

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 controul 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 of 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.