

VII. The 1788 Ratifying Conventions

Once the Convention was over and done with, the issue of judicial review came into better focus in public debate. Most notably, Wilson and Ellsworth vigorously advocated judicial review at their respective ratifying conventions. Each played a dominant role in defending the Constitution during proceedings, and each apparently felt free to declare his support of judicial review because federalists already dominated his state convention. On December 7, 1787, Wilson explained to fellow delegates at the Pennsylvania ratifying convention how federal law would be subjected to judicial review:

If a law should be made inconsistent with those powers bestowed by this instrument [the Constitution] in Congress, the judges, as a consequence of their independence, and the

particular powers of government being defined, will declare such law to be null and void. For the power of the constitution predominates. Any thing therefore, that shall be enacted by Congress contrary thereto, will not have the force of law (McMaster and Stone, 354).

Obviously, Wilson was referring here to federal law alone, but there is every indication he wanted to apply judicial review to state law as well.

A month later, on January 7, 1788, Ellsworth explained to fellow delegates at the Connecticut ratifying convention the importance of judicial review for both state and federal law:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government the law is void;

and upright, independent judges will declare it to be so (3 Farrand, 240–41).

Judicial leverage was essential, Ellsworth argued, as a “coercive principle” to bring the separate states into a single union:

Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary: we all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms? A necessary consequence of their principles is a war of the states one against the other. I am for coercion by law that coercion which acts only upon delinquent individuals (3 Farrand, 241).

Notably missing from Ellsworth’s explanation was any indication whether his “upright, independent judges” would be making their decisions in state or federal courts. As it turned out, both would participate, and Ellsworth’s recognition of this necessity seems probable in light of his ambiguous description of these judges.

Ellsworth’s candor was remarkable, probably because he went entirely unchallenged by others. According to one observer at the convention, “He [Ellsworth] took a very

active part in defending the Constitution. Scarcely a single objection was made but what he answered. His energetic reasoning bore down all before it” (Brown, 171).

Nor did the possibility of judicial review go totally unnoticed by others around the country, and to at least a few it seemed a strategy might be in the works to impose judicial review at a later time. In a series of articles published in 1788 under the pseudonym of Brutus, Robert Yates explained at length how judicial review could lead to centralization in the federal government because of the gradual accumulation of legal precedents. The gradual accumulation of Supreme Court decisions would produce an exponential increase in the power of the judiciary, and sooner or later federal justices would be able to mold the government into almost any shape they pleased. In response Hamilton added the Numbers 78 to 83 essays of *The Federalist*, in which he challenged the likelihood that the courts would ever gain this much power. However, there was an unmistakable suggestion that he was not necessarily opposed to such an outcome, and he did declare his enthusiastic support of the vertical integration of state and federal courts:

. . . the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of

course be natural auxiliaries to the execution of the laws of the Union, and an appeals from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions (*Federalist* 81, 536).

Moreover, Hamilton defended the necessity of judicial review:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law, It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intentions of the people to the intention of their agents (*Federalist* 78, 506).

Combined, judicial review and the vertical integration of state and federal courts would necessarily give federal judges the power to veto state laws, and this power

would necessarily help to defend national sovereignty.

Hamilton's description of the role of the judiciary closely resembled the design already promoted by the small circle of convention delegates who had wanted to postpone the implementation of judicial review. However, his arguments significantly differed from his own proposal for the role of the judiciary in the so-called Hamilton Plan he had presented at the Convention (1 Farrand, 292–93). It therefore seems more probable that Hamilton was influenced by a plan already in the works than, as has often been suggested, that his discussion of the judiciary in his final Federalist papers first introduced this plan, setting the stage for the inclusion of Section 25 in the Judiciary Act.

As hoped and expected, opponents to the Constitution at the 1788 state ratifying conventions focused their concerns on other issues than judicial review. The lack of a bill of rights and the appeal of jury trials to higher courts primarily dominated their attention. Nevertheless, Mason, Randolph, and Martin warned at their respective ratifying conventions against the likelihood of a judicial takeover. All three had participated in the Convention, and they were more suspicious than others of the possibility of a hidden agenda for

imposing judicial review within the system of appellate jurisdiction yet to be established by Congress. Mason was perhaps the most persuasive of the three. On August 27, he had drafted notes suggesting his own modified plan to integrate state and federal courts for appeals exclusively based on law and not fact (2 Farrand, 432–33). However, in notes compiled in the final days of the Convention, he had included the absorption of state courts into the federal judiciary as one of the sixteen reasons why he refused to sign the Constitution:

The Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate, and expensive, and justice as unattainable, by a great part of the community . . . and enabling the rich to oppress and ruin the poor (2 Farrand, 638).

These state judiciaries would have been destroyed, he felt, through their loss of autonomy by having been incorporated into the federal judiciary.

