executive branch officials. Specifically, notwithstanding the Supreme Court’s lopsided seven-to-one approval of this statute with the decision of Morrison v. Olson, 487 U.S. 654, in 1988, Congress concluded that the statute was fundamentally flawed and ought not to be reauthorized with the Ethics in Government Act.

Congressional responses to Supreme Court decisions are not always hostile. Sometimes the Court invites Congress to enact legislation that would effectively negate a Court ruling. For example, when upholding state power to issue search warrants of newspapers, the Court invited a legislative response noting that its decision “does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure” (Zurcher v. Stanford Daily, 436 U.S. 547 [1978]). Congress accepted the invitation, passing the Privacy Protection Act of 1980 to prohibit third-party searches of newspapers.

On other occasions, Congress affirmatively assists in the implementation of a Court decision. In response to resistance in the South to school desegregation, Congress took bold steps to make Brown v. Board of Education, 347 U.S. 483 (1954), a reality. In 1964, it prohibited segregated school systems from receiving federal aid and authorized the Department of Justice to file desegregation lawsuits. These federal efforts proved critical to ending dual school systems. More desegregation took place the year after these legislative programs took effect than in the decade following Brown.

As the above discussion makes clear, the Supreme Court does not speak the last word on the meaning of federal statutes or the Constitution. Congress can nullify Supreme Court interpretations of federal statutes by enacting a new statute or amending an existing law. On constitutional issues, the dynamic is more complex. Congress can respond to Supreme Court constitutional rulings through a variety of techniques, ranging from the enactment of the very same statute to the confirmation of Supreme Court justices who are likely to distinguish or overturn disfavored rulings. Through these varied responses to Supreme Court rulings, Congress plays a critical role in shaping constitutional values.

SEE ALSO Eleventh Amendment; Fourteenth Amendment; Jurisdiction Stripping; Reconstruction

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CONSTITUTIONAL CONVENTION, FRAMING

The most remarkable feature of the judiciary at the Constitutional Convention may be how little it was discussed. The scheme of representation in Congress and the nature of the executive provoked heated debate, which led the venerable Benjamin Franklin (1706–1790), elder statesman at the Convention, to plea for “coolness and temper” on more than one occasion. This may suggest a consensus on the nature of the judiciary. There is evidence, for instance, that judicial review was presumed by many of the delegates to the Convention. Yet judicial review was not the central question at the Convention. Rather, the Convention was preoccupied by whether inferior courts should be national or state courts, and how the judiciary should be positioned within the separation of powers as a whole. When it figures in the Convention debates, judicial review is almost always discussed in terms of the separation of powers—and very often indirectly.

THE VIRGINIA PLAN

Much as it did for the Constitution as a whole, Edmund Randolph’s (1753–1813) Virginia Plan structured debate on the judiciary. Introduced on May 29, 1787, Randolph’s Resolution 9 established a “National Judiciary,” which was to “consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold offices during good behavior.” The resolution then proceeded to establish jurisdiction, with the inferior tribunals hearing cases of national interest in the first instance with the “supreme tribunal,” or possibly tribunals, as a court of last resort:

“[t]he jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue, impeachments of any National officers, and
questions which may involve the national peace and harmony.” (Farrand 1966, vol. 1, p. 22)

This resolution would remain at the center of the Convention’s debates about the judiciary for the next three months and, with important refinements, would become the basis of Article III of the Constitution.

The Convention would very quickly, and unanimously, move to revise Randolph’s Resolution 9 to establish a national judiciary to consist of a supreme court and one or more inferior courts. While the Convention would never return to the question of a single supreme tribunal, the establishment of inferior tribunals was the most contested aspect of Resolution 9. The very next day, the Convention altered Resolution 9 in regard to inferior tribunals and the method of legislative appointment, postponing these questions for future debate. While accepting the need for a national judiciary constituted of a single tribunal, a number of delegates rejected the necessity of national inferior tribunals. On June 5, 1787, having secured a reconsideration of the national legislature’s power to establish “inferior tribunals,” John Rutledge of South Carolina moved to strike the clause from the resolution altogether. The state courts, he contended, should provide the first forum, which might then allow for appeal to a supreme court. As Rutledge argued, “the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments: that it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system” (Farrand 1966, vol. 1, p. 124). Roger Sherman (1721–1793) of Connecticut similarly insisted that the state courts could serve in this fashion.

