Hierarchal Dynamic Recurrent Neural Networks as a Basis For Machine Learning

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Judicial Review: Democratic Institution or Undemocratic Policy Tool, An
Historical Perspective

Honors Project
Presented to: Dr. Roy Meek
By: Christa Leigh Clarke
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The media is quite often preoccupied with political scandals, and the news of the day is dominated by the alleged Clinton/Lewinsky affair. The greatest controversy of this case has been, for the past month, the power of the courts to compel secret service employees to testify as to whether or not they witnessed the President alone with one of his interns. The arguments surrounding whether or not they should testify are not as crucial as who will make the decision regarding whether or not they will testify. This decision belongs to the courts, the United States Supreme Court, in particular.¹

Many assume that the courts are decision-makers, that they have cases brought before them, impartially pass judgement, and possess little more than an adversary role in the American system. Nothing could be more false. The courts have become policy-makers, and to some degree, judicial legislatures in our system. This has been made possible through the institution of judicial review. When review was first used negatively, to strike down legislation in 1803, it immediately grounded itself in the American system. It has grown and allowed the courts to become so much more than a simple adversary branch of the government. And while most argue that the people have done nothing to deter this expansion of the judiciary’s power, thereby approving it; my research has shown that the people know little if anything of the courts’ real power.

This dissertation seeks to consider the foundations of government and democracy, particularly in America. It then lays the groundwork for one institution created by the
judiciary, never affirmed by legislation, which has endured for over 200 years: judicial review. Philosophies of review, case practices of review, and a critical analysis of the same demonstrate its inconsistency with democracy. Judicial review has survived and allowed the courts to wield power the framers probably never dreamed possible. Their role in policy formation has been perpetuated both by activist judges and a lack of education on the part of the American people. This dissertation reflects the findings in my research: judicial review lends nothing to democracy and yet can only prosper as long as activist judges are appointed to the courts and people remain unaware of the true role the judiciary plays in the American political system.

Foundations of Government

One of the first questions political scientists ask is: why are governments instituted among men? Students of government have considered this question since the first constitutions were established. Philosophies concerning the basis of government can be broken into two traditions: Ancient-Medieval philosophies and Modern philosophies. Popular Ancient-Medieval thinkers include Plato, Aristotle, and Cicero. While their philosophies are renowned, those from the Modern tradition have been more influential for American political thinkers. The difference in these traditions exists in their ideas about the origins of government. The Ancient-Medieval thinkers believe the state exists naturally, as an extension of the family. It is organic and is born not out of necessity but out of nature. The Modern theorists believe the state is an inorganic social construct devised with
specific goals. Hobbes, Rousseau, and Locke are among the most noted Modern political philosophers. Their social contract theories flourished in the seventeenth and eighteenth centuries and have provided a basis for American political thought. All maintain, in their own unique way, that some flaw exists in the nature of man. This flaw promotes the formation of inorganic political societies. These societies are created so that laws may be promulgated and executed in order to meet specific goals of the community. The inorganic construction is based on a social contract where each member of the society gives up certain rights in order to attain the benefits of government.

Hobbes exhibited the most negative view of humankind. He claimed that men are born into a ‘state of nature’ being, naturally, without government of any kind. Because all men are equal and unbound by law, the state of nature is unstable and can deteriorate into a state of war almost spontaneously. In the state of nature, men live independently of one another concerned with little more than fulfillment of their desires. Their greatest fear is the fear of violent death, for any independent man can do whatever is necessary to appease himself. Death itself brings an end to the fulfillment of desires, and violent death, in Hobbes’ state of nature is imminent. Hobbes describes life in this state of nature as “solitary, poor, nasty, brutish, and short”. Only a fear of punishment can curtail men’s evil ways, and only enforced laws can instill in men a fear of punishment. Thus, Hobbes maintains each man gives of himself, to the society, so that laws may be created and executed. This social contract creates an inorganic government with specific goals to be met. The basis of the state comes from the fear of violent death, thus the goal of the state
is to ensure the security of the individual. The social contract ensures man the ability to
live peacefully and seek fulfillment of his desires. If any member of the society decides to
leave, the entire contract is broken and the government dissolves.

Rousseau takes a similar ideological though highly more theoretical approach than
Hobbes. Rousseau believes men are born into a state of nature, devoid of government,
where they are preoccupied with preservation of the self. He maintains that all men are
equal in the state of nature, and that war will only arise when private property is acquired.
Men want to preserve the civil liberty to care for themselves by means of their own
industry without constantly worrying about potential threats from without. This stress is
enough to promote a general desire for law and authority. He states:

I suppose that men have reached the point where obstacles that are
harmful to their maintenance in the state of nature gain the upper
hand by their resistance to the forces that each individual can bring
to bear to maintain himself in that state. Such being the case that
original state cannot subsist any longer, and the human race would
perish if it did not alter its mode of existence. 4

Rousseau maintains in this statement that it is the will of all that a government is
constructed to protect civil liberties. However, the will of all is only uniform in that a
social contract should be made. Thereafter the general will dominates, for everyone may
not agree on governmental action meant to pursue the good of all. This inorganic societal
construct seeks to promote civil liberty through majority consent, or the general will,
while the government itself is built on the will of all. When anyone breaks from the social
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longer preserved.

