishment of judicial review by Section 25 of the 1789 Judiciary Act. On August 27, it seems, Wilson briefly considered adding judicial review to the Constitution, but then chose to continue the original postponement strategy, setting the stage for the Judiciary Act two years later.

Federal Authority

Once the Constitution was accepted by state ratification conventions, the 1789 Judiciary Act was enacted, giving the Supreme Court its “vertical” authority over state laws by permitting state court decisions to be appealed to the federal Supreme Court for a final dispensation. As a concession to anti-nationalists, state judiciaries were given exclusive original jurisdiction: only those laws which state courts reviewed and accepted as being constitutional could be appealed to the federal Supreme Court. On the other hand, if one or more state courts rejected a law as being unconstitutional, the Supreme Court could not reexamine it towards its ratification at a higher level. Nevertheless, the Supreme Court was granted final jurisdiction at least in determining the constitutionality of state laws, and this alone, it turns out, provided adequate defense of federal sovereignty, if with less authority than what Madison had sought by means of congressional review.
Sixteen years later, Chief Justice Marshall’s famous 1803 *Marbury v. Madison* decision extended this “vertical” power to the Supreme Court’s “horizontal” ability to veto federal laws passed by Congress. The presidential veto could be exercised during the passage of a law, but only the Supreme Court could review and overturn a law once the President had signed it. This final power of review granted to the Supreme Court was already implicit in both the “arising under” clause of Article III in the Constitution and the first clause in Section 25 of the Judiciary Act, but it was Marshall’s decision that set the stage for its acceptance as official federal policy.

As earlier indicated, the concept of judicial review in determining whether laws accord with a written constitution was just beginning to be understood by the time of the Convention. Nowhere else in Europe or the United States had judicial review been used to impose national authority at the expense of state and local governance. As to be expected, the possibility of substituting judicial review for congressional review in order to guarantee federal sovereignty was almost inconceivable to most delegates at the Convention. At first the steps taken toward the later imposition of judicial review seem to have been unintended, certainly by the majority of Convention delegates. However,
a small minority of delegates fell into a cooperative strategy toward this end, and their effort may be described as having been at least partly deliberate, as much a matter of shared serendipity—call it an accidental conspiracy.

These delegates apparently foresaw the benefits of judicial review earlier than others and possessed the tactical flexibility to make the necessary moves toward its potential implementation at a later date. They cannot be said to have brought into play an intricate strategy they fully understood from the beginning, but there is ample evidence that they strove to keep possibilities open once judicial review seemed needed.

On August 13, Dickinson of Delaware, who played a cooperative role in setting the stage for judicial review, recommended the pragmatic value of makeshift innovations based on experience:

Experience must be our only guide. Reason may mislead us. It was not reason that discovered the singular & admirable mechanism of the English Constitution. It was not reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these
discoveries, and experience has give [sic] a sanction to them. This is then our guide (2 Farrand, 278).

True to Dickinson’s perception, the proponents of judicial review took advantage of accidents, leading to discoveries and further accidents yet. Pragmatism was their modus operandi, not theoretical consistency. Much was at stake, and their success is best judged by today’s integration of state and federal government as reinforced by the authority of our nation’s courts.
III.
The Principal Architects
of Judicial Review

If a strategy to postpone and thus improve the chances of implementing judicial review emerged during the Convention, it was either ignored or opposed by the founders usually credited with having forged the Constitution. Such figures as Washington and Franklin did not address themselves to the issue of judicial review beyond Franklin’s criticism of the committee of revision:

...it would be improper to put it in the hands of any Man to negative a Law passed by the Legislature because it would give him the controul of the legislature (1 Farrand, 109).

His comment was probably intended to apply to judges as well as members of the executive branch.

Hamilton’s input at the Convention was mostly counterproductive. Portions
of his wording to describe the judiciary in his abortive Hamilton Plan seem to have been incorporated into the first draft of the Constitution, but his recommendation that the power of review over state laws be exercised by state governors was totally disregarded by fellow delegates. Hamilton was discouraged by the hostile reception to his June 18 speech and by his unavailing minority status in the New York delegation. He therefore departed from Philadelphia on June 29 and stayed away, except for brief visits, until early September, when the success of the Constitutional Convention was virtually guaranteed. As a result, he was absent when the wording of Articles III and VI was debated on the powers of the judiciary.

Hamilton’s principal contribution came later, when he belatedly added six insightful chapters upon the federal judiciary (Numbers 78 to 83) to the 1788 bound edition of *The Federalist*. These were valuable in anticipating the Judiciary Act, but his arguments should not be treated as having been guidelines which were followed in drafting it, since the essential purpose of judicial review was already familiar to the Convention delegates who were responsible for relevant portions in the Constitution and who would later play a role in framing the 1789 Judiciary Act.
As the principal architect of the Constitution, Madison was ambivalent about judicial review and more often than not opposed to it. Throughout the Convention and most of his subsequent career, he harbored serious doubts about judicial authority—doubts that can possibly be traced to his Princeton education in theology rather than the law, as compared to the legal training of such Princeton classmates as Ellsworth, Paterson, Martin, and Burr.

At the Convention, Madison sought to create an effective but circumscribed judiciary by restricting the veto of Supreme Court justices to their participation on the Council of Revision. As he explained in a letter to James Monroe in 1817, thirty years later, he had advocated this plan at the Convention at least partly to avoid giving the Supreme Court an exclusive and final power to review federal laws (3 Farrand, 424). Ironically, he wanted to curtail the power of the judiciary by limiting it to a role on the Council of Revision, while Luther Martin and others wanted to guarantee this result even further by keeping it off the Council of Revision. Their goals were similar—a strong but constrained judiciary—but their strategies were entirely different.

On June 20, 1787, at an early stage in Convention proceedings, Jefferson had written Madison from France, explaining
that judicial review would be more selective, and therefore more practical, than congressional review as a check upon state laws (Papers, X, 64). Jefferson did not clarify whether he felt that state or federal courts should be used, and there is no evidence that Madison discussed Jefferson’s proposal with those who supported judicial review at the Convention.

On July 23, Madison seems to have conceded the inevitability of judicial review (“A law violating a constitution established by the people themselves, would be considered by the Judges as null & void”), but on August 27 he expressed his doubts, and twice again, on August 28 and September 12, he reaffirmed his preference for congressional review over judicial review. On the latter occasion, for example, he argued that state tariffs might be controlled by the federal government through the jurisdiction of the Supreme Court as “the source of redress.” Nevertheless, he warned that in his own opinion, “... this was insufficient. A [congressional] negative on the State laws alone could meet all the shapes which these could assume” (2 Farrand, 589; also 93 and 430). Madison wanted to create effective federal courts without the power of judicial review, and he remained critical of judicial review during the Convention and
throughout his later career (3 Farrand, 136, 516, 523, 527).

**Supporting Delegates**

Less eminent were the half dozen delegates who may be identified as having actively sought to implement judicial review during the two years spanning the Constitutional Convention, the 1788 state ratifying conventions, and the First Congress of 1789. As already indicated, these included Wilson of Pennsylvania, Rutledge of South Carolina, Paterson of New Jersey, and Sherman, William Johnson and Ellsworth of Connecticut. All but Wilson and Rutledge belonged to the original leadership of the small-state coalition, and Rutledge helped to bring the small southern states into this coalition by early June. For business reasons, Paterson left the Convention on June 29, and Ellsworth on August 24, but their support was firm and they would later work to impose judicial review in the 1789 Congress.

James Wilson began as a close ally of Madison and later played an effective role in the federalist coalition that combined the small-state leadership with most of the leadership of Madison’s original coalition. Wilson was widely respected for both his legal education in Scotland and his expertise in the law, reputed to be best in
America. His importance at the Convention was also enhanced by his friendly relations with Rutledge, one of the southern-state leadership, and by his personal friendship with Robert Morris, reputed to be the principal financier of the Revolutionary War. Through Morris, who hosted Washington during the Convention, Wilson could work in a productive relationship with Madison and others of the Virginia delegation.

John Rutledge, a hero of the Revolutionary War and the former governor of South Carolina, played an important role as a southern delegate in Madison’s coalition who was able to balance his regional allegiance with his recognition of South Carolina’s shared interests with northern small states. Preceding the Convention, Rutledge engaged in business relations with Wilson, and for the first few weeks of the Convention he resided at Wilson’s house in Philadelphia. This association, combined with his tactical alliance with the Connecticut and New Jersey delegations, undoubtedly helped to bridge the gap between the large and small state interests in the final stages of the Convention.

William Paterson had served as New Jersey’s Attorney General when judicial review was first brought to public attention in the 1780 *Holmes v. Walton* case decided in New Jersey. He was also on friendly
terms with Ellsworth since their association in a Princeton debating club (Brown, 20). His jocular letter to Ellsworth during the Convention could only have been written by an old friend (4 Farrand, 73).

**A Northern Team**

Connecticut’s three delegates, Roger Sherman, William Samuel Johnson, and Oliver Ellsworth, consistently worked as a team during the Convention. Sherman and Ellsworth were close friends, and all three had served on the Connecticut Supreme Court. Their effective cooperation with each other in convention deliberations was perhaps the most obvious in their campaign to impose the Connecticut Compromise between large and small states by letting Senators be elected by state legislatures and Representatives by popular ballot, an arrangement nullified in 1912 by the Seventeenth Amendment. Until this amendment large states would necessarily dominate the House of Representatives because of their greater population, but small states would no less effectively dominate the Senate because of equal representation among states, and with the additional benefit that Senators would be chosen by states’ political leadership as opposed to the less predictable will of the populace at large.

To seal this compromise, Connecticut’s delegates were obliged to obtain the support
of southern states by accepting the ownership of slaves as guaranteed by the Constitution. Ellsworth himself gave two pivotal speeches at the Convention supportive of slavery, taking advantage of his status as a northern delegate without slaves of his own. His last act on the floor of the Convention, mentioned without comment by Madison the day before his departure from the convention, was his second speech emphasizing what amounted to the tactical importance of supporting slavery.

Again, a trade-off was obviously involved: in exchange for the support of slavery by the small northern states, the southern states would support the Connecticut Compromise, thereby providing a sufficient majority to permit a continuation of deliberations at the Convention. No slavery meant no legislative compromise, and its rejection meant renewed failure in the effort to impose a viable Constitution. Without these linked compromises—the acceptance of slavery by small northern states in exchange for the bicameral legislature specifically advocated by Ellsworth—the entire purpose of the Convention would probably have been thwarted much as had already happened with the Articles of Confederation.

The primary goal, of course, was a strong central government. At first the three Connecticut delegates resisted
modifications that would strengthen it, but they reversed themselves once the Connecticut Compromise gave small states the share of power they demanded in the federal government. Sherman had more or less taken the lead when they opposed a strong judiciary, but Ellsworth emerged with a leadership role of his own when they changed their minds and supported it. Sherman declared as late as August 15 that he disapproved of judges “meddling in politics and parties,” but Ellsworth had much earlier advocated strengthening the judiciary, for example declaring on July 21 his full support of the Council of Revision promoted by Madison:

The aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive cannot be expected always to possess. Of this the Judges alone will have competent information (2 Farrand, 73).

Few others during the Convention expressed such unqualified confidence in the role of the judiciary in federal government.

As the senior member of the Connecticut delegation, Sherman was conspicuous in debate and addressed most of the issues on which the Connecticut delegation were
in full agreement. Johnson rarely took the floor, but he enjoyed the singular status of having received an honorary Ph.D. in law from Oxford. He may also be credited with having proposed the key amendment that set the stage for the Supreme Court’s judicial review of both state and federal law. It was Ellsworth, however, who turns out to have played a pivotal role—perhaps the most important of all—in having participated on the Committee of Detail that first drafted the Constitution and in having later taken the lead in drafting and forcing the passage of the 1789 Judiciary Act. Like Sherman, Ellsworth had served on the Continental Congress’s Court (or Committee) of Appeals, the predecessor of the Supreme Court under the Articles of Confederation. During his service with this Committee, Ellsworth was able to observe at first hand its failure to resolve the celebrated Olmstead Case (in which Wilson served as counsel for General Benedict Arnold), thus exposing the central government’s inadequate sovereignty over state governments.

At the Convention, Ellsworth played a subordinate role to Sherman and remained silent in floor debate until his proposal was unanimously accepted on June 20 to remove the word *national* from the Constitution. Its connotations of central authority offended small state delegates, so the problem
could be resolved, Ellsworth suggested, by identifying the political entity to be created as “the United States.”

The legal name of their new nation at its inception would be its generic designation—just as Istanbul, once the capitol city of the Ottoman Empire, designates nothing more than “the City” as described by Turkish language. Apropos of the United States, what might have seemed a blank title equivalent to “combined body politic” nevertheless implied national unity with Gouverneur Morris’s addition of two THE’s in the Preamble to the final draft of the Constitution: WE, THE PEOPLE OF THE UNITED STATES. With the inclusion of these articles in capital letters, the nation’s description first used by Paine and later in both the Declaration of Independence and Articles of Confederation confirmed the achievement of unification, thus giving the new coalition of states what seemed its appropriate name linked with its historic origins. The vote on the floor supportive of this proposal was unanimous, and the rest of the world had little difficulty in accepting the name.

Experience Counts

Soon enough Ellsworth was in the thick of debate leading to the Connecticut Compromise, his particular version having finally been adopted, and toward the end
of July he was elected to the Committee of Detail that authored the first draft of the Constitution.

In the first two months of the Convention, all except Wilson among these delegates supportive of judicial review belonged to the small-state faction opposed to a strong national government, but once the Connecticut Compromise was accepted they too became ardent nationalists. George Bancroft later suggested the impact of their shift favorable to the Constitution’s eventual passage:

From the day when every doubt of the right of the smaller states to an equal vote in the senate was quieted, they so I receive it from the lips of Madison, and so it appears from the records exceeded all others in zeal for granting powers to the general government. Ellsworth became one of its strongest pillars. Paterson of New Jersey was for the rest of his life a federalist of federalists (4 Farrand, 89).

The benefits of this realignment were plain by early August, when these delegates (excluding Paterson, who had already left the Convention) joined in an expanded coalition with delegates from the large-state faction who accepted the Connecticut Compromise.
Many of the original leadership in Madison’s coalition were lawyers in their mid-thirties (or younger, as in Charles Pinckney’s case) who were eloquent but relatively impatient of detail. Averaging at least a decade older (Sherman was sixty-six years old, Johnson sixty, Dickinson fifty-five, Rutledge forty-eight, and Ellsworth and Paterson forty-two), these small-state spokesmen were less interested in expounding their views at length than in obtaining their objectives as guaranteed by the precise wording of the Constitution.

The status and experience of Rutledge and the three Connecticut delegates as state supreme-court justices also put them in a special elite at the Convention. Over half the fifty-five delegates had legal experience, but not more than eight had served as court justices, four of whom belonged to this nucleus. Significantly, another state justice at the Convention—Robert Yates of New York—later wrote pamphlets attacking the Constitution because he suspected it would eventually give too much power to the judiciary. With his background on the bench, he fully understood the importance of judicial review as a source of federal power, and apparently he was aware that it might be brought into play, thereby filling the obvious gap in the Constitution as presented to the state ratifying conventions.
The only difference was that he opposed its implementation.