James Madison (1751–1836) of Virginia and James Wilson (1742–1798) of Pennsylvania, perhaps the two leading members of the Convention, argued that an “effective Judiciary establishment commensurate to the legislative authority was essential. A Government without a proper Executive & Judiciary would be a mere trunk of a body without arms or legs to act and move” (Farrand 1966, vol. 1, p. 124). In insisting that inferior national courts were necessary to a truly national system, and could not be
supplemented by state courts, they where seconded by John Dickinson (1732–1808) of Delaware, who often found himself on the side of the smaller states attempts to maintain a federal system against a wholly national system. Yet Rutledge’s motion to strike out the national legislature’s authority to establish inferior tribunals passed. Madison and Wilson had to settle for providing that the national legislature could, if it deemed necessary, provide for inferior tribunals, which passed by a comfortable majority and was included within the final form of Article III.

THE NEW JERSEY PLAN
These refinements would be gathered together as Resolutions 12, 13, and 14—which established a supreme court appointed by the legislature, empowered the national legislature to appoint inferior tribunals, and provided for the jurisdiction of the national judiciary—and put before the Committee of the Whole on June 13, 1787. The next day, William Patterson (1745–1806) of New Jersey asked that the Convention adjourn, as a number of delegates were preparing a purely federal plan, in contrast to the Virginia Plan, that they wished to put before the Convention. On June 15, 1787, Patterson introduced what would be dubbed the New Jersey Plan. Resolution 5 of the New Jersey Plan essentially followed the revised Virginia Plan in regard to the judiciary, save that it established a federal judiciary that consisted only of “a supreme Tribunal,” the judges of which were to be “appointed by the Executive” and given original jurisdiction in the impeachments of federal officers. It also bound the “judiciary of the several states” to the “Acts of the U. States in Congress,” even including the language “any thing in the respective laws of the Individual States to the contrary notwithstanding.” This language was ultimately situated within Article VI of the Constitution and arguably provided for judicial review by state courts of state laws. Unlike the Virginia Plan, Resolution 2 of the New Jersey Plan provided that the “state judiciaries” would be the central courts in the federal system with appeal, both as to law and to fact, “to the Judiciary of the U. States” (Farrand 1966, vol. 1, pp. 243–245).

From the introduction of the New Jersey Plan to the Great Compromise on July 16, 1787, the judiciary played almost no direct role in the Convention’s deliberations. When it did return, it was in the context of the separation of powers as a whole. James Wilson, for instance, had called for executive appointment of judges prior to the New Jersey Plan and moved for it again on July 18, 1787. Madison, and others, had called for appointment by the Senate, which, after the Great Compromise, would be constituted of an equal number of representatives from each state. While the Convention, yet again, unanimously postponed this question, and would go back and forth on the manner of judicial appointment, it was never questioned that judges would hold office during “good behavior.” In fact, the method of appointment, whether by the legislature as a whole, by the Senate, by way of executive appointment, or some combination of each, nearly all turned on maintaining judicial independence and propriety within the separation of powers. This was also true in regard to judicial salaries, where both the Virginia and New Jersey plans provided for fixed compensation, initially not only with no diminution in salary, but no increase, though the latter was ultimately rejected.

THE COUNCIL OF REVISION
In this way, some of the most profound discussions of the judiciary came indirectly as the Convention argued about the nature of the separation of powers. Indeed, the Convention never spoke directly to, or provided for, what is often considered this central feature of the judiciary in the constitutional scheme—the power of the courts to set aside acts of the legislature and executive as unconstitutional. If such was part of the original understanding, it must be gathered indirectly from the Convention’s discussion of the Council of Revision in Randolph’s Virginia Plan.

