

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 (Doctrines, 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.