As the Convention advanced, these five delegates both with judicial experience and fully supportive of judicial review—Rutledge, Paterson, Sherman, Ellsworth, and Johnson—seem to have fallen into a loose confederation with Wilson (forty-five years old), who was a highly successful lawyer if without judicial experience on the bench. They apparently worked in combinations of two, three, and even four to set the stage for the eventual acceptance of judicial review. As earlier indicated, all were legal experts—four of them (Rutledge and the three Connecticut delegates) with experience as justices of state supreme courts, two (Sherman and Ellsworth) with additional experience on the Continental Congress’s Court (or Committee) of Appeals.

The success of their combined effort benefitted from the participation of Wilson, Rutledge, and Ellsworth on the Committee of Detail which first drafted the Constitution, also by the close teamwork among the Connecticut delegation, by the tactical alliance between Rutledge and the Connecticut delegation in bridging southern and northern small-state interests, and by the personal friendships between Rutledge and Wilson and between Ellsworth and both Sherman and Paterson.
The participation of other delegates at the Convention seems to have been peripheral. Dickinson (the principal author of the Articles of Confederation) and Luther Martin of Maryland proposed amendments helpful to judicial review, respectively the “law and fact” and “supremacy” clauses, but neither of them seems to have been in the thick of the effort to impose judicial review. It can be speculated that Dickinson belatedly came to support the plan during the Convention, whereas Martin’s angry departure in August probably resulted in large part from his unwillingness to accept this use of judicial authority as he himself implied by his own amendment.

The role of others is less definable. Hamilton and William Davie of North Carolina openly advocated judicial review without applying any obvious effort toward its implementation, and many others made remarks at one point or another that may be construed as having expressed their support (Berger, 47119). However, none of them seems to have contributed to the preparations for judicial review’s acceptance at a later time.

Obviously, certain steps needed to be taken to lay the groundwork for judicial review, for example in the Constitution’s wording relevant to the creation of the judiciary, and careful scrutiny of
Convention records discloses the relatively close cooperation among Wilson, Rutledge, Paterson, Sherman, Ellsworth, and Johnson in crafting these passages. Early in debate, for example, Rutledge, seconded by Sherman, proposed an amendment to replace permanent federal appeals courts with state courts. At the time their purpose seemed to curtail the power of the central government, but the use of state courts as federal appeals courts later turned out to be essential preliminary to granting the Supreme Court the power of judicial review over state law.

All but Wilson and Rutledge probably helped to draft the New Jersey Plan, portions of which would have given the Supreme Court appellate jurisdiction over state law, and it was Paterson who presented this plan to the Convention as a whole. As members of the Committee of Detail, Wilson, Rutledge, and Ellsworth participated in writing an initial draft of the Constitution whose wording emphasized giving Congress the needed latitude to bring state courts into the federal judiciary once the Constitution was ratified. Twice Wilson praised judicial and/or congressional review on the floor of the Convention, but only to be silenced by Rutledge and Ellsworth, apparently to keep the issue off the agenda.
Rutledge and Johnson then proposed the two amendments whose wording established the groundwork for the later adoption of judicial review. Wilson followed by proposing his amendment which, combined with theirs, would have brought judicial review into the Constitution by giving the Supreme Court appellate jurisdiction over state law. As already indicated, he abruptly withdrew it before it could be submitted to a vote. However, Dickinson resubmitted the “law and fact” portion of Wilson’s amendment for a vote, and its passage helped to justify the later imposition of judicial review in the 1789 Judiciary Act.

Johnson and Wilson were probably among the delegates mentioned by Gouverneur Morris as having fought to protect the exact wording upon the judiciary from stylistic revision in the final draft of the Constitution. It may be speculated that they wanted to avoid apparently harmless but substantive changes that might have justified preventing the adoption of judicial review at a later time. After the Convention, Wilson and Ellsworth went public at their respective state ratifying conventions by emphasizing the importance of judicial review. Finally, in the 1789 Senate, Ellsworth and Paterson played central roles in drafting a Judiciary Act to permit the judicial review
of state law, and Ellsworth took the lead in forcing the passage of this Act.

Perhaps coincidentally, four of these delegates—Wilson, Rutledge, Paterson, and Ellsworth—later served on the Supreme Court, Ellsworth as Chief Justice from 1796 to 1800. In 1847, a half century later, John Calhoun singled out Ellsworth, Sherman, and Paterson for having created an effective system of federal government in which centralization and the sovereignty of individual states were effectively balanced:

It is owing mainly to the states of Connecticut and New Jersey that we have a federal instead of a national government the best government instead of the worst and most intolerable on the earth. Who are the men of these states to whom we are indebted for this excellent form of government? I will name them. Their names ought to be written on brass, and live forever. They were Chief Justice Ellsworth and Roger Sherman of Connecticut, and Judge Paterson of New Jersey. The other states further south were blind; they did not see the future. But to the coolness and sagacity of these three men, aided by others not so prominent, do we owe our present constitution (Brown, 165).
If Calhoun specifically limited his praise to these three delegates for having strengthened the judiciary to guarantee a federalist balance between state and national sovereignties, as would seem to be the case, he neglected the important roles played by Rutledge, Wilson, and Johnson. Unfortunately, none of these six delegates documented their activities, and they lacked the celebrity status later conferred on such figures as Washington, Franklin, Madison, and Hamilton. As a result, their loosely coordinated effort to introduce judicial review has been almost totally overlooked in constitutional history.
IV. 
Convention Debate on Judicial Authority

An independent judiciary with the power to check both state and federal laws was hardly attractive to most of the delegates when they arrived to participate at the Constitutional Convention. Such delegates as Elbridge Gerry and Nathaniel Gorham of Massachusetts, George Mason of Virginia, and Luther Martin of Maryland recognized the necessity of defining judicial authority in the Constitution, but their purpose was to minimize its role, and they assumed the need to isolate state and national courts as much as possible.

Moreover, they were apprehensive of full-scale nationalism, and the possibility that it might be obtained by unleashing federal courts as the final arbiters of state law would have been considered no more acceptable than the power of veto earlier granted to the Privy Council over colonial
law. When Gerry declared on June 4 the shocking information that a few state courts “had actually set aside laws as being agst the [state] Constitution [italics added],” the tone of disbelief in his use of the word actually conveyed the unfamiliarity of most delegates with the possibility of using judicial review to challenge the authority of legislature under constitutional government (1 Farrand, 97).

Delegates were willing to accept the role of state judges in expounding laws and giving preference to some at the expense of others as originally advocated by Coke. However, they did not associate this capacity with the veto of laws in conflict with a state or federal constitution, or, one step further, with the Supreme Court’s veto of state laws in conflict with the federal Constitution. Probably in response to Gerry’s earlier remark, Wilson once again suggested the viability of judicial review on July 21:

It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough (2 Farrand, 73).

Opposed to this view, Martin warned later in the day that the Supreme Court’s power to interpret the law, coupled with its
participation on the Council of Revision, would produce a “double negative” giving it too much control of federal laws (2 Farrand, 76). Here the delayed exchange between Wilson and Martin might seem to have implied the common acceptance of judicial review as a veto of laws passed by Congress.

Not surprisingly, George Mason challenged Martin’s exaggeration of the judicial “exposition” of laws to the status of a veto. Mason’s argument has been misconstrued to suggest that he shared Martin’s assumptions (e.g., Berger 58, 161, 341), but this is simply not true. For a clarification of Mason’s intended meaning, his words may be quoted with bracketed additions:

It has been said (by Mr. L. Martin) that if the judges were joined in this check on the laws [by the Council of Revision], they would have a double negative, since in their expository capacity of judges they would [already] have one negative. He [Mason] would reply that in this [double] capacity they could impede in one case [as judges] only the operation of the laws. [On the other hand, as members of the Council of Revision], they could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious,
which did not plainly come under this description [i.e., as having been submitted to judgment by the Council of Revision], they would be under the necessity as Judges to give it a free course [i.e., to abide by it] (2 Farrand, 78).

The meaning of this passage transcribed by Madison as clarified by italicized portions was probably intended by Mason, but his intentions were obscured by awkward elisions either by Mason himself in explaining his ideas or by Madison in trying to copy his remarks while he was speaking. Nevertheless, Mason entirely supported the Council of Revision, so his words cannot be interpreted to challenge its usefulness because of the excessive power it would grant the judiciary. In effect, Gerry had mentioned rumors of judicial review, Wilson had confirmed them, and Martin had argued that such a possibility would give judges a “double negative” if they also served on the Council of Revision.

In contrast, Mason was a member of the Virginia delegation who unanimously supported the Council of Revision, arguably one of the most important features of the Virginia Plan. He may accordingly be assumed to have responded with the argument, apparently true at the time, that the ability of judges to expound the laws
from the bench should not be confused with the even greater power of particular judges when serving on the Council of Revision to declare these laws null and void. Only as members of the Council of Revision would they exercise this full power of veto. It is important to recognize here that Mason was defending judicial authority relevant to the Council of Revision, not to what would later be advocated as judicial review, which he vigorously attacked after the Convention. In fact, he probably shared Madison’s strategy to limit judicial participation in the review process to the Council of Revision in order to prevent its more effective application through judicial review.

As earlier indicated, Madison’s plan to curtail legislative excesses at the state level by imposing congressional review and establishing a Council of Revision was rejected by the Convention by mid-July. The President’s veto of federal law remained the single counter-majoritarian “negative” accepted by the Convention, but it was irrelevant to the question of federal sovereignty over state laws. States could continue to pass whatever laws they pleased, and these laws would remain on the books despite their potential conflict with federal laws, federal treaties, and the Constitution of the United States.
Why had Madison’s plan failed? Because at this stage in Convention proceedings large-state anti-nationalists such as Gerry of Massachusetts and Robert Yates and John Lansing of New York had fallen into a working coalition with small-state delegates opposed to a large-state takeover. Together, they were able to block every effort to establish a strong central government based on the enlargement of the powers of the executive and judicial branches. If the substitution of judicial for congressional review escaped their condemnation, it was only because it could be overlooked resulting from its novelty. Judicial review was missing from the Virginia Plan and could be bypassed in floor debate as a new and untested innovation.

**Politics of Jurisdiction**

At the beginning most small-state delegates wanted to give original federal jurisdiction to state courts in order to help curtail federal authority. They sought an appeals system from state to federal courts specifically based on fact, not law, and they wanted not to expand federal jurisdiction, but to guarantee the primary role of state courts in the federal judiciary. Rutledge, Paterson, Sherman, Ellsworth, and Johnson possessed sufficient legal backgrounds to grasp the implications of judicial review as a more inclusive principle, which might be incorporated into such an appeals system,
but as long as they opposed centralization, they could hardly be expected to promote judicial review as an instrument for bringing it about.

Only when the July 16 Connecticut Compromise united large and small states in a new and more inclusive coalition, did these delegates join in seeking a strong central government. At this point, however, they would necessarily have found themselves between the horns of a dilemma if they wanted to impose judicial review. The Convention was probably the most sympathetic body of American leaders that could be gathered for accepting such a new and innovative principle. But if judicial review were debated by the Convention and voted down, as it probably would have been, its later adoption would have been difficult, if not impossible. This was already the fate of congressional review, and prospects would have been the same for judicial review. Once defeated, its later resurrection as an amendment to the Constitution would have required a two-thirds majority in Congress, or, even more difficult, three-quarters support from state legislatures. On the other hand, if judicial review were accepted by the Convention and incorporated into the Constitution, its inclusion would probably have led to the Constitution’s rejection at state ratifying conventions. Judicial review therefore
needed to be postponed as an issue. It was best kept from debate and set aside until the Constitution was ratified, after which it could be discretely implemented by a simple majority of Congress.

Beneficial to this effort was the opposition to an enlargement in federal courts early in the Convention by the very small-state delegates who would later be seeking to implement judicial review. As early as June 5, six weeks before the Connecticut Compromise, Rutledge proposed a motion, seconded by Sherman, to eliminate the creation of permanent inferior federal courts. Rutledge argued that the original jurisdiction of federal cases could be given to state courts, and then, if necessary, these cases could be appealed to the Supreme Court for a final determination (1 Farrand, 124). Here Rutledge advocated the use of state courts to curtail federal authority. He was willing to concede the Supreme Court’s review of specific cases, not its review of laws by which these cases might be judged. As a small-state delegate, he wanted at this stage in the Convention to diminish federal authority relative to state authority, so he sought to give state courts original jurisdiction in the federal judiciary.

In debate Rutledge fully acknowledged his intentions, but to maximize support for his amendment he worded it to reject
permanent inferior federal courts without specifying the use of state courts as the obvious alternative in serving this purpose. Delegates from Connecticut and New Jersey teamed up with those from Georgia and North and South Carolina in support of Rutledge’s amendment, winning a narrow 5 to 4 victory over delegates from Virginia, Pennsylvania, Maryland, and Delaware (Dickinson included). Votes were divided, therefore discounted, in the Massachusetts and New York delegations, probably because Gerry of Massachusetts and Yates and Lansing of New York sided with Rutledge.

**Inferior Courts**

In a quick tactical maneuver, Madison and Wilson responded by proposing a compromise amendment, later described as the “Madison compromise,” which let Congress establish temporary inferior courts as soon as it convened subsequent to the ratification of the Constitution (1 Farrand, 125). As earlier indicated, Madison wanted a strong federal judiciary without the power of judicial review, and at this stage in debate Wilson shared Madison’s objective. The two of them based their proposal on Dickinson’s argument just before Rutledge’s motion came to vote, that Congress should be given the authority to create the national judiciary—once again a small-state proposal probably intended to maximize the role of
state courts. Madison and Wilson could anticipate support among convention delegates for such a compromise, since the Articles of Confederation already provided the appointment of temporary federal courts. Only the Connecticut and South Carolina delegations voted against their amendment, while New York’s vote continued to be divided.

As it later turned out, the postponement in the creation of “temporary” federal courts expanded to become a postponement in the creation of the entire appeals system. In effect, the choice to arrive at a permanent integration of state and federal courts was held over until after the ratification of the Constitution, and, needless to say, this was highly useful to the cause.

On July 18, the issue of the status of inferior courts was introduced a second time. Three small-state delegates—Sherman, Martin, and Pierce Butler of South Carolina—renewed their effort to grant state courts original jurisdiction, while three large state delegates—Nathaniel Gorham of Massachusetts and Randolph and Mason of Virginia—opposed them, respectively because of precedent, because of the unreliability of state courts, and because of future uncertainty in the role of the courts (2 Farrand, 46). This time the power of Congress to create inferior courts
was confirmed by a unanimous vote, but as before without specifying whether these inferior courts would include state courts as well as federal appeals courts. This was an important choice, but it was excluded from the wording and thus postponed until Congress could establish these inferior courts, as it turned out, two years later with the 1789 Judiciary Act.