Locke has been substantially more influential in American political thought than both Hobbes and Rousseau. Locke describes a state of nature similar to that of Hobbes and Rousseau, lacking government of any kind, where all men are equal. However, Locke's state of nature is less static than Hobbes', and devolution into a state of war is less imminent. The primary goal for men is acquisition of private property. According to Locke, once the property is acquired, men want to be free to enjoy their possessions in peace. This is not possible in the state of nature, for the threat of external and internal thievery is constantly present. The potential for war is not as predominant as it is in Hobbes' state of nature, but the mere threat of property loss drives men to fear. For this reason, laws are needed to protect men and their possessions. In addition to this, all men are subject to the law of nature, or reason, which "wills" the "peace and preservation of all mankind". This law of nature bonds men into societies, which, once formed, are not dissolvable. However, societies do not have laws, thus property is not protected and the law of nature cannot be enforced. If a majority of the people in society prefer a governmental construct, they can establish one and reserve the right to withdraw power at any time. Once the political community is constructed, men can preserve themselves and their property in peace. If government becomes destructive of its ends, the majority can withdraw it and establish a new government without dissolving the community.

Hobbes, Rousseau, and Locke demonstrate, in their own unique ways, the need for government. While their theories may differ somewhat, the underlying tenants of their
arguments are the same. Government is based on a social contract and has specific goals it is meant to achieve. The contract is based either on the will of all or the majority. The contract can be broken at any time if government does not work to achieve its ends. To go a step further and consider Locke’s idea of revolution is to consider the founding of America.

The colonists were not pleased with the English government, so they broke from it, maintained their societal structure and formulated a new government meant to preserve its citizens’ right to ‘life, liberty, and the pursuit of happiness.’ The colonists adopted the modern philosophers’ idea of legitimate government based on majority will and adopted the tenants of democracy for organizing government. As the Modern theorists maintained, this new government was inorganic, built with specific goals in mind. It follows from this that governments instituted under the social contract theory can be assessed solely on the merit of how well they have pursued their proposed ends. It makes no difference who wields the power, as long as the ideals of the social contract are maintained. This brings us to the question: has government served to maintain the ideals of democracy in America? To consider every aspect of this is an undertaking even the most apt political theorists and scientists have not ventured to do. However we can consider democracy, its foundations, its evolution, and pinpoint one particular institution that has been critical to the democratic ideal. This institution is judicial review.
Foundations of Democracy

Democracy derives its name from the Greek words demos, meaning the people, and kratos, meaning authority. Literally, democracy is supposed to be government by the people. "Democracy, however, means more than popular rule - it suggests a government within constitutional limits. It places a high value upon the worth of the individual and seeks to safeguard his basic rights." The democratic ideal carries the effect of the majority will from the basic social contract through to the organization and functioning of government. America was intended to be a representative democracy, otherwise known as a republic, in which government is intended to serve the public interest through the decisions of elected, representative officials. Whether or not it has become this, is determined by its history, its institutions. However, the history of America is extensive and its institutions numerous. Therefore it is not my intention to consider every aspect of our government.Rather a brief understanding of how government was constructed under the tenants of democracy should suffice and lay the groundwork for the one institution to be considered in this dissertation: judicial review.

The colonists were influenced by the ideals of the earlier mentioned Modern political theorists, Hobbes, Rousseau, and Locke. The colonists knew the need for government and had already set out to break from the political structure of their mother country, England. On July 2, 1776, the Continental Congress, the colonists’ first ‘federal’ government, accepted a motion to declare its independence. Richard Henry Lee of Virginia had proposed the motion, “That these united colonies are and of right ought to be
free and independent states". The Declaration of Independence, the states’ first accepted social contract, sets forth the ideals their new government would seek to enforce through law:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness.

These words, eloquently written by Thomas Jefferson, set the stage for a new democratic government. The declaration was adopted two days later on July 4, affirming the historical liberal ideals of Hobbes, Rousseau, and Locke, that individual rights must be preserved.

The Articles of Confederation was the united colonies’ first official constitution established after independence was declared. The Second Continental Congress adopted it on November 15, 1777. The Articles established state sovereignty and a small central government, which consisted of nothing more than a Congress that exercised very limited powers. It did demonstrate a commitment to individual liberty and provided a government based on republican ideals. However, this quite inflexible document quickly proved to be unsuitable for the perpetuation of democracy. The national government wielded no true power. It was unable to collect taxes, support its armies, or compel state compliance. States reserved the right to preserve individual liberties, but they could not do this without
a federal government that was strong enough to preserve the states. America was falling
apart as quickly as it had been born. Thus a constitutional convention was set up in
Philadelphia on May 25, 1787 to modify the Articles.

There were strong and conflicting feelings towards developing a stronger central
government. It was essential that the states preserve individual liberties by existing under a
federal government strong enough to preserve the states from external and internal threats.
The construction of the Constitution was possibly the most controversial moment in
American history. It was the apex of everything the colonists had worked for and it was
the thing that would make or break the democratic ideal the colonists sought to uphold.
"We...decide forever the fate of Republican government," James Madison told the
Constitutional Convention on June 26, 1787.

