

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.

Balance Aborning

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.