In retrospect, it seems clear that the Madison compromise came of desperation, not conspiracy, and that its success led to results entirely different from what anybody had anticipated. Once Congress was granted the power to create temporary federal courts, the possibility was salvaged of maintaining a strong federal court system, but as was later recognized—perhaps as early as mid-July—what turned out to be a two-year delay in the creation of this system opened an important loophole for additional modifications once the Constitution had been ratified. By limiting the Constitution’s description of the federal judiciary to the Supreme Court alone, the Convention postponed the establishment of the rest of the federal judiciary, including Rutledge’s proposal for giving state courts at least a portion of original jurisdiction. Also permitted was the Supreme Court’s judicial review of state law as an afterthought that completed the package.
Madison’s compromise victory for federal courts thus paved the way for exactly what he wanted to avoid: both the inclusion of state courts in the federal judiciary and the imposition of judicial review.

New Jersey Plan

On June 15, ten days after Rutledge’s amendment, Paterson had presented the New Jersey Plan to the Convention as a substitute for the Virginia Plan that would be acceptable to small-state and anti-nationalist delegates. The New Jersey Plan featured a couple of important proposals bearing upon the judiciary, which were eventually brought into constitutional law. Proposition 5 defined the appellate jurisdiction of the Supreme Court, and Proposition 6, like Resolution 14 of the Virginia Plan, established an oath to guarantee the loyalty of state justices to the federal government. But most important, Proposition 2 formalized Rutledge’s earlier suggestion by giving state courts original jurisdiction and the Supreme Court appellate jurisdiction strictly limited to foreign and interstate legal disputes:

... all punishments, fines, forfeitures & penalties to be incurred for contravening such acts rules and regulations shall be adjudged by the Common law Judiciaries of the State in which ... [these offenses] ... have
been committed or perpetrated, with liberty of commencing in the first instance all suits & prosecutions for that purpose in the superior common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law & fact in rendering judgment, to an appeal to the Judiciary of the U. States (Madison, 119).

Here the hierarchy needed for the Supreme Court’s power of judicial review over state law was suggested without mentioning the power of judicial review itself. Verdicts could be appealed, but not necessarily laws based on their constitutional validity.

Those besides Paterson who participated in drafting the New Jersey Plan probably included Martin, Dickinson, and Lansing of New York as well as the three Connecticut delegates (1 Farrand, 242). Martin’s share in the authorship of Propositions 2, 5, and 6 has been speculated, and contributions from others were also highly probable (Clarkson and Jett, 92). On June 19 the New Jersey Plan was decisively rejected by the Convention as a whole after a passionate denunciation by Madison that swayed even the Connecticut delegation to switch its vote.

On July 17, almost a month later (and one day after the Connecticut Compromise),
Martin took advantage of momentum favorable to small-state interests and reintroduced a portion of Section 6 in the New Jersey Plan which bound state justices by oath to federal treaties and legislative acts:

That the Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants & that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding (2 Farrand, 28).

Martin’s amendment was unanimously passed by the Convention and provided the basis for the supremacy clause in Article VI of the Constitution.

Martin’s intentions in proposing this amendment were relatively complex, but, as he later indicated at the Maryland ratification convention, they did not include granting federal courts judicial review over state law (3 Farrand, 206, 222–23). The congressional review of state law had just been defeated for the second time after a brief
but significant exchange in which its benefits were contrasted with those of judicial review by state courts. Sherman had argued that congressional review was unnecessary since state courts would be able to overturn laws “contravening the Authority of the Union,” and in response Madison had expressed his doubt whether state courts could be trusted as “guardians of the National authority and interests” (2 Farrand, 27).

As soon as congressional review was voted down, Martin sought to neutralize Madison’s objections by resurrecting the New Jersey Plan’s supremacy clause to guarantee the loyalty of state justices to federal law. If state justices were loyal to the federal government, they could presumably make the final determination whether particular state laws were in conflict with federal authority. Martin later claimed he had also wanted to grant state courts original jurisdiction, thus by implication giving appellate jurisdiction to the Supreme Court (3 Farrand, 286–87). However, there was no explicit reference to such an arrangement in the supremacy clause as proposed by Martin on July 17. Moreover, Martin acknowledged that he had intentionally omitted state constitutions and bills of rights from the “contrary notwithstanding” phrase, so these could retain their priority over federal law in state court decisions. Unlike others in
the small-state leadership, he continued to oppose a strong central government and failed to recognize that granting original jurisdiction to state justices could eventually be used to justify the subordination of state courts to the federal Supreme Court.

As a result of the Connecticut Compromise, most other small-state delegates supported centralization by the end of July, so they no longer haggled over amendments to diminish federal authority. In the case of the judiciary, they could actually give a bigger role to federal courts by revising the structures they had advocated to maximize state authority, the supremacy clause and the original jurisdiction of state justices. They had the additional advantage that many in their leadership were more familiar with the judiciary than most of the large-state delegates (Wilson excluded) and could implement the necessary modifications for bringing this about.

But of course the small-state delegates were shifting to a new course, and their successful anti-nationalist tactics in earlier deliberations set the stage for their even more successful reversal of strategy that would benefit nationalization at the expense of state sovereignty.
V.

The Committee of Detail

The Committee of Detail wrote the first draft of the Constitution over a period of ten days, between July 26 and August 6, during which the Convention as a whole took a vacation from proceedings.

Participation on the Committee of Detail was limited to five members elected by the Convention—Wilson, Rutledge, Ellsworth, Randolph, and Gorham—three of whom belonged to the de facto coalition that later supported judicial review. Rutledge and Ellsworth were probably chosen to represent the southern and northern factions of the small-state coalition, while Randolph, Wilson, and Gorham represented three of the four large states, respectively Virginia, Pennsylvania, and Massachusetts. New York, the fourth large state, became unrepresented at the Convention once Yates and Lansing left in protest on July 10, eleven days after Hamilton’s departure.
Multiple Roles

All five of the delegates on the Committee of Detail had played constructive but supportive roles in their state delegations. Wilson had been overshadowed in floor discussions by Gouverneur Morris, Ellsworth by Sherman, and Rutledge by the often-superfluous enthusiasm of Charles Pinckney. Gorham was probably chosen to split the difference between Gerry and Rufus King on the Massachusetts delegation, and Randolph to split the difference between Mason and Madison on the Virginia delegation.

Gorham, a wealthy Boston merchant, had briefly served as president of the Continental Congress, and currently served as chairman of the committee of the whole at the Constitutional Convention. Gorham replaced Washington on the few occasions when he stepped down from the chair, for example to rally support for slavery. Randolph had served as both Attorney General and Governor of Virginia, as a member of the legislative committee that had drawn up Virginia’s constitution and bill of rights, and as the delegate honored with presenting the Virginia Plan to the Convention on May 29. Each member of the Committee of Detail except Gorham had benefitted from extensive legal experience, each shared the central assumptions of
the group he represented, and they had all proven capable of effective compromise.

When the Committee of Detail was elected, three of its members—Wilson, Randolph, and Gorham—could be counted on to support the thrust of the Virginia Plan for imposing federal sovereignty with more effectiveness than would have been possible through exclusive dependence on judicial review by state courts as specified by Martin’s initial version of the supremacy clause.

Wilson had expressed his views to this effect on June 5 and July 21, and Randolph and Gorham on July 18. These three delegates also continued to advocate congressional review, as indicated by Wilson’s remarks to the Convention on August 23 and by Randolph’s list of five “Suggestions for Conciliating the Small States,” a compromise proposal dated on July 10 which included as an option that the rejection of state law by Congress could be appealed to the Supreme Court for a final determination (3 Farrand, 56). Randolph’s suggestion combined congressional and judicial review in what might have amounted to a major revision of the Virginia Plan, but there is no evidence that anybody, Randolph included, followed up on such a possibility.
Meanwhile, Ellsworth, as a small-state participant on the Committee of Detail, supported both the Council of Revision and judicial review by state courts, while Rutledge, like Sherman and Martin, apparently supported an exclusive reliance on judicial review by state courts more or less as entailed by the supremacy clause and other portions of the New Jersey Plan. What seems to have happened during the Committee of Detail's sessions over the next ten days, as may be adduced from the subsequent record, is that Wilson, Rutledge and Ellsworth joined forces in working toward an entirely new alternative—the more inclusive use of judicial review through a vertical integration of state and federal courts. Seen in retrospect, their shared process of discovery was in fact a momentous inspiration that state supreme court decisions upon the constitutionality of state laws could be appealed to the federal Supreme Court for a final dispensation.

Just as Proposition 5 of the New Jersey Plan permitted other verdicts to be appealed from state to federal courts, the judicial review of state laws by state courts could be appealed, and this appeals process could effectively substitute for the principle of congressional review advocated by Madison. Such an arrangement would have been too new, too intricate, and too controversial to
impose at the Convention, but the description of the judiciary in the Constitution could be kept as open as possible and tailored to permit and justify later modifications that imposed judicial review.

The Committee of Detail kept no records of deliberations, so there is no clear evidence that this strategy was in the works before the August 23 and 27 amendments of Rutledge, Johnson, and Wilson. However, the pains taken by this committee to grant Congress full power in creating an appellate judiciary but little if any power in curtailing its authority once it was created suggest the likelihood that it began to take root within the Committee of Detail.

The committee’s modifications favorable to judicial review were subtle, yet persistent and ultimately successful. For example, preceding the Connecticut Compromise, small-state delegates had wanted to grant state courts original jurisdiction of cases to be settled by the Supreme Court, while large-state delegates had favored a compromise guaranteeing the later creation of federal appeals courts with at least temporary status. Now, in the Committee of Detail, the emphasis on temporary measures shifted to postponement, since Congress could only make its temporary assignments following the acceptance of the Constitution by all of the state ratifying conventions. This
modification permitted a fusion of large and small-state goals, both the later creation of a federal court system and the use of state courts for original jurisdiction.

In retrospect, it seems obvious that this arrangement was intended for permitting Congress to bring state and federal courts into a vertical hierarchy, and it also seems probable that this hierarchy was intended for imposing judicial review to reinforce federal sovereignty. Such a possibility becomes apparent in light of Wilson’s abortive August 27 amendment and Section 25 of the 1789 Judiciary Act, probably written by Ellsworth, both of which linked judicial review with the use of state courts for original jurisdiction. Since Wilson and Ellsworth were knowledgeable in the law—more knowledgeable, in fact, than most other delegates at the Convention—it seems likely that they realized while serving on the Committee of Detail how the postponed integration of state and federal judiciaries would benefit their subsequent effort to impose judicial review.

**Drafting the Constitution**

During the proceedings of the Committee of Detail, two full-scale preliminary drafts of the Constitution were composed in the handwriting of Randolph and Wilson, but often with marginal notes
by Rutledge, the Committee of Detail’s elected chairman. Randolph’s draft (often described as the Randolph-Rutledge draft) seems the earliest, since it was roughly sketched out and significantly differed from the Committee of Detail’s final draft submitted to the Convention as a whole on August 6. Wilson’s draft (often described as the Wilson-Rutledge draft) was much closer to the final draft in its content. It seems likely that Wilson and perhaps Randolph were chosen as amanuenses to transcribe the wording found acceptable by the group as a whole during these final sessions.

Wilson and Randolph are usually credited with having dominated committee proceedings because they authored these two drafts and because the Committee of Detail’s final draft was exclusively in Wilson’s handwriting. However, this was not necessarily the case, any more than the role of executive secretaries in transcribing the verbal instructions of their superiors while they strive to explain their ideas.

It is significant that Randolph later refused to sign the Constitution, and in light of debate on the floor once the Convention as a whole reconvened, it seems likely that Rutledge and Ellsworth’s contributions were more or less as important as those of Wilson. What seems most likely that Randolph’s authorship was as a secretary,
while Wilson’s role was as a final editor. What was actually said among the group as a whole is anybody’s guess. Vigorous group participation can be adduced from Ellsworth’s casual remarks as reported by his son to the historian, George Bancroft, several decades later:

One day, upon my reading a paper to him (in his illness), containing an eulogium upon the late Gen. Washington, which among other things ascribed to him the founding of the American Government, . . . he (Judge E.) objected, saying that President Washington’s influence while in the convention was not very great; at least not much as to the forming of the present Constitution of the United States in 1787. Judge E. said that he himself was one of the five who drew up that Constitution (Brown, 169–70).

According to Farrand’s version of Ellsworth’s conversation (3, 396-97), there were six authors altogether, including all members of the Committee of Detail except Randolph. Instead, both Madison and Hamilton were included, Hamilton’s name probably having been confused with Randolph’s, though Hamilton’s advocacy of judicial review in The Federalist Papers might have been taken into account.
Ellsworth was supposedly feeble and approaching death when he made his remark, so such a mistake seems at least a possibility. If this were the case, Ellsworth merely conceded Madison’s ubiquitous role at the Convention and emphasized the shared participation of the Committee as a whole without specifying the relative importance of its particular members except as might be implied from his mistake about Randolph’s name.

By far the most important of the Committee of Detail’s modifications was the enlargement of Congress’s mandate to create inferior federal courts as guaranteed by the June 5 Madison compromise. Both the Virginia Plan and Madison compromise had granted Congress simply the power to set these inferior courts in motion. In contrast, the Committee of Detail’s three drafts gave Congress comparatively broad powers in the creation of the judiciary.

The first of these, the Randolph-Rutledge draft, granted Congress the power to increase the Supreme Court’s jurisdiction “to such other cases, as the national legislature may assign”:

But this supreme jurisdiction shall be appellate only, except in <Cases of Impeachmt. & (in)> those instances, in which the legislature shall make it original. And the legislature shall
organize it . . . The whole or a part of the jurisdiction aforesaid according to the discretion of the legislature may be assigned to the inferior tribunals, as original tribunals (2 Farrand, 147; italics added).

The Wilson-Rutledge draft somewhat curtailed this freedom by specifically designating the Supreme Court’s areas of appellate and original jurisdiction. But in compensation it granted Congress the power to impose exceptions and regulations whenever these seemed necessary:

In all the other Cases before-mentioned, it [the jurisdiction of the Supreme Court] shall be appellate, with such Exceptions and under such Regulations as the Legislature shall make. The Legislature may assign any part of this Jurisdiction above mentd., except the Trial of the Executive, in the Manner and under the Limitations which it shall think proper to such inferior Courts as it shall constitute from Time to Time (2 Farrand, 173; italics added).

As it stood, the exceptions and regulations clause, indicated by italics, was incorporated word for word into the Committee of Detail’s final preliminary draft.
The wording of this clause was possibly borrowed from the abortive Hamilton plan, which had used exceptions to refer to guidelines imposed by the Constitution and regulations to refer to the power of Congress to impose later modifications: “. . . subject to such exceptions as are herein contained and to such regulations as the Legislature shall provide” (3 Farrand, 626; italics added). However, the Committee of Detail revised this distinction by combining exceptions and regulations to augment the power of Congress when it later created the judiciary. Even with a comma added in the Constitution’s final draft to separate the two phrases (“with such exceptions, and under such regulations”), the intent remained plain for giving Congress full responsibility in this task. And of course the primary responsibility of Congress would remain its choice whether to use state or federal courts, or both, for the original jurisdiction of federal cases. This choice had been twice debated at the Convention, but was yet to be resolved. Now Congress, and Congress alone, was empowered to make it once the Constitution was ratified.