The framers knew it was their duty, and possibly their last attempt to construct a
Constitution which would preserve the ideals of democracy. Once it was drafted it
contained many elements focused on maintaining individual rights. The first of these
elements was federalism. Federalism is the American system of separating national and
state governments. It was critical that an appropriate balance of power was achieved. The
states were meant to retain their original powers, giving only enough to the federal
government to allow it to preserve the national welfare. Article 1, Section 8 of the
Constitution perfectly demonstrates this. The federal government has its powers
specifically enumerated. It also had specific limitations placed on it in Article 1, Section 9.
The thirteen original colonies had demonstrated that different regions had different needs.
The states, through federalism, maintained their ability to decide matters that only affected their citizens, and, yet, they could still benefit from having a centralized, national government to decide matters of national concern. It was the federal government’s responsibility to support a militia, raise taxes for its maintenance, and preserve the national welfare in international relations and the development of a free economy. Beyond this, the states retained most, if not all, of their previous powers.

The second element of the new Constitution meant to preserve democracy was popular sovereignty. This recognized the power of the people in decision-making. Article I of the Constitution constructs Congress. Section 2 of this Article states, “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States...”. Just as the Representatives were to be elected, so were Senators and Executive officials. Whether by direct election, indirect election, or appointment by elected officials, all federal legislators and executives were responsible to the people. These officials were given specific terms of office so that the public could hold periodical elections, opting either to retain or dismiss the officials. Majority votes are required in both houses of Congress to pass legislation and/or amend the Constitution. All of these examples serve as indicators of republicanism at the federal level. The states are also guaranteed a republican form of government in Section 4 of Article 1. While these are just a few examples of the establishment of popular sovereignty in the Constitution, they are indicative of the democratic ideal of America. Government is based on the popular will and is responsible at all levels to its citizens.
Third, Democracy was exemplified in the establishment of limited government. Article I, Section 9 lists specific limitations on the government. Examples of these limitations include the prohibition of bills of attainder and ex post facto laws and denial of suspension of the privilege of the writ of habeas corpus. The states were meant to preserve individual rights, thus a limited federal government was still necessary, even after the failure of the Articles of Confederation. The powers not enumerated in the Constitution were left to the states, thus providing a limited central government with specific goals and objectives.

The fourth element of democratic government demonstrated in the Constitution exists in the supremacy of national law within the sphere of its delegated authority. Under the Articles of Confederation, Americans found that their individual rights could not be protected without a strong, central authority. Article IV states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land: and the judges in every State shall be bound thereby, anything in the Constitution or laws of the State to the contrary notwithstanding.

Clearly, this small section of the Constitution defines a central authority, the Constitution being the supreme law of the land, and establishes any unwarranted deviation therefrom as a threat to national, state, and individual security. However, this supreme law was meant to exist only in relation to the specific functions of the federal government defined throughout the Constitution. This allowed the federal government to insist compliance
from the state on matters related to the authority they had been delegated by the states in the Constitution.

The fifth and final element of the Constitution meant to preserve democracy is the separation of powers. Articles I, II, and III define the legislative, executive and judicial branches, respectively. Their structures, purposes, and functions are established. More importantly, legislative and executive limitations are established. An elaborate and complex set of checks and balances is constructed, through, among other things, veto power, the establishment of laws, and the process of amendment. This idea preserves democracy by proposing that no single branch becomes all-powerful. Interestingly, this element becomes both a justification for judicial review and an example of its inconsistency with democracy. The separation of powers and its four sister elements can be considered in the context of review only after the foundations of democracy and review have been defined.

Brief descriptors of these tenants give us a vantagepoint for assessing the establishment of democracy in America. On its face, the Constitution seemed to cure the ills experienced with the Articles, yet problems arose immediately. The founders were quick to express their opinions on the strengths and weaknesses of the document. The people were still unsure about having such a strong centralized government, a centralized government that had some, but not all of it elements, written in black and white. As the Articles had proven to be too weak in ensuring the role of the federal government, would this document prove to be too strong? Would the states and individuals eventually lose all
of their power to the new national government?

This problem presented itself upon ratification of the Constitution. On June 21, 1788 New Hampshire made ratification official by being the ninth state to ratify the Constitution. Virginia followed closely after, leaving only three states outside the new national union. The Constitution was official, but, ironically, the document set forth to protect all, had not been ratified by all. It was the intention of the Federalists, supporters of the Constitution and a strong federal government, to receive approval and ratification from the remaining three states. The most important of these states was New York. It was a large, strong state that could make or break the new union. If it ratified the Constitution, it would be a pillar for the new nation. If it refused to ratify, it could harm the union on the merits of its influence. The undertaking of a few of the founders was to gain New York’s approval.

We must turn once again to philosophical ideas of democracy and consider the arguments made by James Madison, Alexander Hamilton, and John Jay in the Federalist papers. They wrote the papers to persuade New York to ratify the Constitution, to ensure to its citizens a central government strong enough to serve its purposes within the confines of its delegated authority. They sought to ensure New York that it would remain a strong state and not be overshadowed by the new central government. Madison, Hamilton, and Jay were influenced by the ideas of Aristotle, who set forth a unique and incredibly influential theory of democratic government.

Aristotle was "the first great theorist to treat democracy coherently as a system of
government". He noted that government, whether power rests in the hands of the one, the few, or the many, should perpetuate the interest of the community, not one segment of the community. He saw democracy as a perversion of constitutional government.