Far more controversial than the Virginia Plan’s establishment of a national judiciary, which would be refined and modified, but essentially left intact, was Randolph’s Resolution 8:

The Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that a particular Legislature be again negatived by the members of each branch. (Farrand 1966, vol. 1, p. 21)

On June 4, 1787, the Convention agreed to postpone consideration of the Council of Revision and in its place took up consideration of a resolution introduced by Elbridge Gerry (1744–1814) of Massachusetts that formed the basis of the executive veto. Despite the strong support of James Wilson and James Madison, the Council was rejected—and on multiple occasions. As late as August 15, 1787, Madison reintroduced a variation of the Council, seconded by Wilson, which moved Gerry of Massachusetts to complain that, “this motion comes to the same thing with what has been already negatived” (Farrand 1966, vol. 2, p. 298). It was again.

JUDICIAL POWER
Yet the debates surrounding the Council are of deep interest to understanding the nature of judicial power
established by the Convention. Indeed, the Council is most frequently turned to as justifying judicial review. Many members of the Convention rejected the Council of Revision insofar as it combined the judiciary with the executive. While the executive veto alone was acceptable, delegates were concerned that placing members of the judiciary on the Council would place them in the awkward position of hearing cases as judges that they had previously weighed in on as members of the Council. Gerry’s “doubts whether the Judiciary ought to form a part of it [the Council], as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality” is typical of this line of reasoning (Farrand 1966, vol. 1, p. 97). Luther Martin (1748–1826) of Maryland similarly insisted, “as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative” (p. 76).

A central question is whether this exercise of judicial review applies only to state laws and not national laws, as might be suggested by Roger Sherman’s (1721–1793) presumption of such a power: “the Courts of the States would not consider as valid any law contravening the Authority of the Union” (p. 27).

Yet the defenders of the Council seemed to speak of the possibility of judicial review of national laws—and most of the objections insisted that the Council was either unnecessary or unwise as it violated the separation of powers, rather than rejecting the propriety of judicial review. Defenders of the Council such as Madison worried that if left to the judiciary alone, laws that were unconstitutional would operate before the Court could strike them down (Farrand 1966, vol. 2, p. 27). And Madison defended the combining of the executive and judiciary as an “auxiliary precaution” in favor of the maxim of keeping the “great departments of power separate and distinct”; that is, as a way of confining the national legislature to its constitutional limits. Colonel George Mason (1725–1792) of Virginia, seconded by James Wilson, thought this combination would also allow the Council to prohibit “unjust, oppressive or pernicious” laws, while the judiciary alone would only “declare an unconstitutional law void” (pp. 78 and 73). Here Mason was speaking of national laws, not merely state laws. Gouverneur Morris (1752–1816) of Pennsylvania would also insist, whether the Council or a like mechanism was accepted, that the judiciary could not “be bound to say that a direct violation of the Constitution was law” (p. 299). Or as Madison expressed it, “A law violating a constitution established by the people themselves, would be considered by the Judges as null and void” (p. 430).

This led Max Farrand, who drew together the authoritative Records of the Federal Convention, to go so far as to insist, “it was asserted over and over again . . . that the federal judiciary would declare null and void laws that were inconsistent with the constitution. In other words, it was generally assumed by the leading men in the convention that this power existed” (1913, p. 157).

This may well be so. But it should be noted that there was opposition to such a power. John Mercer (1729–1821) of Maryland, for example, “disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void” (Farrand 1966, vol. 2, p. 298). So, too, did John Dickinson. Even if this power was presumed by many, and explicitly insisted upon by others, one should be clear about its reach as deliberated within the Convention. As Madison would later insist, it was “going too far to extend the jurisdiction of the Court to cases arising under the Constitution,” as the “Judicial Power” should “be limited to cases of a Judiciary Nature” (p. 430).

Madison’s insistence occurred against a motion of William Johnson (1727–1819) of Connecticut, which sought to refine the Committee on Details’s language regarding jurisdiction. Johnson moved that the jurisdiction of the national Judiciary “shall extend to Cases arising under this Constitution and the Laws passed by the general Legislature.” Johnson’s motion was agreed to unanimously, yet it was done so on the grounds that the jurisdiction given was limited to cases of a “Judiciary nature” (Farrand 1966, vol. 2, p. 430). The insistence on the peculiar nature of the “judicial power” also found expression in Madison and Morris’s motion to use that language in speaking to the judiciary’s jurisdiction, which was agreed to unanimously. Thus Article III, section two reads: “The judicial Power shall extend to all Cases,” which it then proceeds to enumerate. And at this point the Convention very nearly fleshed out the cases the judicial Power extended to, including treaties of the United States (postponing whether or not it would include impeachment, which was ultimately excluded from the judiciary’s jurisdiction and placed with the Senate) giving us all of the elements that found expression in the final form of Article III.