The Committee of Detail’s final draft of the Constitution also discouraged the use of federal appeals courts by emphatically stressing their temporary status: “. . . and in such inferior Courts as shall, when necessary, from time to time, be constituted
by the Legislature of the United States” (2 Farrand, 186; italics added). This limitation was justified by the passage of Rutledge’s June 5 motion against permanent inferior federal courts, and Rutledge and Ellsworth might well have insisted upon its being stressed in the Constitution. To emphasize this point, the words “when necessary” were added to the final draft of the Committee of Detail. The Committee of Style later deleted them, but without diminishing the importance of the phrase, “from time to time,” which was retained.

What is absolutely important to recognize is that this emphasis on the use of temporary appeals courts encouraged the use of state courts for this purpose, since the temporary courts already appointed under the Articles of Confederation employed state justices who could just as easily fulfill their responsibility in state courts. The use of state courts as appeals courts could be temporary, but these courts would retain a permanent role in state government, permitting the appeal of cases from these permanent lower courts to a permanent Supreme Court.

Why appoint temporary federal appeals courts to perform a temporary function when permanent courts could do the same thing on a continuing basis? Nobody can be quoted as having advocating the vertical
integration of state courts and the federal Supreme Court because of their shared permanence, but the wording of the passage hardly discouraged such an interpretation.

The use of state courts for original jurisdiction was also encouraged by the vague reference to inferior courts and by the manner in which the Supreme Court’s original and appellate jurisdictions were specified. In contrast to Article 9 of the Virginia Plan, there was no effort to identify the inferior tribunals to be granted original jurisdiction. Instead, in Article XI, Section I, of the Committee of Detail’s final draft (equivalent to Article III, Section I, in the final draft of the Constitution), the wording specified “such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States” (2 Farrand, 186; italics added). Section 3 (Section 2 of the final draft) listed specific areas of jurisdiction, but there was no indication what courts would be assigned original jurisdiction.

Moreover, the jurisdiction of inferior courts could only be deduced by the process of subtraction. First the full jurisdiction (both original and appellate) of the Supreme Court was listed:

The Jurisdiction of the Supreme Court shall extend to all cases
arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects (2 Farrand, 186).

Next the Supreme Court’s original jurisdictions were listed: “In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original.”

Finally, the Supreme Court’s appellate jurisdictions (i.e., the original jurisdictions of inferior courts) were subtracted from this total:

In all the other cases before-mentioned, it [the jurisdiction of the Supreme Court] shall be appellate, with such exceptions and under such regulations as the Legislature shall make (2 Farrand, 186; italics added).
Only by subtracting the second list from the first—eight items minus four—could readers determine that the original jurisdiction of inferior courts would include,

- Cases arising under laws passed by Congress,
- Controversies between citizens of different states,
- Controversies between citizens and foreign states, and
- Controversies between citizens and foreign subjects.

As earlier indicated, state justices were already involved in deciding these cases under the Articles of Confederation, so here too the participation of state courts would have seemed entirely appropriate. Remarkably, the wording in all other cases likewise compelled the establishment of inferior courts as soon as possible and implied by omission the possibility that these could be state courts. There was no wording to suggest otherwise.

The extent to which the Committee of detail wanted to stress the full authority of Congress to incorporate state courts within the federal judiciary was also indicated by the so-called assignment clause that followed the list of jurisdictions in the final draft of the Committee of Detail:
The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time (2 Farrand, 186).

The Randolph-Rutledge draft had used the word “assign” in describing the power of Congress to increase or diminish the Supreme Court’s original jurisdiction (2 Farrand, 147). Later, in the Wilson-Rutledge draft, the word “assign” was used in a more emphatic construction that provided the basis for its use in Wilson’s final preliminary draft (2 Farrand, 173). However, the clause became entirely redundant once the role of Congress in creating inferior courts was stressed in the exceptions and regulations clause.

Moreover, once the Supreme Court’s full original and appellate jurisdictions were specified in the Constitution itself, the mandate of Congress to organize the judicial system was automatically tied to the “assignment” of establishing inferior federal courts, exactly the issue at stake in the New Jersey plan and June 5 and July 18 debates. Consequently, the assignment clause could be deleted, as it was by a unanimous vote on August 27, three weeks
after the Committee of Detail submitted its preliminary draft of the Constitution to the Convention as a whole (2 Farrand, 431). Nevertheless, the use of this clause in the Committee of Detail’s final preliminary draft indicates the importance attached to it by at least a majority of this committee.

**Deliberate Compromise**

It should be emphasized that the deliberate use of omission and indirect reference in the Committee of Detail’s final draft of the Constitution was probably intended in the spirit of compromise. The June 5 and July 18 amendments had not mentioned state courts, and the New Jersey Plan, which did, had been rejected in its entirety by the Convention. Moreover, there had been no second effort to submit to a vote the vertical integration of state and federal courts, such as Martin had made for the supremacy clause. Since the Official Proceedings of the Convention that were provided to the Committee of Detail specified neither a mixed nor an exclusively federal judicial system, the Committee properly kept both possibilities viable. The choice could later be resolved, either during the Convention or when Congress fulfilled its mandate in appointing inferior courts.

Randolph could accept this compromise as a holding action that deferred debate until others could join in resisting an integrated
judicial system, and Gorham was possibly unaware of the full implications of what was transpiring. However, Wilson, Rutledge and Ellsworth must have taken full satisfaction with the wording of the final draft, since its postponement of a final decision could also be interpreted as having empowered Congress to integrate state and federal courts. And of course it was Ellsworth who subsequently took advantage of this wording once elected to the U.S. Senate by drafting the Judiciary Act to give the Supreme Court its power of judicial review over state laws, if on a permanent—not temporary—basis.
VI.
August 1787

The continuing relationship among members of the Committee of Detail once debate resumed in the Convention as a whole bears close examination. Gorham’s reduced participation in convention proceedings suggests the possibility that he played a relatively minor role in having drafted the Constitution. His spoken contributions as tabulated based on Madison’s records actually declined by a third compared to his contributions during the equivalent period immediately preceding the Committee of Detail. Likewise, Randolph fell into hostile disputes with his fellow members of the Committee at least five times over the next fourteen sessions, suggesting his dissatisfaction with the shared perspective of the rest of the committee.

Meanwhile, the verbal participation of both Rutledge and Ellsworth increased dramatically on the floor of the Convention.
Rutledge’s contributions doubled and Ellsworth’s increased by two-thirds. In absolute numbers, Ellsworth’s total of 53 spoken contributions from August 6 to August 23, when he left the Convention, exceeded Wilson’s (49) and was surpassed only by Gouverneur Morris’s (59) and Madison’s (55). The tally of contributions of other delegates trailed at a distance: Mason (39), Sherman (36), Pinckney (34), Randolph (30), Rutledge (25), Mercer (23), Williamson (22), Gorham (20), King (18), Butler and Dickinson (16 apiece), etc.

Silent during his first three weeks in attendance, Ellsworth became a major presence while debating the merits of the Constitution’s wording. It may be conceded that most of his contributions were of minor importance, but their frequency and specificity suggest an intense proprietary concern in promoting the Committee of Detail’s final draft of the Constitution he had a hand in composing. Whenever the wording of particular contexts was taken into consideration, he seems to have felt obligated to help explain the Committee’s intentions.

The style of debate also radically shifted once the Committee of Detail submitted to the Convention its preliminary draft of the Constitution. This draft necessarily replaced the Virginia Plan as the Convention’s
working agenda, and rhetoric was minimized as delegates concentrated their attention on the wording of specific amendments, swiftly turning from one to another as support by the convention as a whole was determined. During this period, the five members of the Committee of Detail were outspoken in their discussion of amendments and frequently lapsed into exchanges among themselves as if they were seeking improved clarification of their shared objectives. Thirty-four exchanges may be counted in which they spoke in clusters of two, three, or four. Others joined in, of course, but there seems to have been sustained “inside” dialogue among members of the Committee of Detail.

Throughout August the group also continued to hold independent sessions of their own, though none of these are recorded. Usually, Wilson, Ellsworth, and Rutledge presented their arguments in unison, and sometimes with Gorham’s participation. On the other hand, the occasional hostility of Randolph’s contributions anticipated his later refusal to sign the Constitution and his attack on the federal judiciary at the 1788 Virginia ratifying convention.

The two occasions when the veto power over state and federal laws was introduced in early August, the interaction among the Committee of Detail suggests that Wilson might have forgotten himself and broken
a prior understanding to avoid debate on the issue. On August 15, for example, John Mercer (a friend of Martin and fellow delegate from Maryland) specifically attacked judicial review as a usurpation of legislative power:

He disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable (2 Farrand, 298).

Dickinson expressed his agreement, but confessed he “was at a loss what expedient to substitute.” Sherman warned against judges “meddling in politics” in their capacity as members of the Council of Revision, after which Gorham pointedly suggested abandoning the issue. Wilson, however, could not refrain from launching into a speech advocating the prevention of legislative tyranny by granting “sufficient self-defensive power either to the Executive or Judiciary department” [italics added]. Immediately, Rutledge complained of the tediousness of the proceedings, and Ellsworth joined in by declaring, “We grow more & more skeptical as we proceed. If we do not decide soon, we shall be unable to come to any decision.” Obviously they wanted to terminate Wilson’s abortive effort. Here Wilson seems to have strayed
into arguments, which touched upon judicial review, whereupon Rutledge and Ellsworth interceded to keep the issue out of discussion. Just five months later at their respective ratifying conventions, both Wilson and Ellsworth ringingly declared the necessity and inevitability of judicial review as the bulwark of constitutional government.

On August 23, a comparable exchange occurred when Charles Pinckney of South Carolina introduced for the last time Madison’s notion of congressional review over state laws (2 Farrand, 390). Madison remarked that he had always supported the principle, but “thought the modification might be made better.” There is no indication what he meant by “the modification,” but it seems more than likely that he was referring to the substitution of judicial review at a later time. When Sherman, Mason, and Williamson repeated their longstanding objections to congressional review, Wilson once again seems to have forgotten himself, this time by using the issue of congressional review to emphasize “the keystone wanted to compleat the wide arch of government, we are raising.”

Once again Rutledge and Ellsworth came to the rescue in response to his tactic. Rutledge chastised Wilson with the ominous warning, “If nothing else, this alone would damn and ought to damn the Constitution.
Will any state ever agree to be bound hand & foot in this manner?” Rutledge neglected to mention how judicial review might be used as an alternative, but as later became obvious, one of its most useful benefits would be its imposition of federal sovereignty on a more limited basis. Then Ellsworth added his important but usually overlooked explanation that there would also be serious technical difficulties in implementing congressional review, since all state laws would need to be reviewed either by Congress or by its appointed agents (by implication inclusive of federal judges). Ellsworth also left unspoken judicial review’s primary advantage already mentioned by Jefferson in his June 20 letter to Madison, that it would eliminate this problem, since the only laws reviewed by the Supreme Court would be those appealed from inferior courts.

Soon the vote was taken on the floor of the Convention, and once again congressional review was defeated as opposed to judicial review, which remained free and clear of having been rejected at the Convention.

For business reasons Ellsworth departed from the Convention by August 24, but both Sherman and Johnson took his place in floor proceedings. The day after Ellsworth’s departure, Sherman spoke up five times, and on August 27 Johnson
dropped his modest bombshell with his carefully worded amendment that granted the Supreme Court the authority to interpret the Constitution. It can be speculated that as usual Sherman, Ellsworth, and Johnson were acting as a team, and that Johnson’s amendment could have been proposed by any of the three, or, for that matter, by Rutledge or Wilson. Except for Wilson, all of these delegates had held their silence when Gerry and Martin raised the issue of judicial review on June 4 and July 21.

Twice again subsequent to the Committee of Detail’s meetings, on August 15 and 23, the issue surfaced, but both times they succeeded in preventing its discussion. Then, when amendments upon the judiciary came under discussion on August 23 and 27, Rutledge and Johnson put through their two quick and easily overlooked amendments which made the necessary modifications to facilitate the later adoption of judicial review, and which did this without specifically referring to judicial review. On both occasions debate was minimal, so these amendments could be adopted almost as quickly as they were introduced.

A third amendment, proposed by Wilson, would then have incorporated judicial review into the Constitution itself, but, again, it would have done this without
having specifically referred to it by name or by the powers it granted. As earlier indicated, Wilson’s amendment was quickly withdrawn without debate.

**Strategy Considerations**

Considered in retrospect, the three amendments of Rutledge, Johnson, and Wilson suggest a major advance in strategy. In the Constitution’s original draft submitted by the Committee of Detail, there was no explicit provision for judicial review and the possibility of vertical integration between state and federal courts was indicated only by omission. It was with Rutledge’s August 23 amendment that Martin’s supremacy clause was expanded to establish loyalty to the Constitution itself as a primary responsibility of all state justices. Indeed, Rutledge’s careful sequence in his wording of the amendment gave the Constitution first priority among federal laws, statutes, and treaties to be granted supremacy by state judges, thus guaranteeing the role of state justices as officers of the court primarily responsible to the Constitution:

*This Constitution & the laws of the U.S. made in pursuance thereof, and all Treaties made under the authority of the U.S. shall be the supreme law*
of the several States . . . (2 Farrand, 389; italics added).

This emphasis on loyalty to the Constitution itself had already been featured in Article 14 of the Virginia Plan ("bound by oath to support the articles of Union"), but it had been excluded in both the New Jersey Plan and Martin’s amendment later identified as the Supremacy Clause. With his amendment Rutledge resurrected this portion of the Virginia Plan, but his purpose at this stage in the Convention was probably doubled, first to secure the loyalty of state officials to the federal government as Madison had first intended, but also to validate by this means the role of the state judiciary in the enforcement of the Constitution. Rutledge likewise eliminated Martin’s anti-nationalist escape clause by including state constitutions in the “contrary notwithstanding” phrase that specified the state documents to be subordinated to the federal Constitution:

And the Judges in the several States shall be bound thereby in their decisions, any thing in the Constitutions or laws of the several States, to the contrary notwithstanding (ibid.; italics added).

Rutledge thus inverted the small-state strategy of Martin’s July 17 amendment by
giving the federal Constitution final authority over all state laws, state constitutions included, but with state courts granted their authority in defending the Constitution. State justices would have the opportunity to veto both state laws and those portions of state constitutions they found in conflict with the federal Constitution. Once Rutledge’s amendment was unanimously accepted, the only ingredients needed to impose judicial review by the federal Supreme Court were the vertical integration of state and federal courts and an appeals process granting the Supreme Court its final authority.

Just as Rutledge laid the groundwork for the judicial review of state law with his August 23 amendment, Johnson did the same for the judicial review of both state and federal law by his August 27 amendment four days later. Johnson very likely proposed his amendment in response to the adoption of Rutledge’s amendment, since the two amendments respectively held state courts and the Supreme Court itself primarily responsible to the federal Constitution.

Madison had set the stage for Johnson’s amendment on July 18, when he resolved a relatively minor issue by proposing “that the jurisdiction [of the Supreme Court] shall extend to all cases arising under the national laws” (2 Farrand, 46).
“under” had been used in the supremacy clause, so its addition to Article III could be justified for having provided symmetry between Articles III and VI pertaining to the adjudication of national laws in both state and federal courts.

