

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.