

## **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.

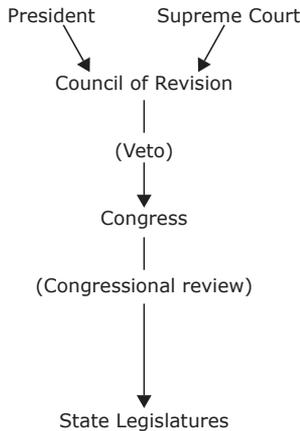
Madison wanted to subordinate individual states to the sovereignty of the federal government led by disinterested statesmen dedicated to the rule of law. For this purpose he sought a uni-dimensional hierarchy with the President and Supreme Court at the top and with state legislatures at the bottom. Congress 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**

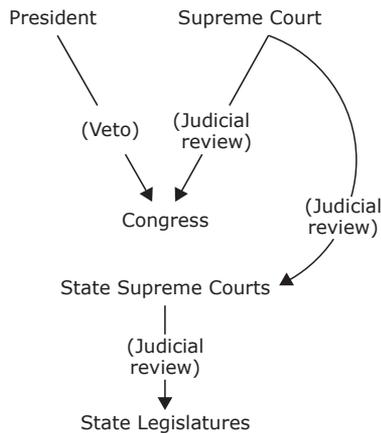


as compared to Madison's plan was the participation of the other two primary federal branches—Congress deprived of authority over state law and the president deprived of authority as a co-partner with members of the Supreme Court on a Council of Revision. Procedurally, it was more convenient to give 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.

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**Figure 2. The Final Model**



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 supplanted 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.