When Madison and Gouverneur Morris likewise sought on August 27 to extend the Supreme Court’s judicial power to all controversies “to which the US shall be a party,” Johnson quickly responded by adding the Constitution itself as yet another subject of its judicial power. This modification might have seemed harmless enough, since it provided comparable symmetry between Articles III and VI by expanding Madison’s “arising under” clause to feature the Supreme Court’s authority relevant to the Constitution as well as treaties and national laws:

The Judicial Power shall extend to all cases both in law and equity arising under this Constitution and the laws of the United States, and treaties made . . . under their authority . . .” (2 Farrand, 430, 576; italics added).

Now the Supreme Court would exercise two presumably independent functions, of judging all federal law and of remaining loyal to the Constitution itself.
Once these two functions were combined however, the Supreme Court would necessarily be able to determine the validity of federal law based on its agreement with the Constitution. Granted, this power was not specifically declared until the 1803 *Marbury v. Madison* decision, but wording that established the defense of the Constitution as the primary obligation of the Supreme Court left the possibility open to later interpretation.

Another important effect of Johnson’s amendment, often overlooked, was that it gave identical status to the Constitution in both the federal Supreme Court and state courts, permitting an appeals arrangement between the two once state courts were granted original jurisdiction. Since both state courts and the Supreme Court were obliged to defend the supremacy of the Constitution, the state courts’ judicial review of state laws possibly in conflict with the Constitution could be appealed for final dispensation by the Supreme Court. Exactly the same principles obtained at both levels, so the Supreme Court could review the decision of lower courts on a comparable basis.

Rutledge’s amendment thus established the basis for judicial review of state laws as later guaranteed by the Judiciary Act, and Johnson’s amendment, established
the basis for judicial review of both state and federal laws in conflict with the federal Constitution, in the latter case as confirmed by the 1803 *Marbury v. Madison* decision.

Madison quickly recognized the implication of Johnson’s wording that any federal law could be judged and rejected by the Supreme Court based on its constitutionality. Opposed to such an arrangement, he expressed his concern that judicial review might have been intended and suggested the Convention was “going too far” if this were the case. He argued that the power of the Supreme Court should be properly limited to “cases of a Judiciary Nature,” *i.e.*, those cases submitted by adversary parties for judicial determination (Berger, 216). He elaborated his objection that “the right of expounding the Constitution in cases not of this nature ought not to be given to that Department [the Supreme Court].” Others at the Convention whose identities remain undisclosed assured him that there was no threat of judicial review, since the Supreme Court’s jurisdiction would of course be *constructively* limited to cases of a Judiciary Nature” (italics added).

By “cases of a judiciary nature,” these delegates probably meant cases in which the law was applied, as opposed to cases in which the law itself could be vetoed. Swayed by the momentum of proceedings, Madison
reluctantly joined in the unanimous vote supporting Johnson’s amendment. However, as he warned, the combination of his and Johnson’s amendments, both of which passed unanimously, did establish the basis for *Marbury v. Madison*, giving the Supreme Court the power to judge the constitutionality of federal laws.

Perhaps because he was rattled by debate, Madison neglected to mention in his *Notes* the next major amendment under consideration once two minor revisions proposed by Rutledge were unanimously accepted. As summarized by the official *Journal*, but not by Madison himself, this overlooked but crucially important amendment offered by Wilson finally gave the Convention the opportunity to vote on an appeals system that integrated state and federal courts as proposed on June 5, July 18, and in the New Jersey plan.

**Law and Fact Language**

Delegates had voted against the New Jersey plan in its entirety; now they would be able to vote specifically on the vertical integration of state and federal courts, and in an arrangement whereby both laws and factual evidence adjudicated by state courts could be appealed to the Supreme Court. The official *Journal* mentioned this abortive amendment without disclosing its
source, and, as already indicated, Madison altogether neglected to mention it, so constitutional historians have overlooked its importance. However, the amendment as described in the Journal can be conflated with its discussion by Morris and Wilson as reported by Madison, an exchange that otherwise seems disconnected with earlier proceedings, thus suggesting Wilson’s authorship as well as the full significance of his proposal:

**Journal:**

It was moved and seconded to agree to the following amendment. In all the other cases before-mentioned original jurisdiction shall be in the Courts of the several States but with appeal both as to Law and fact to the courts of the United States, with such exceptions and under such regulations, as the Legislatures shall make (2 Farrand, 424).

**Madison’s Notes:**

Mr. Govr. Morris wished to know what was meant by the words “In all the cases before mentioned it (jurisdiction) shall be appellate with such exceptions &c.” whether it extended to matters of fact as well as
law and to cases of Common law as well as Civil law.

Mr. Wilson. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed (2 Farrand, 431).

**Journal:**

The last motion being withdrawn . . . (2 Farrand, 424).

Here, at last, was the keystone that would have imbedded judicial review in the Constitution without further effort. It was far more significant than earlier proposals for integrating state and federal courts, since it specifically permitted state court decisions to be appealed to the Supreme Court and since its phrase “both as to law and fact” could be construed to permit the review of state laws based on their compatibility with the Constitution as guaranteed by the Rutledge and Johnson amendments that had just been accepted. Also significant was the probable authorship by Wilson since it was Wilson who responded to Morris’s question about the “law and fact” clause” by explaining the intent of the amendment.

The “law and fact” clause had not been mentioned in previous convention debate
upon the judiciary, so Morris appropriately asked what it meant in the context of the amendment, and it was Wilson who responded by trying to reconstruct its intended meaning. Who else but the delegate who presents an amendment with entirely new wording could be expected to clarify this wording to such an assembly?

In his response to Morris, Wilson also disclosed that the wording, “both as to law and fact,” and thus probably the entire amendment, was chosen by the Committee of Detail, which he simply described as “the Committee.” As explained earlier, those among the Committee who could support this amendment would have included Wilson, Rutledge, and Ellsworth, with Gorham having played a peripheral role and with Randolph opposed to such an addition to the Constitution. Perhaps disingenuously, Wilson argued that the wording seemed appropriate to the Committee because of its earlier use by the federal Court of Appeals, suggesting that it granted no broader powers than already exercised under the Articles of Confederation for judging the use of law as applied to facts.

Nevertheless, a more threatening interpretation would have been possible if the “law and fact” clause could also have been interpreted to permit judgments upon law itself independent of fact, or as
illustrated by fact, to be appealed from state to federal courts. With fact-granted priority, appeals would primarily involve jury trials, but with law-given priority, law itself could be appealed, and this would have entailed judicial review. Not surprisingly, the “law and fact” clause was familiar to both Ellsworth and Wilson, since Ellsworth had acted as a justice on the Court of Appeals, and Wilson as a lawyer who had appeared before it in the celebrated Olmstead case. Wilson had likewise used the words “law and fact” as the title of one of his early fragments in the Committee of Detail (2 Farrand, 157). It therefore seems likely that Wilson himself, serving as the Committee’s amanuensis, had drafted the amendment as a contingency whose controversial importance was fully recognized by Ellsworth and himself, and at least to an extent by others on the Committee.

That Wilson proposed such an amendment might have been surprising to some delegates, since he had been one of the two authors of the June 6 Madison compromise whose purpose was to avoid the use of the state judiciary for original jurisdiction. Now, however, it was obvious that he completely reversed himself, apparently because he felt that with the Convention’s rejection of congressional
review, nationalism would best be served by switching his allegiance to judicial review.

Just as Rutledge, once a small-state advocate, based his July 23 amendment on the Virginia Plan featured by the nationalists, Wilson, once opposed to small-state objectives, was trying to resurrect a portion of the New Jersey Plan featured by the small-state faction. By earlier standards, the two might have seemed to be rather dramatically switching roles, but their reversal was fully justified if they shared a new goal at this point in deliberations, the eventual imposition of judicial review as the principal guarantee of federal sovereignty.

With the addition of Wilson’s amendment, combined with the Rutledge and Johnson amendments, the principle of judicial review would have been fully written into the Constitution, though in a piecemeal arrangement that postponed its justification until later interpretation by the Supreme Court. As indicated in the Journal, Wilson’s amendment was withdrawn after brief discussion without being voted upon. Why? Probably because it was considered too controversial. Everything would be lost if it were rejected by the Convention, or, worse yet, if it were incorporated into the Constitution, but only to rally an effective opposition at state ratifying conventions. As drafted by the Committee of Detail, Article III
compounded by the Rutledge and Johnson amendments already gave Congress the implicit power to impose judicial review at a later time. Why let redundant explicitness jeopardize something already in the works?

It seems probable that Wilson spontaneously decided on August 27, perhaps without consulting the others, that the time was ripe to submit the amendment to the Convention for a final showdown in giving state courts original jurisdiction and thus permitting judicial review. Rutledge and Johnson’s amendments had just laid the basis for judicial review by featuring the primary authority of the Constitution in both state courts and the federal Supreme Court. Now, despite Madison’s admonitions, the keystone could be added, letting judicial review by state courts be appealed to the Supreme Court. However, as already indicated, Wilson withdrew his amendment from consideration. It may be speculated that Wilson took it upon himself to present the amendment, but that Rutledge once again exerted a restraining influence, as he had on August 15 and 23, and convinced Wilson to withdraw it for a later time.

Another possibility would be that Wilson did indeed act as a spokesman for others on the Committee of Detail, Rutledge included, but that other delegates, either friendly or hostile—perhaps Dickinson or
Morris—prevailed upon them to defer to Congress any final judgment in the matter. In either case, it seems likely that Wilson himself withdrew his amendment. Just as explicit reference to the vertical integration of state and federal courts had been excluded from earlier motions and amendments, Wilson was apparently convinced to carry on the strategy of omission even now, at the final stage of the Convention. As it turned out, Section 25 of the Judiciary Act would later serve this purpose, and with better and more specific guidelines for determining the scope and procedures of judicial review.

In response to Wilson’s remarks, Dickinson took the opportunity to propose a relatively narrow substitute amendment permitting appeals based on both “law and fact” without specifying whether state courts would be granted original jurisdiction. Once again, the full significance of Dickinson’s amendment following that of Wilson is best clarified by collating the Journal and Madison’s Notes, in this instance once Wilson withdrew his amendment as indicated in the Journal:

**Madison’s Notes:**

Mr. Dickinson moved to add after the word “appellate” the words “both as to law & fact which was agreed to nem: con: (2 Farrand, 431).
Journal:

It was moved and seconded to amend the clause to read “In cases of impeachment, cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, this jurisdiction shall be original In all the other cases before mentioned it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make” which passed in the affirmative (2 Farrand, 425).

Here Dickinson seems to have tried to salvage as much of Wilson’s amendment as possible based on Wilson’s definition of the “law and fact” clause for later establishing judicial review pertinent to law alone. Dickinson’s substitute amendment was unanimously accepted as what might have seemed a harmless component of the withdrawn amendment. His wording was probably found suitable in guaranteeing the full appellate authority of the Supreme Court regardless of who would be granted original jurisdiction. Whether state and federal courts were integrated, the principle would insure an effective appeals process, fact linked with the law, and if and when
judicial review itself were imposed, with the law emphasized rather than fact, the wording of Dickinson’s amendment would help to justify it. Meanwhile, those opposed to judicial review could support Dickinson’s amendment as a technicality for improving the appeals process without mandating either judicial review or the fixed integration of state and federal courts.

Apparently, it did not occur any of the delegates that anti-nationalists would later challenge the Constitution because of a relatively superficial consideration, the possibility that jury trial verdicts as opposed to state and local laws could be reversed by the Supreme Court based on the law and fact clause, thus imposing an extra burden on litigants to make their case again at a different location. However, everybody present at the Convention was hurrying to complete its business and eager to dispense with specific issues without exploring them too much in depth. The timing was perfect both to lay the foundation for judicial review and to postpone its implementation until Congress established inferior federal courts.

**Style Matters**

Given the intricacy of the strategy to postpone the implementation of judicial review, it should be no surprise that in the final draft of the Constitution, as in all earlier drafts, Articles III and VI were
kept brief and deliberately void of direct reference to judicial review. These two articles turned out to be what might have seemed the briefest and vaguest part of the Constitution, yet they were phrased with such precision that Gouverneur Morris, who was principally responsible for the wording in the final draft, later complained that here alone, in the description of the judiciary, he was prevented by fellow delegates from making the stylistic modifications he felt were needed:

That instrument [the Constitution] was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; *excepting, nevertheless, a part of what relates to the judiciary*. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their self-love, and to the best of my recollection, this was the only part which passed without cavil (3 Farrand, 420; italics added).

Morris did not identify the delegates who interfered with his effort to improve the wording upon the judiciary, but these probably included Madison and Johnson,
also members of the Committee of Style (Johnson as its chairman), as well as Wilson, who was not a member, but a fellow Pennsylvania delegate permitted to inspect and revise Morris’s final version because he had shared in authoring the initial version by the Committee of Detail.

Both Johnson and Wilson would have been motivated to defend the original wording of these amendments from stylistic modifications, since the later imposition of judicial review depended on a precise choice of words in order to convey the intentionally broad implications of the exceptions and regulations clause, the ambiguous designation of inferior federal courts, and the primary role given to the Constitution in both Article III and the supremacy clause. To meddle too much with the style of Articles III and VI could well have thwarted their purpose—to be unclear in the specifics, but absolutely precise in granting Congress the power to take advantage of these specifics when it created inferior courts as mandated by Article III.

The rest of the Constitution was straightforward and could therefore be revised with relative latitude for stylistic purposes, but the wording upon the judiciary was fraught with intricate legal implications crucial to the establishment of the federal judiciary two years later, when judicial review could finally be imposed.
Once the Convention was over and done with, the issue of judicial review came into better focus in public debate. Most notably, Wilson and Ellsworth vigorously advocated judicial review at their respective ratifying conventions. Each played a dominant role in defending the Constitution during proceedings, and each apparently felt free to declare his support of judicial review because federalists already dominated his state convention. On December 7, 1787, Wilson explained to fellow delegates at the Pennsylvania ratifying convention how federal law would be subjected to judicial review:

If a law should be made inconsistent with those powers bestowed by this instrument [the Constitution] in Congress, the judges, as a consequence of their independence, and the
particular powers of government being defined, will declare such law to be null and void. For the power of the constitution predominates. Any thing therefore, that shall be enacted by Congress contrary thereto, will not have the force of law (McMaster and Stone, 354).

Obviously, Wilson was referring here to federal law alone, but there is every indication he wanted to apply judicial review to state law as well.

A month later, on January 7, 1788, Ellsworth explained to fellow delegates at the Connecticut ratifying convention the importance of judicial review for both state and federal law:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government the law is void;
and upright, independent judges will declare it to be so (3 Farrand, 240–41).

Judicial leverage was essential, Ellsworth argued, as a “coercive principle” to bring the separate states into a single union:

Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary: we all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms? A necessary consequence of their principles is a war of the states one against the other. I am for coercion by law that coercion which acts only upon delinquent individuals (3 Farrand, 241).

Notably missing from Ellsworth’s explanation was any indication whether his “upright, independent judges” would be making their decisions in state or federal courts. As it turned out, both would participate, and Ellsworth’s recognition of this necessity seems probable in light of his ambiguous description of these judges.

Ellsworth’s candor was remarkable, probably because he went entirely unchallenged by others. According to one observer at the convention, “He [Ellsworth] took a very
active part in defending the Constitution. Scarcely a single objection was made but what he answered. His energetic reasoning bore down all before it” (Brown, 171).