Constitutional government, as he would maintain, is government that rests in the hands of the many. It does not serve the interests of only one segment of society, but serves the interest of all to the best of its ability. But the government the framers constructed had been assessed by him, centuries earlier, to be government in the interest of the poor. He explained that everywhere, the poor are more numerous than the rich. Extreme direct democracy, which is what the framers had constructed, lacked a legal structure for protecting the rights of minorities, i.e., the rich. This might seem on its face to be a base argument, but if you want a true democracy built on a common ideal, it must meet the prerequisites. True constitutional government has to protect everyone to the best of its ability. Popular sovereignty has to belong to everyone, not an oppressive majority of the people. He articulated the problem that "either the few will be successful in preserving their extreme privilege by resorting to tyrannical rule, or the resentful many will deny minority right in advancing their claims. Unless a clear balance is struck in society, the government will become perverted and tyrannical. This was the concern of the citizens of New York, and these were the fears Madison, Hamilton, and Jay sought to absolve in the Federalist Papers.

Madison possibly wrote the most influential of the Papers. He adopted Aristotle's ideal that legitimate government serves all, not just a perpetual and possibly oppressive
majority. He also adopted they theory that legitimate government has to be based upon representation. Representation keeps the majority from becoming apathetic to the will and needs of the minority. It assures that most if not all the opinions and ideals in society are brought to the forum for debate and governmental action. These ideas Madison adopted from Aristotle are evident in the Federalist Papers he wrote to persuade New York to ratify the Constitution.

The most noted of the 85 papers written in support of the Constitution were Madison's #10 and #51 papers. In *The Federalist No. 10*, Madison considered the affect of factions, a faction being:

> a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

This is exactly what the Anti-Federalists feared, and Madison hit it head on. He maintained that the causes of factions cannot be controlled, for the purpose of democracy is to provide liberty. Thus the effects of factions must be controlled. This control can only come from an extended republic. In an extended republic, everyone who is willing and able participates in electing representative officials. This allows for an extensive representation of virtually every interest in the community. He assured the citizens of New York that the idea of an extended republic had been built into the Constitution, and that this extended republic would deter the effect of factions.

Madison expounded on this ideal in *The Federalist No. 51*. He maintains that the
greatest protection of democracy and individual rights exists in the checks and balances set forth in the Constitution. He says:

Ambition must be made to counteract ambition...If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary...You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. A dependence on the people is no doubt the primary control of the government; but experience has taught mankind the necessity of auxiliary precautions.

Thus both papers maintain that the government had been constructed to alter the affects of factions primarily through the separation of powers and the institution of checks and balances.

With the publication of the Federalist Papers and the addition of a Bill of Rights to the Constitution, it seemed the ideal democracy had been born. The conventions of New York, North Carolina, and Rhode Island ratified the document and gave it the unanimous backing of all 13 original colonies. Democracy was new, alive, and well in America. The ideal everyone would work toward was preservation of 'life, liberty, and the pursuit of happiness.' Everyone would have a hand in making decisions for the country. It must be noted that citizenry and public involvement was quite limited in comparison to today, but by the ideal, it held that all who were willing and able to participate could. The Constitution was strong enough to formulate the ideals and structure of the new government, and yet it was flexible enough to allow for future modification and growth with the times. The primary questions that remained were: who would interpret the
tenants of America’s new Constitution? Who would ensure that the ideals and guidelines set forth in the document would always remain the Supreme Law of the Land?

**Foundations of Judicial Review**

In the same *Federalists Papers* that were published to persuade New York, North Carolina and Rhode Island to ratify the Constitution, Alexander Hamilton answered these questions about who he believed should interpret the Constitution and uphold it as the Supreme Law of the Land. Hamilton utilized *The Federalist No. 78* to give his justification for the constitutional principle that judges serve terms of good behavior. Also in this *Paper*, he concluded that the courts should be the primary interpreters of the Constitution. His justification cannot be better articulated than to use his own words:

> ...the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either in the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgement, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements.

Thus he articulated so many ideas in so few words. Hamilton maintained that the judiciary should be the primary interpreter of the law, because it was independent of any legislative powers, unlike Congress and the executive. He believed judges should be appointed and serve terms of good behavior leaving them free of political recourse. This would allow
them to make fair and impartial judgments in every case - their most crucial job. Finally, he noted how harmless the judiciary would be as the executive and legislative branches both had checks to reverse judicial interpretation if necessary. Interestingly, Hamilton was the most anti-democratic founder of the nation. His support for review serves as the first basis for an institution that would perpetuate and grow into a grossly undemocratic policy tool in America.

The judiciary was, by far, the most vaguely defined branch in the Constitution. The Framers essentially drew an outline and left the remaining work to Congress. The Judiciary Act of 1789, drafted by Oliver Ellsworth, established a three-tier federal court system. This system consisted of thirteen district courts, three circuit appeals courts, and one Supreme Court. The states maintained own, unique systems. The size of the Supreme Court was set at six members and the first Chief Justice, John Jay was named to the bench. Jay presided over the Court from 1790 to 1795. It was during these years that the landmark cases, Hayburn's Case and Hylton, were decided. These cases paved the way for the Marshall Court's firm establishment of judicial review.