At the Virginia ratifying convention, Mason also warned more specifically against the absorption of state courts into the federal judiciary:

What is there left to the state courts? Will any gentleman be pleased, candidly, fairly, and without sophistry, to show us what remains? There is no limitation . . . The inferior courts are to be as numerous as Congress may think proper. They are to be of whatever nature they please. . . . When we consider the nature of these courts, we must conclude that their effect and operation will be utterly to destroy the state governments; for they will be the judges how far their laws will operate. *They are to modify their own courts, and you can make no state law to counteract them. The discrimination between their judicial power, and that of the states, exists, therefore, but in name.* To what disgraceful and dangerous length does the principle of this go! . . . (3 Elliott, 521–22; italics added).

Obviously, as far as Mason was concerned, a plot was afoot to use the judiciary as an instrument for imposing nationalization:

The principle itself goes to the destruction of the legislation of the states, whether or not it was intended. As to my own opinion, I most religiously and conscientiously believe that it was intended (*ibid.*).

In his brief response to Mason, Madison more or less conceded the extraordinary powers granted to the judiciary:

It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a *new policy of submitting it to the judiciary* of the United States (3 Elliott, 532; italics in the original).

Monarchy had limited the power to explicate and make a final determination upon laws to the executive branch (*i.e.*, itself), and the Articles of Confederation had taken Blackstone to the limit by having shifted this ultimate power to the legislative branch. Madison had sought during the Convention to prevent bias in either direction, but now, he acknowledged, however grudgingly, the explication and final determination of laws would be assigned neither to executive nor legislative authority, but to the judiciary, and for the first time in the history of western civilization. In effect, he suggested here that the primary achievement of the Convention, though almost entirely kept from debate throughout its proceedings, was the imposition of judicial review to guarantee federal sovereignty.

Because of his personal experience on the Committee of Detail, Randolph had even more reason than Mason to doubt the use of the judiciary implied by the Constitution. At the Virginia Ratifying Convention, Randolph declared, “The judiciary is drawn up in terror— here I have an objection of a different nature. I object to the appellate jurisdiction as the greatest evil in it [the Constitution]” (3 Farrand, 310). Like Mason and Gerry, Randolph had refused to sign the Constitution, but he was convinced by Washington, Madison, and others to reverse himself, probably in exchange for his appointment as our nation’s first Attorney General in order to appease the opposition. Nevertheless, he remained dubious of the provision for appellate jurisdiction—exactly the feature of Article III left unresolved by the Committee of Detail.

In comparable fashion, Luther Martin, the original author of the supremacy clause, solemnly warned at the Maryland ratifying convention against nationalization resulting from Rutledge’s amendment to this clause:

. . . it [the Constitution] is now worse than useless, for being so altered as to render the treaties and laws made under the federal government superior to our [state] constitution, if the system is adopted it will amount to a total and unconditional

surrender of that government, by the citizens of this state, of every right and privilege secured to them by our [state] constitution, and an express compact and stipulation with the general government that it may, at its discretion, make laws in direct violation of those rights (3 Farrand, 287).

Later confiding his doubts about the intentions of his fellow delegates at the Convention, Martin warned, "I most sacredly believe their object is the total abolition and destruction of all state governments, and the erection on their ruins of one great and extensive empire" (3 Farrand, 291). In retrospect, Martin's expectation turned out to be justified, whether or not the proponents of judicial review had this particular outcome in mind. As Martin anticipated, an enlarged judiciary did eventually help to integrate the separate states into what could only have seemed an empire, if with more acceptable results than he anticipated.

The expanded powers of the judiciary likewise took on central importance when the Judiciary Act was debated in Congress during the summer of 1789. However, the specific issue of judicial review seems to have been largely ignored. Senators opposed to the Judiciary Act included Richard Henry Lee and William Maclay, both of whom

expressed their concerns without referring to judicial review. During debate in the House of Representatives later in the summer, elaborate speeches by Smith, Livermore, and Stone emphasized the general threat of an expanded court system, but also without referring to judicial review. In a rambling speech, James Jackson of Georgia more specifically warn against judicial review, but his diatribe stirred no response beyond Sherman's quick and somewhat elusive assurance that "uniformity of decision would be guaranteed" (34 *Annals*, 6–7).

On the other hand, Fisher Ames, who had not attended the Convention, eloquently defended the need for a Judiciary Act without mentioning judicial review, and even Madison and Gerry, former opponents at the Convention, supported a stronger judiciary with a few sentences apiece again without mentioning judicial review. They seem to have swallowed their opposition, thereby joining the strategy of silence begun at the Convention. Though they might have strayed into the discussion of judicial review in their personal conversations, they refrained from doing so in their speeches before the House of Representatives as reported in the *Annals*.