Nor did the possibility of judicial review go totally unnoticed by others around the country, and to at least a few it seemed a strategy might be in the works to impose judicial review at a later time. In a series of articles published in 1788 under the pseudonym of Brutus, Robert Yates explained at length how judicial review could lead to centralization in the federal government because of the gradual accumulation of legal precedents. The gradual accumulation of Supreme Court decisions would produce an exponential increase in the power of the judiciary, and sooner or later federal justices would be able to mold the government into almost any shape they pleased. In response Hamilton added the Numbers 78 to 83 essays of *The Federalist*, in which he challenged the likelihood that the courts would ever gain this much power. However, there was an unmistakable suggestion that he was not necessarily opposed to such an outcome, and he did declare his enthusiastic support of the vertical integration of state and federal courts:

... the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of
course be natural auxiliaries to the execution of the laws of the Union, and an appeals from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions (Federalist 81, 536).

Moreover, Hamilton defended the necessity of judicial review:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law, It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intentions of the people to the intention of their agents (Federalist 78, 506).

Combined, judicial review and the vertical integration of state and federal courts would necessarily give federal judges the power to veto state laws, and this power
would necessarily help to defend national sovereignty.

Hamilton’s description of the role of the judiciary closely resembled the design already promoted by the small circle of convention delegates who had wanted to postpone the implementation of judicial review. However, his arguments significantly differed from his own proposal for the role of the judiciary in the so-called Hamilton Plan he had presented at the Convention (1 Farrand, 292–93). It therefore seems more probable that Hamilton was influenced by a plan already in the works than, as has often been suggested, that his discussion of the judiciary in his final Federalist papers first introduced this plan, setting the stage for the inclusion of Section 25 in the Judiciary Act.

As hoped and expected, opponents to the Constitution at the 1788 state ratifying conventions focused their concerns on other issues than judicial review. The lack of a bill of rights and the appeal of jury trials to higher courts primarily dominated their attention. Nevertheless, Mason, Randolph, and Martin warned at their respective ratifying conventions against the likelihood of a judicial takeover. All three had participated in the Convention, and they were more suspicious than others of the possibility of a hidden agenda for
imposing judicial review within the system of appellate jurisdiction yet to be established by Congress. Mason was perhaps the most persuasive of the three. On August 27, he had drafted notes suggesting his own modified plan to integrate state and federal courts for appeals exclusively based on law and not fact (2 Farrand, 432–33). However, in notes compiled in the final days of the Convention, he had included the absorption of state courts into the federal judiciary as one of the sixteen reasons why he refused to sign the Constitution:

The Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate, and expensive, and justice as unattainable, by a great part of the community . . . and enabling the rich to oppress and ruin the poor (2 Farrand, 638).

These state judiciaries would have been destroyed, he felt, through their loss of autonomy by having been incorporated into the federal judiciary.

At the Virginia ratifying convention, Mason also warned more specifically against the absorption of state courts into the federal judiciary:
What is there left to the state courts? Will any gentleman be pleased, candidly, fairly, and without sophistry, to show us what remains? There is no limitation . . . The inferior courts are to be as numerous as Congress may think proper. They are to be of whatever nature they please. . . . When we consider the nature of these courts, we must conclude that their effect and operation will be utterly to destroy the state governments; for they will be the judges how far their laws will operate. They are to modify their own courts, and you can make no state law to counteract them. The discrimination between their judicial power, and that of the states, exists, therefore, but in name. To what disgraceful and dangerous length does the principle of this go! . . . (3 Elliott, 521–22; italics added).

Obviously, as far as Mason was concerned, a plot was afoot to use the judiciary as an instrument for imposing nationalization:

The principle itself goes to the destruction of the legislation of the states, whether or not it was intended. As to my own opinion, I most religiously and conscientiously believe that it was intended (ibid.).
In his brief response to Mason, Madison more or less conceded the extraordinary powers granted to the judiciary:

It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a new policy of submitting it to the judiciary of the United States (3 Elliott, 532; italics in the original).

Monarchy had limited the power to explicate and make a final determination upon laws to the executive branch (i.e., itself), and the Articles of Confederation had taken Blackstone to the limit by having shifted this ultimate power to the legislative branch. Madison had sought during the Convention to prevent bias in either direction, but now, he acknowledged, however grudgingly, the explication and final determination of laws would be assigned neither to executive nor legislative authority, but to the judiciary, and for the first time in the history of western civilization. In effect, he suggested here that the primary achievement of the Convention, though almost entirely kept from debate throughout its proceedings, was the imposition of judicial review to guarantee federal sovereignty.
Because of his personal experience on the Committee of Detail, Randolph had even more reason than Mason to doubt the use of the judiciary implied by the Constitution. At the Virginia Ratifying Convention, Randolph declared, “The judiciary is drawn up in terror—here I have an objection of a different nature. I object to the appellate jurisdiction as the greatest evil in it [the Constitution]” (3 Farrand, 310). Like Mason and Gerry, Randolph had refused to sign the Constitution, but he was convinced by Washington, Madison, and others to reverse himself, probably in exchange for his appointment as our nation’s first Attorney General in order to appease the opposition. Nevertheless, he remained dubious of the provision for appellate jurisdiction—exactly the feature of Article III left unresolved by the Committee of Detail.

In comparable fashion, Luther Martin, the original author of the supremacy clause, solemnly warned at the Maryland ratifying convention against nationalization resulting from Rutledge’s amendment to this clause:

. . . it [the Constitution] is now worse than useless, for being so altered as to render the treaties and laws made under the federal government superior to our [state] constitution, if the system is adopted it will amount to a total and unconditional
surrender of that government, by the citizens of this state, of every right and privilege secured to them by our [state] constitution, and an express compact and stipulation with the general government that it may, at its discretion, make laws in direct violation of those rights (3 Farrand, 287).

Later confiding his doubts about the intentions of his fellow delegates at the Convention, Martin warned, “I most sacredly believe their object is the total abolition and destruction of all state governments, and the erection on their ruins of one great and extensive empire” (3 Farrand, 291). In retrospect, Martin’s expectation turned out to be justified, whether or not the proponents of judicial review had this particular outcome in mind. As Martin anticipated, an enlarged judiciary did eventually help to integrate the separate states into what could only have seemed an empire, if with more acceptable results than he anticipated.

The expanded powers of the judiciary likewise took on central importance when the Judiciary Act was debated in Congress during the summer of 1789. However, the specific issue of judicial review seems to have been largely ignored. Senators opposed to the Judiciary Act included Richard Henry Lee and William Maclay, both of whom
expressed their concerns without referring to judicial review. During debate in the House of Representatives later in the summer, elaborate speeches by Smith, Livermore, and Stone emphasized the general threat of an expanded court system, but also without referring to judicial review. In a rambling speech, James Jackson of Georgia more specifically warn against judicial review, but his diatribe stirred no response beyond Sherman’s quick and somewhat elusive assurance that “uniformity of decision would be guaranteed” (34 Annals, 6–7).

On the other hand, Fisher Ames, who had not attended the Convention, eloquently defended the need for a Judiciary Act without mentioning judicial review, and even Madison and Gerry, former opponents at the Convention, supported a stronger judiciary with a few sentences apiece again without mentioning judicial review. They seem to have swallowed their opposition, thereby joining the strategy of silence begun at the Convention. Though they might have strayed into the discussion of judicial review in their personal conversations, they refrained from doing so in their speeches before the House of Representatives as reported in the Annals.
VIII.
The Judiciary Act

Among the six delegates who had promoted judicial review at the Constitutional Convention, Wilson and Rutledge were appointed to the Supreme Court, and Sherman was elected to the House of Representatives. The remaining three—Ellsworth, Johnson, and Paterson—were elected to the Senate, where the Judiciary Act was drawn up as specified by Madison’s compromise and the exceptions and regulations clause Article III, Section 2, of the Constitution.

The central figure in the passage of the Judiciary Act turns out to have been Ellsworth, who was chosen with Paterson and six others (with two more added six days later) to serve on the ad hoc committee for drafting the Judiciary Act, described as Senate Bill No.1. This was the first such committee appointed by the new Senate, and its formation was the very first order of business on the first day of its First Session.
Truly, the Judiciary Act was at the top of the Senate’s agenda at its very inception in 1789. Former Convention delegates appointed to this committee included, besides Ellsworth and Paterson, Richard Bassett of Delaware, William Few of Georgia, Caleb Strong of Massachusetts, and Paine Wingate of New Hampshire.

Ellsworth himself was elected to serve as chairman of this committee. He already composed his own preliminary draft of the Judiciary Act preceding the version of the drafting subcommittee on which he served, as indicated by his letter to Judge Richard Law on April 30, twelve days before this subcommittee was chosen. Here he sketched out many of the provisions later found in the committee’s original draft (Brown, 185; Warren’s “History,” 60–61). Portions of the original draft survive in the handwriting of Ellsworth, Paterson, and Strong—Sections 1 to 9 in Paterson’s handwriting, Sections 10 to 23 in Ellsworth’s, and Section 24 in Strong’s (Warren, “History,” 50). The rest, including Section 25, survive in the handwriting of a clerk.

One can assume that Ellsworth himself authored Section 25 in its original draft, since a clerk would not have been able to belabor its content to such an extreme. The imposition of judicial review is, arguably,
the initial bulwark of federal sovereignty in the history of constitutional law.

Ellsworth led Senate debate in support of the Judiciary Act through June and the first half of July, and his persistent defense of its wording is reported to have been extraordinarily aggressive. His primary responsibility for the Act was acknowledged in several entries of William Maclay’s journal, the only systematic record that survives of Senate proceedings. Maclay emphasized Ellsworth’s singular role perhaps most emphatically in his remark, “This vile bill is a child of his [Ellsworth’s], and he defends it with the care of a parent, even with wrath and anger” (Maclay, 91; also 94, 101, and 152). In 1836, Madison also singled out Ellsworth as the author of the Judiciary Act:

It may be taken for certain that the bill organizing the judicial department originated in his [Ellsworth’s] draft, and that it was not materially changed in its passage into law (Brown, 185).

Among opponents to the Act, Ellsworth was cast as the principal villain, and the Judiciary Act as a dangerous nationalist takeover strategy—in Maclay’s words, the American equivalent to the gunpowder conspiracy.
In retrospect, it can be recognized that Ellsworth quickly took a dominant role in the Senate regarding other issues as well. He forced the passage of every feature in Hamilton’s economic program except for those minor changes he himself felt were important. He sponsored Madison’s Bill of Rights in the Senate and singlehandedly sponsored and forced the passage of legislation which pressured Rhode Island into joining the union despite heavy opposition by a majority of its citizens. John Adams praised Ellsworth as “the firmest pillar of his [Washington’s] whole administration in the Senate,” and Aaron Burr complained, “If Ellsworth had happened to spell the name of the Deity with two d’s, it would have taken the Senate three weeks to expunge the superfluous letter” (Brown, 231, 225).

Why, then, did Ellsworth make the Judiciary Act his very first task in the Senate? Why was this his dominant concern? The answer seems evident that he treated the Constitution as unfinished business without the Judiciary Act and that he swiftly worked to bring it to its completion. Because of his experience on the Committee of Detail, he was the most qualified in the Senate to promote the Judiciary Act, and he knew exactly what needed to be done.

Now that the Constitution had passed muster at the state ratifying conventions,
its less attractive enabling features could be imposed, the most important of which was judicial review permitted by the vertical organization of state and federal judiciaries. The Constitution itself had provided a central government based on an elaborate model of checks and balances, and now, with the Judiciary Act, this government would be able to defend its sovereignty through an interlocking hierarchy of state and federal courts with a Supreme Court at the top able to revoke state laws in conflict with the Constitution. It was thus the passage of the Judiciary Act that gave teeth to the Constitution and helped to extricate the nation from its powerlessness under the Articles of Confederation.

Amazingly, all references to the principle of judicial review were buried in the 25th section of the Judiciary Act and spelled out in just two sentences, the first an elaborate and almost indecipherable 307-word explanation of the procedures of judicial review, and the second a brief amendment added during Senate debate which limited the application of judicial review to issues featured in the written opinions of lower courts. The heart of the Judiciary Act lay in the first of these two sentences, since it outlined the circumstances and procedures for appealing state Supreme Court decisions upon state law to the federal Supreme Court
for its final determination. Probably drafted by Ellsworth, this overlooked keystone (and linchpin) of constitutional law defied both revision and effective opposition, and this was undoubtedly its principal value in declaring the application of judicial review without submitting it to debate. For in fact it was neither discussed nor amended by either the Senate or House of Representatives. Members of the latter body later proposed a number of changes for other portions of the Judiciary Act, but none that was relevant to this particular sentence, perhaps the most important—certainly the most gnarled—provision in the history of constitutional law.

Independent of the Constitution first authored by Ellsworth and four others on the Committee of Detail, the Judiciary Act established the only enforceable defense of our nation’s sovereignty, of necessity based on the vertical organization of state and federal courts. The labyrinthine precision of this remarkable sentence guaranteed its obscurity in simultaneously specifying the function of judicial review and crowding from recognition the enormous powers conferred by the wording italicized here:

[Be it enacted,] *That a final judgment* or decree in any suit, *in the highest court of law* or equity of a *State* in which a decision in the suit could be had, *where is drawn in question the*
validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be reexamined, and reversed or affirmed by the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in
a circuit court, and the proceedings upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution [italics added].

Experienced judges and constitutional historians may have been able to fathom the process of judicial review described in this context. However, most laymen could only have been puzzled by the wording. Even today, reputable constitutional historians seem unaware of the full scope of powers conferred by it.

Close scrutiny, however, reveals that three legal clauses were embedded in this sentence, respectively submitting,

- Federal laws and treaties,
- State laws, and
- The constitutional rights of individual parties,

to a process of judicial review that originates in state courts and can then be appealed to the Supreme Court. It turns out that the veto of international treaties by state and
federal courts has never been exercised, while the veto of federal law did not gain general acceptance until the 1803 *Marbury v. Madison* decision.

Of immediate importance, however, was the second clause, the veto of state laws, since it guaranteed federal sovereignty over the separate states. Amazingly, one hundred and fifty-six words separate its compound subject (“final judgment or decree”) from its compound verb (“be reexamined, and reversed or affirmed”). If all intervening qualifications can be ignored, an inner syntax emerges expressing the simple principle in exactly the same words:

. . . that a final judgment . . . in the highest court of law . . . of a State . . . where is drawn in question the validity of a statute . . . on the ground of [its] being repugnant to the constitution . . . and the decision is in favor of such their validity . . . may be reexamined, and reversed . . . by the Supreme Court of the United States.

Even more simply translated, the favorable review of state law by state supreme courts could be reversed by the federal Supreme Court. A relatively brief sentence to this effect could easily have been inserted in Article III, Section 2, of the Constitution, but to do so prematurely would have guaranteed
the rejection of the Constitution as a whole in either the Convention or the state ratifying conventions the following year.

On the other hand, if a state supreme court rejects a law as being unconstitutional, there is nothing the federal Supreme Court can do about it. The state supreme court’s decision stands as having been decided. Only if the state supreme court accepts this law as being constitutional can its decision be appealed to the federal Supreme Court for its final decision. A substantial compromise was thus brought into play. State courts retained an initial negative power over state laws, but if and when they exercised positive support for these laws, the federal Supreme Court was able to exercise negative power at a final level. As a result the federal Supreme Court seemed relatively impotent at the time, but cumulative weight of its decisions over the following decades substantially enlarged its authority.