Perhaps, judicial review appeared for the first time in the American political system in the 1793 case known as Hayburn's Case. This case considered whether or not the legislature had the power to give courts non-judicial functions. In this case, it was requested that the Court issue a mandamus to the circuit court of the district of Pennsylvania, commanding the said court to act in a certain way. The Court maintained that it was being asked to act ex officio, on the merits of a legislative act of March 23,
1971. The Court insisted that it could not be assigned non-judicial functions by the legislature. It practiced review in this sense, but it did not find the statute to be unconstitutional. It acted in accordance with the guidelines of the provision while maintaining that it questioned the act and its validity.

The next landmark case was *Hylton vs. the United States* (1796). This case considered the question: is the tax on carriages for the conveyance of persons, kept for private use, a direct tax? The Court in this instance got to consider the constitutionality of a tax imposed by the federal legislature. The Court maintained that the tax was constitutional, opening a new door in review. This was the first great case of judicial advocacy giving credence to legislation. The underlying premise recognized here is the same as in *Hylton*. The Court recognized that if it found a piece of legislation to be unconstitutional, they could deem it as such upon their will.

Before we reach recognized establishment of review in the infamous *Marbury* case, we must consider one more case of great importance, decided in 1798: *Calder et Wife vs. Bull et Wife*. This case considered a hearing involving an inheritance law and an ex post facto law. Great language comes out of this case establishing judicial review in more than just the vague penumbras of the opinion. Justice Chase speaking seriatim said:

> The counsel for the plaintiffs in error, contend, that the said resolution or law of the Legislature of Connecticut, granting a new hearing, in the above case, is an ex post facto law, prohibited by the Constitution of the United States; that any law of the federal government, or of any of the state governments, contrary to the Constitution of the United States is void; and that this court possesses the power to declare such law void.\(^{13}\)
This was an important acknowledgment by Chase of the issue at hand. He went on in the opinion to lay out the fundamental argument for review.

There are acts which the federal, or state, Legislatures cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.¹⁴

These three cases recognized the power of review, but in all three judicial self-restraint was practiced. The Judges noted that they could deem an act of the legislature inconsistent with the Constitution if necessary and act accordingly. *Marbury v. Madison* (1803) is most often referred to as the case which established review as a 'right' of the courts. This case not only recognized review like its predecessors, it exercised it and watched for its effects. Thomas Jefferson defeated John Adams in the 1800 presidential election. Adams made a series of 'midnight appointments' to fill vacant justice of the peace positions with men from his own party. In the confusion, William Marbury's appointment was not delivered by then Secretary of State, John Marshall. James Madison replaced Marshall as Secretary of State and refused to deliver the appointment. Marbury went to the Supreme Court headed, ironically, by new appointee John Marshall, and asked that a writ of mandamus be issued ordering Madison to deliver the appointment. Marshall concluded that Marbury had every right to the appointment papers, but stated that the
parts of the Judiciary Act of 1798 empowering the court to issue writs of mandamus were inconsistent with the Constitution and thus invalid.

The reason this case stands above the three 'review' cases preceding it is attributed to Marshall's negative use of judicial review. He first justified his decision based on the merits of his oath, articulated in the Supremacy clause of the Constitution. The Supremacy clause defines the Constitution of the United States as the Supreme Law of the Land, gives judges of the courts the power of interpretation, and says any law not made in pursuance of the Constitution is null and void. Marshall took this to mean that he could discount parts of the Judiciary Act he found to be inconsistent with the Constitution. The Constitution did not allocate to the courts the power to issue the mandamus, thus the Judiciary Act, being a mere law and not an amendment to the Constitution, couldn't revise the Court's power.

This decision was monumental, not because it applied review to the facts of the case, but because it allowed for review in every subsequent case thereafter. It is interesting that Marshall would not issue the mandamus because the power to do so was not enumerated to the courts in the Constitution. Yet, he established for the courts the power of judicial review, a power also not enumerated to the courts in the Constitution.¹⁵ Political theorists who oppose review also note that the United State Supreme Court did not have original jurisdiction to over the Marbury case. Thus the Court never had real power to decide the case. Regardless, the practice of review became embedded in the precedent of the case and would be allowed to continue on in the American system
through the practice of common law.

Judicial review was unique to the American system, as its future use in policy formation would also be. Questions arose soon after the *Marbury* decision concerning the framers’ intentions for this institution. Only speculative answers existed. The words of the Constitution were unclear in establishing the power of the courts. Article III, Section I reads:

> The judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their time in office.

The Article goes on to define the jurisdiction of the courts, trial by jury, and treason.

Nowhere does it state that the courts shall wield the power of review. Speculations have been made that it was the intention of the framers that the courts exercise review.

Justifications for this are supplied primarily by the supremacy clause and Alexander Hamilton’s *Federalist Paper No. 78*. Neither clearly states that the courts should have the power to deem legislative nor executive acts unconstitutional. The more conservative view is that both only maintain that the courts should be bound by the law and should apply the law, as stated to particular cases. Hamilton does state in *Federalist 78*:

> By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in a practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the
reservations of particular rights or privileges would amount to nothing.