SEPARATION OF POWERS

Taken altogether, this lends powerful support to the insistence that judicial review was endorsed by the Convention. But this also suggests that judicial review was not the same as constitutional review. Not all disputes arising under the Constitution would take judicial form. Thus many constitutional disputes would not fall under the “judicial Power.” The executive veto, for instance, provided a form of constitutional review, but had nothing
to do with the judiciary because the Council of Revision was rejected by the Convention.

In modern terms, this might be best understood by distinguishing between judicial review and what has come to be known as judicial supremacy. The former allows the Court to strike down acts of the legislature or executive; it does not, however, entail the power to bind the other branches of government to its interpretation of the Constitution. In contrast, judicial supremacy positions the judiciary as the authoritative interpreter of the Constitution for all the branches of government. There is no evidence that the Convention contemplated such a power for the national judiciary, despite the Court’s rather easy insistence on this role in the early twenty-first century. If the Convention spoke of a “Supreme Tribunal,” it was supreme over other courts and not over the Congress and the president, which were put forward in Articles I and II of the Constitution.

Here the Convention seemed to situate the judiciary squarely within the separation of powers. Not only was legislative action necessary to bring forth inferior national tribunals (if it saw fit to do so), but the Convention gave the legislature power to alter much of the Supreme Court’s jurisdiction without any objection or debate. And while the appointment of judges was finally lodged in the executive with little extensive debate, it also included the consent of the Senate. It may have been with an eye toward maintaining separate and independent powers that trials for impeachment were removed from the Court’s jurisdiction and given to the Congress. The debate was not extensive, but there were certainly those members of the Convention who objected to judges sitting over the impeachment trial of an executive who may well have been responsible for their appointment. Such an understanding also neatly accords with a judiciary that would be independent of the other branches of government, but not superior to them.

SEE ALSO Articles of Confederation; Constitution of the United States; Great Compromise; Judicial Independence; Judicial Review; Marshall Court; Separation of Powers; Slavery

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George Thomas

CONSTITUTIONAL INTERPRETATION

The U.S. Constitution is famously obscure. It uses words it does not define, lists powers without explaining their scope or limits, and relies on vague terms like due process of law. Before judges can apply the Constitution to actual cases, they must supply the missing details. In keeping with the American tradition of judicial supremacy, the U.S. Supreme Court has the last word on what the Constitution means.

The Constitution itself gives no guidance on how it is to be interpreted. Some judges focus on the details of individual cases and never commit themselves to interpretive theories in the abstract. But other judges prefer to approach all their cases in the same way. A general interpretive theory, approach, or method gives judges a place to start each case analysis, highlights what they should look for, and thus makes their work easier, more consistent, and more predictable. It can also make their work more legitimate, because people are more willing to accept some controversial decision if they believe that it was made in accordance with a decision-making method that is known in advance, appropriate, and fair.

Judges have never agreed on a single theory of constitutional interpretation. Since the 1970s as the Court has had to deal with more controversial material, judges, law professors, and philosophers have given more thought to theories of constitutional interpretation in the abstract. The most commonly discussed theories fall into one of two categories: interpretative and noninterpretative.

INTERPRETIVE THEORIES

Interpretivists assert that the necessary meanings are already in the Constitution itself, either implied by the ways in which its words are used or discoverable from the circumstances in which it was created. The job of the judge is to study the document and its creation, infer or otherwise find the meaning, and then apply it to the case at hand.

Originalism Originalism, sometimes called intentionalismin, is the most frequently discussed theory of constitutional interpretation, and the most controversial. Originalists argue that the meaning was put into the Constitution by the people who made it. “Those who framed the constitution chose their words carefully,” observed former attorney general Edwin Meese III in 1985. “The language they chose meant something. It is incumbent upon the court to determine what that meaning was. . . . The text of the document and the original intent of those who framed it would be the judicial standard in giving effect to the Constitution.”