Everything was finally in place: Rutledge’s August 23 amendment to the supremacy clause had permitted state courts to judge the constitutionality of state laws, and Johnson’s August 27 amendment to Article III had guaranteed the Supreme Court’s comparable powers. Now Section 25 established the procedures and circumstances for appealing state court decisions to the Supreme Court. As
Wilson’s August 27 amendment would have done, Section 25 bridged the gap between the two earlier amendments, specifically by providing for the use of a writ of error signed by a justice of the Supreme Court for challenging favorable decisions by state courts at the federal level. This was a bold innovation—both too detailed and too dangerous to have been included in the Constitution.

It has been suggested that the assignment of original jurisdiction to state courts and appellate jurisdiction to the Supreme Court was a concession to anti-federalists such as Richard Henry Lee. However, the exclusive use of state courts in the first instance had been featured as early as Rutledge’s June 5 amendment, and it seems probable that Ellsworth was both willing and eager to bring this arrangement into the Judiciary Act. Anti-nationalists could take satisfaction in having granted state courts the power to initiate judicial review, but, as recognized by Yates, Mason and Martin, such an arrangement contained the seeds of even greater powers accruing to the Supreme Court over subsequent decades based on its cumulative authority.

Fortunately, few fathomed the full implications of Ellsworth’s sentence reduced to its essential components. Unlike the elegant lucidity of the Constitution’s
final draft crafted by Gouverneur Morris, Ellsworth’s tangled syntax repelled attention in the very act of establishing the federal government’s defense of its sovereignty through judicial review. The resulting opacity seems to have been typical of Ellsworth’s legal style and was later ridiculed by Maclay because it resisted amendment except by imposing completely new wording:

This bill [a later bill upon consuls and vice-consuls] was drawn and brought in by Elsworth, and, of course, he hung like a bat to every particle of it. The first clause was a mere chaos—style, preamble, and enacting clause all jumbled together. It was really unamendable; at least, the shortest way to amend it was to bring in a new one (Maclay, 368–69).

The problem, Maclay suggested, very likely resulted from a peculiar lopsidedness in Ellsworth’s talents: “All-powerful and eloquent in debate, he is, notwithstanding, a miserable draftsman.”

In Section 25 of the Judiciary Act, Ellsworth apparently exceeded himself as a miserable draftsman, but with salutary results, since judicial review was far less likely to be challenged and rejected than if explained in a simpler construction. The
Constitution itself had been gracefully elucidated for the benefit of the American public. In contrast, the wording of Section 25 was delayed two years and then smuggled aboard in this fashion, an obscure rider to an elaborate bill for creating inferior courts as provided by Article III of the Constitution.

President Washington signed the Judiciary Act on September 24, 1789, just two years after the Constitution was adopted, and it effectively complemented Articles III and VI of the Constitution. The contents of the Judiciary Act were both too elaborate and too controversial to be brought into the Constitution except as a kind of appendix provided by the Judiciary Act. But in the end everything more or less fit.

Article III, Section 2, of the Constitution had broadly assigned to Congress the task of giving the Supreme Court “appellate jurisdiction, both as to Law and Fact with such Exceptions and under such Regulations as the Congress shall make.” With such generous latitude, the Judiciary Act could be framed to impose the vertical integration of state and federal supreme courts. The initial review of both state and federal laws was limited to state courts, and their final acceptance on constitutional grounds could only be provided by the federal Supreme Court once state supreme courts had found them acceptable. Those laws rejected by
state supreme courts could not be appealed to the Supreme Court. This concession might seem to have reinforced states rights, but at last the federal government acquired what might be described as defensible sovereignty based on the Supreme Court’s authority to dispense final judgments.

As to be expected, this system was initially weak—so weak, in fact, that John Jay, the first Chief Justice, resigned in disgust in 1795. Only a half dozen cases required judicial review by the Supreme Court in the decade following the passage of the Judiciary Act. Nevertheless, the gradual accumulation of judicial decisions since then has indeed expanded the veto of the federal judiciary over state and local laws, and to such an extent that Supreme Court rulings today bear a mounting influence on every aspect of life in the United States.
IX.

*Marbury v. Madison*

According to most accounts it was Chief Justice John Marshall who primarily enlarged judicial review as the keystone and final ingredient in our nation’s legal system as late as 1803, sixteen years after the Constitution was ratified. By declaring the Supreme Court’s power of review over federal law in *Marbury v. Madison* (1 Cranch, 174), Marshall is said to have established the use of judicial review for ascertaining the constitutional validity of laws passed by Congress, thereby putting its “negative” possibilities into effect. However, Marshall’s horizontal use of judicial review relevant to congressional law can also be seen as an essential enlargement of Ellsworth’s earlier achievement, which primarily involved the vertical use of judicial review in determining the constitutionality of state laws.

Both applications of judicial review were crucial, and both posed difficulties
of their own in their formulation. Whereas Ellsworth’s use of judicial review in order to defend federal sovereignty can be described as having been somewhat duplicitous, Marshall’s Supreme Court decision to augment executive constraint on populist excesses turns out to have been fraught with a variety of potential legal violations worthy of challenge. Moreover, Marshall’s argument depended on the unavoidable status of the Judiciary Act as being less authoritative than the Constitution itself, an argument that could have equally applied to all other portions of the Judiciary Act inclusive of Section 25 if it could be found in potential contradiction with any portion of the Constitution.

In any case, Marshall’s gambit was successful in having completed the establishment of judicial review as the nation’s bulwark of legal deliberations at all levels of government and among a selection of the nation’s leadership relatively free of political bias. The judiciary became truly as powerful as the legislative and executive branches, whatever the intrinsic contradictions of Marshall’s interpretation. If its unique authority was not necessarily declared by the Constitution itself, it should have been.

Marshall specifically achieved this aim by denying the Supreme Court the right to
issue a writ of mandamus. Established by Section 13 in the Judiciary Act, the writ was not included in the Constitution itself and was therefore presumably restricted to the affairs of inferior courts as indicated by Article III’s exclusionary wording (“in all other cases,” etc.). The Constitution took precedence over the Judiciary Act (a mere law), Marshall explained, so he was obliged to declare Section 13 null and void. He accordingly announced his inability to issue a writ of mandamus that would force James Madison, Jefferson’s new Secretary of State, to employ William Marbury, a last-minute political appointee of John Adams.

The immediate victory went to Madison, but on more basic grounds the *Marbury v. Madison* decision was a stunning defeat for his vision of constitutional checks and balances, since it risked the vertical application of judicial review in order to set the stage for the acceptance of the Supreme Court’s final and irreversible power to veto federal law as well as state law. During the Convention, Madison had tried to prevent any expansion of judicial authority that would make the Supreme Court the final arbiter of federal law and had expressed his serious reservations when Johnson added his amendment referring to the Constitution itself. Now Madison’s worst suspicions were confirmed, and, ironically,
in a case decided in his favor. Nevertheless, as Marshall pointed out, only the Supreme Court possessed the ability and credentials to determine the constitutional validity of specific federal laws. If it made its determination unfavorable to these laws, its negative opinion necessarily constituted their veto for being unconstitutional.

Nor can it be overlooked that Article III prohibited Marshall from declaring Section 13 unconstitutional without awaiting the appeal of its favorable review from inferior courts to the Supreme Court. Enforcing the writ of mandamus for the benefit of Marbury was entirely within Marshall’s original jurisdiction, but his jurisdiction was appellate, not original, when it came to rejecting the writ for being unconstitutional. A decision supportive of the writ would first have been needed from a state supreme court, as provided by Section 25 of the Judiciary Act, and then it could be appealed to the Supreme Court for its final dispensation. But most important, Marshall denied Congress its right to incorporate the writ of mandamus into the Judiciary Act as justified by the exceptions and regulations clause of Article III: “. . . with such exceptions, and under such regulations as the congress shall make” (italics added).

Amazingly, Marshall dispensed with this entire phrase, featured by the Committee of
Detail to provide for enlarging the authority of the Supreme Court, as “mere surplusage” and “entirely without meaning” (Commager, 193). However, only four sentences later, at a different stage in his argument, Marshall declared, “It cannot be presumed, that any clause in the constitution is intended to be without effect.” Indeed, he was correct here, but at the expense of his earlier argument against Congress’s authority to include the writ of mandamus in the Judiciary Act. If an “effect,” or intended application, were perceived in the exceptions and regulations clause rejected by Marshall, Section 13’s guidelines for imposing the writ of mandamus could be recognized to have been fully constitutional as an “exception” that Congress had chosen to make if, in fact, it were any exception at all.

Finally, of course, Marshall should have disqualified himself from judging the case, since he had served as Secretary of State in the final months of the Adams administration and had been personally responsible for the delay in giving Marbury his last-minute federal appointment. To this extent, at least, the litigation had arisen from negligence on Marshall’s part, and yet he sat in judgment on the case!

Nevertheless, it can be acknowledged in retrospect that the defects and fallacies in Marshall’s judgment against the writ of
mandamus were less important than his defense of the right of the Supreme Court to impose such a judgment, whatever its flaws. By declaring the writ of mandamus unconstitutional, he established by example the inevitability of judicial review over federal law additional to state law. As originally intended, judicial review had been no more than implied in the Constitution, but its use was unavoidable as Marshall explained, and as Johnson and fellow delegates had planned when they added the “arising under” clause to Article III.

Among other potential contradictions was Marshall’s veto of the writ of mandamus without having taken into account the comparable status of the writ of error for making appeals to the Supreme Court as required by Section 25. Both writs were missing from the list of powers granted by Article III, and both were first specified in the Judiciary Act, so both could have been declared unconstitutional by Marshall’s logic. In other words, the judicial review of state laws—vastly more important than the writ of mandamus—was no less susceptible to veto, as in fact Marshall himself argued when he had appeared as a lawyer before the Supreme Court in 1796 (Ware v. Hylton, 3 Dallas 199). However, now that he was elevated to Chief Justice, Marshall understandably wanted to preserve the
vertical review of state law as well as adding its horizontal application to federal law. As a result, the intentional ambiguity of Article III pertained to both writs, but with entirely different implications leading to identical results.

Because there was no indication whether state or federal inferior courts would be used, Section 25 of the Judiciary Act, including the writ of error, could be accepted as being constitutional, permitting the Supreme Court’s judicial review of state laws. However, because of the exclusionary wording used to convey this ambiguity (“in all other cases,” etc.), Section 13, including the writ of mandamus, could be found unconstitutional, thereby establishing the necessity of judicial review for federal law too. Paradoxically, it was only by reducing the Supreme Court’s authority that Marshall could enlarge this authority to impose such a reduction.

A double standard seems to have been imposed, in both instances favorable to judicial review. In effect, Marshall denied the Supreme Court the right to use the writ of mandamus because it had incidentally been excluded from the Constitution. But in rejecting it he laid claim to another and more important right, the judicial review of federal law, a right that had been intentionally left
open to interpretation so it could later be imposed.

As to be expected, this mixture of potentially contradictory assumptions was susceptible to challenge. In the 1816 *Martin v. Hunter’s Lessee* case (1 Wheat, 304) and the 1821 *Cohens v. Virginia* case (6 Wheat, 264), the Virginia Court of Appeals declared Section 25 unconstitutional on the grounds, apparently consistent with the original intent of the Constitution, that state judiciaries possessed independent authority to interpret the Constitution for themselves. In both cases the Supreme Court reversed their decision based on the arguments of Joseph Story and Marshall that its appellate jurisdiction was unavoidable except for those cases in which it exercised original jurisdiction.

True, there was no reference to the vertical integration of state and federal courts in the Constitution, but, as first intended, there was likewise no word or phrase in the Constitution which prohibited its adoption. And if the jurisdictions of state and federal courts were coextensive and integrated, the same principle of contradiction applied as explained in *Marbury v. Madison*, to the effect that both state and federal laws could be vetoed when found in conflict with the Constitution. In other words, by the principle of omission state and federal courts could
be integrated, and then by the principle of negation (Marshall’s dictum, “Affirmative words are often, in their operation, negative of other objects than those affirmed”), state laws found in conflict with the Constitution could be declared null and void. By logic alone, centralization prevailed.

Ill and in retirement when *Marbury v. Madison* was decided, Ellsworth had perhaps even more reason than Madison to be ambivalent about Marshall’s line of argument, since he had played a central role in framing both documents Marshall found in conflict with each other. Marshall extended judicial review to federal law by misconstruing the exclusionary wording of Article III, which Ellsworth helped to draft, and Marshall did this in order to reject Section 13 of the Judiciary Act, whose original draft still exists in Ellsworth’s handwriting. In and of itself, the writ of mandamus was relatively inconsequential, but it was indeed missing from the Constitution, so Marshall could use its absence to compel its exclusion from the powers exercised by the Supreme Court. By later specifying its use in the Judiciary Act, Ellsworth had ostensibly contradicted himself, and Marshall could use this potential inconsistency as the precedent he needed to justify the judicial review of federal law.
Whether Marshall’s interpretation was correct did not deprive him of the right to make it. Ellsworth himself had imposed the Judiciary Act in order to guarantee the Supreme Court’s power to review state laws, and now Marshall challenged a very minor portion of this Act in order to help consolidate another of Ellsworth’s principal objectives (as specified by the first clause of the Judiciary Act), the Supreme Court’s power to review federal laws. So how could Ellsworth complain? Everything was finally in place, more or less.

A makeshift pragmatism had, in fact, been Ellsworth’s primary asset throughout the Constitutional Convention and his subsequent career in government. With disdain, Maclay had ridiculed Ellsworth’s dependence on caballing, the use of quiet negotiations in the halls of Congress as a supplement to the public eloquence then expected in legislative deliberations (Maclay, 105). However, it was only by caballing that trade-offs could be made, and these trade-offs were essential compromises toward the formation of our government. To help impose the Connecticut Compromise, Ellsworth had twice assumed the distasteful responsibility of addressing the Convention in support of the inclusion of slavery in the Constitution. Also in the spirit of compromise he had participated in the tactic of omitting any
reference to the identity of inferior courts by the Committee of Detail on which he had served. Later, with the Judiciary Act, he had likewise given state courts exclusive original jurisdiction to offset the exclusive final determination granted to the Supreme Court. This might have seemed a generous compromise to opponents of judicial review but it later turned out to provide the Supreme Court with judicial power unprecedented in world history. And of course he participated in the remarkable trade-off whereby the passage of the Judiciary Act had been linked with the passage of the Bill of Rights.

After obtaining the passage of the Judiciary Act in the Senate, Ellsworth sponsored the Bill of Rights in the Senate and worked vigorously for its passage, just as Madison did for judicial review in the House of Representatives. The two were obviously intended to work in coordination with each other. The Judiciary Act gave the Supreme Court its full legal authority, while the Bill of Rights limited this authority relevant to the needs and circumstances of individual citizens as well as state and local governments. The two pieces of legislature fit like a glove.