This must be read in stride as Hamilton supported a constitutional monarchy for the United States, and the majority of his peers who framed the Constitution did not write the power of review into it.

Regardless of whether or not review had its foundations in the Constitution, it received little if any criticism after its effect in the *Marbury* case. The Constitution itself is law and nowhere did it state the power of review. The Court said it had a duty to deem null and void any statute or provision in contradiction to the Constitution, and, yet, it had established its own judicial law contrary to the laws of the Constitution. It had established for itself the power of review. A power that, Marshall maintained, existed out of every judge's oath to uphold the Constitution. But nowhere did the Constitution state that federal judges were bound, it only maintained that state judges were bound by the supreme law of the land. Thus the power hinges on interpretation. Marshall adopted for himself and his peers the ability to interpret the law, and yet this power of the Courts never appears in the Constitution either.

Some believed the power to interpret the law belonged to the originators of the law, the legislators and executives. Others argued that the courts must interpret the law as it applied to any particular case before them. The most liberal political thinkers maintained that the courts should not only discern the meaning of the law as it applied to particular cases, but should define it as a whole. Is it not a long stretch to say they should be the sole interpreters, apply the law where necessary, and discern if the statutes were constitutional?
Many contemporary thinkers have spoken out on this issue, but their arguments lack impact if we don’t understand the other American institutions that helped perpetuate review early in America’s history. Whether or not it was intended by the framers, and whether or not it concretely or hypothetically existed in the words of the Constitution, Marshall assured that review was alive and well in America.

**Institutional Growth of Judicial Review**

American courts constructed themselves in the image of English courts and adopted common law and stare decisis early in their political tradition. These institutions have helped fuel the growth and power of review in the 200+ years since the founding. America’s acceptance of review and judges’ willingness to practice it have also helped perpetuate what some believe to be a mythical power in the judicial system.

It is amazing to many Americans that England exists under the tradition of an unwritten constitution. The constitution of England consists of a series of written statutes that are widely open to interpretation, allowing for the formation of new legal rules in judicial decision-making. These legal rules, or judge-made law, are referred to as ‘common law.’ This judge-made law is based on adherence to precedents, or past court decisions. America adopted this practice even though it has a written Constitution. It was and always has been a popular practice to adhere to the common law.

The institution that allows common law to thrive is known as stare decisis. Stare decisis is the reliance upon past decisions or precedents in formulating decisions for new
cases. By practicing stare decisis, judges allow common law to grow and become
grounded in the American system. This institution is almost as contradictory to justice and
democracy as is review. Stare decisis perpetuates similar decisions in similar cases.
However, elements of the Constitution such as the appointment of judges, point to a
desire for fair and impartial judges. Fair and impartial judges ideally make unique decisions
in each case judging solely on the facts involved and any applicable laws. Stare decisis
lends nothing to fairness and impartiality. Rather it dictates decisions in cases based on
prior decisions regardless of their fairness, applied laws, or other legal aspects.

Judicial review is fueled by both institutions. If a court decision deems a statute
unconstitutional, chances are that the next court ruling involving the same statute will
maintain the same. There is a fine line between accepting each decision independently of
the other and understanding the perpetuation of the precedent to be a matter of policy
formation. However, common law and stare decisis cannot act as incubators of review
unless judges adhere to tradition and the American public finds some substantive meaning
in the decisions of the courts.

Judges are free to follow precedents; they are not bound by them. When a judge
employs stare decisis, accepts a precedent, and perpetuates the common law, he does it by
choice. Any number of reasons could explain this; most often it is nothing more than
feeling obligated to adhere to tradition. Judges can always, without question, break new
ground, employ their personal legal reasoning, and make a judicial decision based on
nothing more than the facts at hand and the applicable laws. Unfortunately, the American
judicial system has not experienced 200+ years of judicial-freethinking.

*Marbury* not only established review; it became a perfect first example how the America would serve to perpetuate the myth. Common law and stare decisis have been major tools in its perpetuation. Americans accepted the Marshallian decision almost without question. They have done likewise in almost every substantive public case since. Americans not only view judicial decisions as binding in the case for which they are constructed, but also view judicial decisions as a matter of law and policy. The public reacts to the whims of the Court and accepts its word as law almost as readily as the words of their elected officials. Maybe this is a product of a lack of education, or maybe Americans are simply unconcerned with whether or not their public policy is constructed through democratic methods. Certainly the media plays a role in deeming the courts to be ‘all-mighty’. Whatever the case, certainly, common law and stare decisis have led Americans to expect similar decisions in similar cases, and when review is applied negatively, Americans assume the statute which is ‘struck down’ becomes null and void for the public as a whole.

These institutions, among others, have coddled the courts and allowed review to grow and fester. The people make the decisions in a democracy, and most of the people have decided to be rather ambivalent to the institution of review. Those contemporary theorists who have spoken out in support or dissent have spoken out loudly. Perhaps not loud enough though, because many people still do not know what judicial review is, how it has come to exist, or what a powerful policy forming tool it has become in our system.
Regardless, it is insightful to look at the thoughts of the staunchest supporters of review, moderate advocates, and powerful dissenters to consider what the proper role of judicial review should be. In two hundred plus years that role has not been properly defined.

**Review Considered: Four Contemporary Perspectives**

To analyze any political institution is to consider its founding, its means of growth, and theories surrounding its legitimacy or illegitimacy. Many political theorists have considered the problem of judicial review. Most would agree that the true intention of the framers concerning review cannot be known. Regardless it has endured as a powerful institution hidden behind the mysterious intricacies of the courts. Knowing this, many political scientists move beyond textual exegesis to consider the practices and consequence of review in America. Before considering actual case examples of review in America’s history, it is interesting to consider the theories of its legitimacy (or illegitimacy) and its proper use. Four contemporary theorists stand out in my mind on the issue of review: Charles Lund Black, Alexander Bickel, Judge Learned Hand, and Robert Bork. These men represent the most expansive to most constrictive opinions of review, respectively.

Charles Lund Black accepts judicial review as an integral and necessary part of a republican democracy. He believes is a legitimate part of our system not only because it has endured for more than 200 years, but because it is a necessary element of the checks and balances of our government. Legitimacy, he points out, has nothing to do with our
present-day opinion of government, but with what has thrived and survived in our society.

Ideally, Black maintains, the body which makes decisions regarding constitutionality would 1) "have a satisfactory degree of independence from the active policy making branches of government"; 2) "be a specialist in tradition"; and 3) would be composed of people trained in the law. This means, for Black, that the ideal bodies for deciding constitutionality are the courts. The courts move a step further for theorists of Black's caliber to become legitimators of the government. The courts' decisions of constitutionality serve as validation and invalidation of congressional and executive acts. Therefore, he says, there should be no judicial self-restraint, the practice of not exercising review. This would only deter the natural checking function of the courts and contradict tradition. Thus he presents the most expansive theory of review: its tradition and necessity lend to its legitimacy, and its practice should not be curtailed.

For the most part, Black and his fellow theorists are broad constructionists, accepting very general and sometimes vague interpretations of constitutional provisions. Black maintains that the Constitution was written vaguely by the framers to allow for expansion on the rights of the branches in their checking functions. This allows for the most effective maintenance of the system. Thus judicial review never had to be written into the Constitution in order to be legitimate. Other theorists such as Alexander Bickel and Judge Learned Hand have a more moderate view of the institution. Middle-men (as some might call them), such as Bickel and Hand might not agree with Black on the nature and 'founding' of judicial review, but they understand it to be an integral part of our
Bickel argues that the greatest historical/textual justification for review exists in the Supremacy Clause of the Constitution. He would even say that the framers predicted a need for review. He legitimizes it by viewing its place in the founding of America. He would maintain that there was a probable intent for review stemming from the bindingness of the Constitution on the courts. However, middle-road theorists, such as Bickel, introduce the possibility of review interfering with democratic ideals. To an extent, Bickel would agree with fellow theorist Thayer – if judicial review must exist, and it does, then it should be used only when there is a clear mistake of the Congress or Executive branch of government. A very important aspect for these theorists is that the Court remain neutral and disinterested in practicing review. Bickel moves a step further in his discussion to lay out the real issue at hand. In considering review, we must consider that our government is constantly torn between principle and expediency. Which branch is best equipped to maintain strong principles while satisfying the expedient needs of the nation? Which is best equipped to strike the perfect balance? Black would certainly say the courts. Bickel and Hand might name any of the branches. And, as we shall see, Bork would say Congress. Bickel essentially understands that while there is no true justification for review, it exists and is therefore legitimate; and, yet, he would maintain that the wisest thing to do is practice it very cautiously.

Judge Learned Hand is quite similar in his political thinking to Bickel. He maintains that the greatest justification for review exists in our system of checks and balances.
Review is legitimized in that it allows the courts to oversee the acts of the legislative and executive branches of government. He is, however, an even stronger advocate than Black of judicial self-restraint. He maintains that judicial review should be practiced in only the most extraordinary circumstances. He understands that review could be a true threat to the democratic ideal. The Supremacy Clause does not grant judicial supremacy. Hand’s strict constructionist views become somewhat visible when he says we cannot know the framers’ true intentions. “All we can know is that a majority has accepted the sequence of words in which the ‘law’ has been couched, and that expect the judges to decide whether and occasion before them is one of those that the words cover”\textsuperscript{17}. He explains that the Court has acted legitimately in keeping Congress and the states within their accredited authority, but has acted illegitimately in assuming the role of a third legislative chamber\textsuperscript{18}. Judge Hand may be considered a middleman between Alexander Bickel and Robert Bork. He gives more constricted legitimacy and practice principles for review than Bickel, and yet is more accepting of review than our final theorist, Robert Bork.

Often, Bork is deemed the most radical of the theorists as he contends there should be an almost total negation of review. Bork’s approach is unique. He considers review in its historical context. To state his position as simply as possible: the right of review is stated nowhere in the Constitution, and, therefore, does not rightfully exist. Bork is a strict constructionist/original theorist. He would maintain that if the framers had intended the courts to possess the power of review, they would have written it into the Constitution. Theorists like Bork maintain that review goes against the grain of democratic
fundamentals, it is illegitimate, and can be justified only the most extreme cases.