As the de facto Senate majority leader throughout Washington’s term in office, Ellsworth was able to guarantee full
support for Washington and Hamilton’s Federalist agenda as compared to sustained dissension in the House of Representatives. In the opinion of John Adams, Washington’s principal mistake at the end of his presidency was his elevation of Ellsworth to become the Chief Justice of the Supreme Court, thereby jeopardizing the Federalist Party’s legislative dominance in the Senate, at that time a more important arena during the inception of the United States.

After a couple years of judicial inactivity, Ellsworth resigned from the Supreme Court to lead a delegation to France in order to negotiate terms with Napoleon in order to avoid the possibility of naval warfare. Ellsworth and his team spent a year in friendly arbitration in Paris, and for a while he was even considered a potential substitute for Adams in the next presidential election. However, the 1798 Alien and Sedition Acts provoked a hostile public reaction that made any federalist victory unlikely, whoever the candidate might have been. Also, Ellsworth’s concessions to Napoleon in their 1800 treaty compounded public hostility against the Federalists to such an extent that Jefferson won the presidency by an even greater margin than might otherwise have been the case. Three years later, however, it turned out that these concessions might well have helped to inspire Napoleon’s sudden and
presumably inexplicable “giveaway” sale of the Louisiana Territory to the United States despite his dislike of Jefferson. Suddenly the United States was twice its earlier size, and, if there was any connection, Ellsworth’s ability to compromise once again paid substantial dividends.

In the end, however, the sacrifice of the writ of mandamus in order to impose the Supreme Court’s horizontal check upon Congress was the most bizarre compromise linked with Ellsworth’s role, and Marshall rather than Ellsworth himself obtained it. Undoubtedly conspiracy was involved, but its outcome was truly accidental, at least on Ellsworth’s part.
X.

Conclusion

In retrospect, the accomplishment of Ellsworth and his fellow delegates was somewhat different from Madison’s primary objectives at the Convention, but with modifications that may be considered to have led to a more viable system.

Madison wanted to subordinate individual states to the sovereignty of the federal government led by disinterested statesmen dedicated to the rule of law. For this purpose he sought a uni-dimensional hierarchy with the President and Supreme Court at the top and with state legislatures at the bottom. Congress would play an intermediate role by checking state legislatures while being checked itself by a Council of Revision. However, as already indicated, Madison’s structural plan was decisively rejected by the Convention, and it seemed to many during the early stages of the Convention that the Constitution would
be no more binding upon state legislation than the Articles of Confederation had been. Instead, by makeshift arrangement the coalition of dissident delegates provided the federal government with its needed sovereignty by giving the federal Supreme Court the needed appellate jurisdiction to review both federal law and state supreme court decisions bearing upon state law. Central authority was thus salvaged, but by use of the judiciary rather than Congress and within a vertical integration from state legislatures to state and federal courts.

In effect, the federal Supreme Court replaced the Council of Revision in curtailing the authority of state legislatures. Somewhat diminished by this arrangement.

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**Figure 1. Madison's Model**

```
President  Supreme Court
          Council of Revision
            (Veto)
                ↓
            Congress
                ↓
          (Congressional review)
            ↓
State Legislatures
```
as compared to Madison’s plan was the participation of the other two primary federal branches—Congress deprived of authority over state law and the president deprived of authority as a co-partner with members of the Supreme Court on a Council of Revision. Procedurally, it was more convenient to give a single branch, the judiciary, the power to veto both state and federal laws, but Madison’s emphasis on checks and balances was necessarily diminished by the substitution.

The difference between Madison’s model and the final model as determined by the 1789 Judiciary Act followed by the 1803 *Marbury v. Madison* decision may be readily diagrammed.
The final model’s upper “V” portion indicates the presidential veto as well as the judicial review of federal law as confirmed by Marshall’s 1803 *Marbury v. Madison* opinion, while the vertical detour extending from the Supreme Court to state supreme courts and then state legislatures represents the judicial review of state law as defined by Section 25 of the Judiciary Act. As modified, the counter-majoritarian veto became workable, if asymmetrical and of relatively precarious legitimacy.

It also turns out that the Supreme Court’s power to review state law was guaranteed by a federal law—the Judiciary Act—that could be repealed or amended any time by a simple majority of Congress. Likewise, the judicial review of federal law was guaranteed by a Supreme Court opinion—*Marbury v. Madison*—that could be supplanting or modified by later opinions of the Supreme Court. Neither power of review over state or federal law was stated in the Constitution itself, nor was either legitimized as an amendment to the Constitution. Paradoxically, as a result, the Constitution’s effectiveness as our nation’s primary legal contract has been guaranteed by a mere law and by a mere Supreme Court decision, both of which lie outside the the Constitution itself. As already indicated the effect has been tautological—constitutional
government has provided the basis for their implementation; they in turn have served as bulwarks confirming the central authority of the Constitution to do so.

The importance of *Marbury v. Madison* is generally recognized at least partly because of the dramatic circumstances that led to its adoption. However, the comparable importance of the Judiciary Act has often been overlooked in constitutional history, apparently on the assumption that the judicial review of state laws has been just as effectively guaranteed by the Constitution’s supremacy clause, by the 1803 *Marbury v. Madison* decision, and by the due process clause of the Fourteenth Amendment of 1868. However, without Section 25 of the Judiciary Act, none of these documents would have specifically granted the Supreme Court the power to veto state laws.

For example, without Section 25 the supremacy clause could actually have been interpreted to deprive the Supreme Court of its final power to exercise judicial review. As first intended by Martin, state oath of loyalty to the Constitution would have established their full authority to overturn state laws without further review by any particular branch of the federal government. Section 25 reversed this possibility by imposing an appeals system whose final authority was vested in the Supreme Court alone.
Marbury v. Madison was even less useful in guaranteeing the Supreme Court the power of judicial review over state law. Marshall’s decision did affirm the Supreme Court’s power of judicial review over laws passed by Congress, but it bore no relevance whatsoever to the veto of state law.

Finally, the equal protection clause of the Fourteenth Amendment significantly expanded the Supreme Court’s authority to protect individual rights from both state and federal government. However, without the Judiciary Act the Supreme Court would not necessarily have exercised final authority in this matter. State courts could have held coextensive and essentially independent authority, and their decisions could have retained independent validity as guaranteed by their judges’ oath of allegiance to the United States as required by the supremacy clause. There was no clear guarantee that the Supreme Court could have reversed these decisions, any more than state courts could have reversed the Supreme Court’s findings. Even if the broadest interpretation of the Fourteenth Amendment’s equal protection clause were granted, Section 25 provided an indispensable antecedent and established the procedures and circumstances by which judicial review at the state level could be appealed for a final judgment by the Supreme Court. Nowadays little more than
an unexplored dark hole in the history of American jurisprudence, the Judiciary Act was at the core of our nation’s difficult but ultimately successful unification.

As for the Bill of Rights, it too became dependent on judicial review as guaranteed by Section 25. In the First Congress of 1789, Madison promoted the Bill of Rights as a protection of individual and states rights from federal interference as might be exerted by the Supreme Court. As earlier indicated, just as there was a balance of power among the three branches of government, a secondary twofold balance seems to have been envisaged between the Judiciary Act and the Bill of Rights. Both dominated proceedings in the 1789 Congress—the Judiciary Act promoted by Ellsworth in the Senate, and the Bill of Rights promoted by Madison in the House of Representatives. Their linkage effectively established symmetry between the federal government’s power of judicial review and the defense of personal and communal liberties from all branches of the federal government, the Supreme Court included.

The First Amendment’s guarantee of free speech, for example, not only restricted the federal government from curtailing the free speech of individuals, but also prevented it from interfering with state laws and judicial decisions that either supported
or limited free speech. If state laws curtailed free speech, the Bill of Rights in its original formulation prevented the Supreme Court, Congress, or any other office of the federal government from interfering with these laws despite their review powers as guaranteed by the Judiciary Act.

Unexpectedly, however, the equal protection clause of the 1868 Fourteenth Amendment subverted this intention by expanding the Bill of Rights to protect individual liberties from state and local government as well as the federal government. This turned out to be something entirely different. The Bill of Rights became a universal standard of justice, and the Supreme Court necessarily assumed final authority in enforcing its application at every level of government inclusive of state and local levels. For the first time, a single branch of the federal government, the Supreme Court, was empowered to prohibit all state and local laws deemed unacceptable—even, as it later turned out, individual, group, and corporate practices found in conflict with the Bill of Rights. Since virtually all human intercourse somehow touches upon freedoms designated by the Bill of Rights, there was necessarily a substantial increase in federal intrusiveness as justified by the need to defend individual parties from state and local governments, exactly what many
of our founders had sought to prevent when they first drafted the Bill of Rights.

Yet the effect of the Fourteenth Amendment has been beneficial. The American public enjoys relative uniformity in the rule of law, and the integrated enforcement of the two countervailing principles of judicial review (which is essentially “counter-majoritarian”) and of inalienable right (which is essentially “egalitarian”) has helped to complete the absorption of the separate states into a single nation. Full nationalization has been achieved through the Supreme Court’s enlarged authority imposed by the Fourteenth Amendment, but necessarily with a wide array of residual privileges still in effect among all the states. The system that has emerged might seem both crude and redundant, but perhaps the best and most pragmatic arrangement under the circumstances.

How could this Rube Goldberg contraption, this jerrybuilt hodgepodge of reversible safeguards and potentially incompatible laws, clauses, and judicial decisions have become the foundation of American constitutional law? At least in part because the relatively simple design for a central government sought by Madison and his supporters had been prevented by anti-nationalist convention delegates, and it had
been impossible under the circumstances to impose any other alternative with comparable safeguards against excessive decentralization.

As disclosed by letters between Washington and Hamilton, the Constitutional Convention was in total disarray by early July 1787 (3 Farrand, 534, 565–67). The most important features of the Virginia Plan were under attack, and prospects seemed inevitable that the Constitution would be just as ineffective as the Articles of Confederation. Obviously, some kind of a structure was necessary to veto state laws incompatible with federal prerogatives. Since congressional review was found unacceptable, by default the role of the judiciary became the focus of the effort to salvage this responsibility. Yet the basic powers eventually granted to the Supreme Court by the Judiciary Act and *Marbury v. Madison* had been too innovative, and too threatening to many anti-nationalists, to have been accepted at the Constitutional Convention. These powers were therefore excluded from proceedings, setting the stage for their subsequent adoption on a piecemeal basis. Having not been rejected, they could later be imposed, paradoxically, by granting state courts federal authority in order to let the Supreme Court reverse state court decisions, and by depriving the
Supreme Court of a specific authority, the writ of mandamus, in order to establish its final authority, if so disposed, to risk making such mistakes.

The piecemeal implementation of this convoluted strategy necessarily involved confusion, postponements, temporary expedients, and unexpected compromises. As might have been anticipated, it resulted as much from serendipity as from planning and synthesis. If an architectonic symmetry emerged, its realization transcended its frame and scaffolding. Like a thrown toy gyroscope, the organization of our nation’s courts stabilized and found its own path independent of the energies that launched it, yet more or less as intended when thrown. Delegates who might have been willing to impose judicial review “lucked into” the creation of inferior courts because of the June 5 Madison compromise. However, there was little they could do beyond crafting the language of Articles III and VI to permit its later adoption. As a result, nobody at the Convention could have predicted the outcome with any degree of confidence.

Such individuals as Wilson, Ellsworth and Hamilton sought a strong judiciary based on the principle of judicial review, while others such as Yates, Mason, Randolph and Martin feared it—some of them longer than others. But none of them wielded the
power to shape with exactitude the system of justice that would emerge over the next two centuries. Ellsworth had more of a hand than others in shaping the judiciary, but his contribution was fraught with the most contradictions.

Many basic questions remain unanswered. Those contemporary statesmen who painstakingly documented their contributions to statecraft—Washington, Hamilton, Jefferson, and Adams—did not play central roles. In contrast, those who helped to steer possibilities toward judicial review neglected to explain themselves for the benefit of posterity. Indeed, they seem to have avoided fully exposing their ideas to public scrutiny, and instead negotiated (or caballed) in private. Like modern politicians, they did not feel compelled to clarify their objectives with the thoroughness that their strategy might otherwise have necessitated. Several were prevented from compiling their papers at the end of their careers.

In Ellsworth’s case this might well have been because of a prolonged terminal illness resulting from effect of stormy seas while crossing the Atlantic on his diplomatic mission to France. Rutledge can be excused because of incurable insanity (its onset produced by his outrage with the Jay mission to England suggested by Ellsworth to Washington), and Wilson because of public
disgrace as a fugitive from his creditors, dying in the care of his young bride in an obscure rural hotel. As a result, many of the steps taken in implementing judicial review can only be hypothetically reconstructed. Some modifications were plainly intended, but others seem to have resulted from the happy mixture of experience and accident first recommended by Dickinson.

Quite properly, opponents of the Judiciary Act suspected by 1789 that it contained the seeds of a nationalist takeover, but they did not know where to look. The issues they emphasized—trial by jury, the relocation of trials, and an appeals system based on fact as well as law—were relatively harmless distractions. Moreover, the Bill of Rights was adopted to safeguard both state and individual rights from any misuse of federal power, and the Judiciary Act seemed to give state courts sufficient authority to defend state sovereignty from federal intrusion. Nevertheless, widespread suspicions continued, and they were justified. Unmentioned by the Constitution and buried in Section 25 of the Judiciary Act was the culprit, a tangled recipe for judicial review that almost completely went without notice at the time. With the passage of the Act as a whole, this recipe took effect, and, as predicted by Yates, the trend toward unification could at last begin.
The linchpin had been inserted and the Constitution given its defensible supremacy over state law. In statute as well as spirit, the United States was no longer a loose and powerless confederation, but a single nation—eventually the most powerful in the world.

Today, the Supreme Court’s ability to check both state and federal law is universally recognized. First intended to defend the federal government’s sovereign authority, judicial review has taken on much broader applications, and with beneficial results. The rule of law prevails, and those who interpret it have been chosen based on merit as well as possible in a democracy. As predicted by Ellsworth at the Constitutional Convention, the selection and lifetime service of Supreme Court justices encourages both competence and integrity in the context of elective government. On the average wiser and better educated than elected officials, these justices have become our nation’s guardians of last resort. When important laws are at stake, their role is paramount. There is no other nation in the history of civilization, which has vested this much power in its judiciary.
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About the Author

After public schooling in Darien, Connecticut, on both coasts of Florida, two towns in Iowa, and a military base on the Mojave desert, Edward (“Mike”) Jayne attended the University of California through his master’s degree in English, then SUNY of Buffalo for a Ph.D. under the guidance of Lionel Abel and Leslie Fiedler. He taught critical theory at Humboldt State University, the Universities of Massachusetts and Minnesota, the Universities of Freiburg and Munich in Germany, the latter under a Fulbright fellowship, and the University of Santa Catarina in Brazil. He spent his final two decades of teaching at Western Michigan University (edward.jayne@wmich.edu).

Jayne’s literary approach in his various publications depends on thorough explicative analysis, and here, in his first and only venture in legal history, he puts this approach to use in order to help clarify what actually happened during the necessarily complex first fifteen years of our
nation. His text benefits from the editorial assistance of Diane Worden in addition to his patient wife, Elaine, who helps moderate his more extravagant suppositions.
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