Democracy is meant to function by the authority of the majority, not the decisions of an 'elitist' minority. The ideal for these theorists is to be at the will and mercy of legislative majorities. That is the idea our country was founded upon. The legislators are directly elected by the people whereas the judges are appointed. Not only are the judges free of constituencies to answer to, they (federal judges at least) serve terms of good behavior in which they know they can act freely and rarely be reprimanded. Bork and his proponents would argue that judges could be moved by political motives and would not always be guaranteed to be free and neutral. To worsen matters for Bork and his fellow theorists, there are revisionists holding judicial positions, waiting to contort the legitimate actions of the legislatures and executives at their will. Bork maintains that review never be practiced unless it is an extreme circumstance, such as the establishment of an *ex post facto* law. Thus he views the power as illegitimate and maintains that the standard of practice be almost absolute judicial self-restraint.

Robert Bork represents a unique segment of society. Obviously, very few people in 200+ years have considered the power of review illegitimate and denounced its practice. Review has flourished. There have been periods of judicial activism and judicial self-restraint. Judicial review has been used to create policy in virtually ever segment of society, it has considered almost every pressing issue in America. There are many ways that cases of review and their significance can be considered. It is idealistic to think all cases employing review and their effects can be studied. Rather, it is more practical to take
two areas which have been greatly influenced by review and consider their causes and
effects.

Major Review Cases

Two of the most important areas of review have been the expansion of federal power and the use of the Due Process Clause to apply the Bill of Rights to the states. The early 1800's saw the Court as a key figure in 'growing' the power of the federal government. The 1950's, 60's, and 70's were a time of activism in applying the federal Bill of Rights to the states. The negative effects of these periods can be assessed in the conclusion of this thesis. The facts of the cases and their decisions alone can be considered first, as an example of judicial policy formation at its finest. The cases to be considered under the expansion of federal power are Marbury v. Madison (1803), McCulloch v. Maryland (1819), and Gibbons v. Ogden (1824). The cases to be considered under the Due Process Clause are Brown v. Board of Ed. Of Topeka, Kan. (Brown II) (1955), Engel v. Vitale (1962), Miranda v. Arizona (1966), Frontiero v. Richardson (1970), and Roe v. Wade (1973).

Marbury v. Madison (1803) certainly serves as the first case which employed review and expanded federal power. The facts of the case have already been accounted for here (see page 19). Marshall deemed parts of the Judiciary Act of 1798, thus giving the courts the power of review. He allowed the courts a new power which was nowhere enumerated in the Constitution nor fervently implied in its supporting documents.
In 1819 a case was brought before the United States Supreme Court involving the establishment of a national bank. Congress had chartered, in 1816, the Second Bank of the United States. The bank was unpopular not only because it hindered the growth of state-chartered banks, but also because the legitimacy of its establishment was questionable insofar as it was constitutional. Many states levied taxes and provisions against the bank in an attempt to run it out of business. Maryland was one of the states to impose the taxes and restrictions on the federal bank. When James McCulloch, employee of the Baltimore branch of the federal bank, refused to pay the taxes and abide by other Maryland imposed restrictions, he was sued by the state of Maryland and convicted. He appealed the case the Supreme Court on the basis of the constitutionality of the state-imposed taxes. Two important political questions came out of the case as did a decision which greatly expanded federal power.

McCulloch v. Maryland (1819) considered two important questions: 1) did Congress have the authority to charter a bank, and 2) if it did, could a state tax the national bank? Marshall first acknowledged that the Constitution contains enumerated or express powers giving Congress the authority to levy and collect taxes, issue currency, and borrow money. He then expansively interpreted the necessary and proper clause of Article I, Section 8 to show how the chartering of a bank might be necessary and proper to carrying out the functions listed above. The necessary and proper clause of the Constitution allows Congress to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this
Constitution in the Government of the United States, or in any Department or Office thereof.

Marshall said this was an elastic clause allowing for implied powers of the federal government. In order to carry out its enumerated powers, it would occasionally have to employ implied powers, he maintained. By this he claimed it was constitutional for the Congress to charter a bank. He then turned to the question of the state taxes announced that federal creations, such as the bank, had to be free from state encroachments to allow the federal government to function properly. Thus he not only allowed for a dramatic expansion of federal power, he laid a precedent for containment of state power. Thirty-one short years after the Constitution was ratified under the pretext that states would retain their powers giving only enough to the federal government to allow it to protect the United States, Marshall opened the door for federal power expansion and new limitations on the states.

The third important case involving the expansion of federal power was *Gibbons v. Ogden* (1824). The New York state legislature had granted an exclusive right to operate steamboats on the Hudson River. At nearly the same time, Congress had licensed a ship to sail on the Hudson River. A question arose concerning the constitutionality of the New York statute in the context of Congress’s scope of authority under the commerce clause. Marshall maintained that Congress’s power to regulate interstate commerce included the right to regulate some commercial activities. Thus he denounced the New York statute and expanded the federal powers under the commerce clause.
The last two cases demonstrate the Marshall Court’s attempts to suppress state activity under federal law. All three cases gave new powers to the federal government, all of which appeared nowhere in the Constitution. Interpretation of federal law and review of state law, primarily in *McCulloch* and *Gibbons* proved painfully antagonistic to the states. Within forty years of the ratification of the Constitution, federal powers had grown to monstrous proportions thanks to Marshall’s interpretations and active judicial legislating.

Various periods in history and various Courts headed by unique justices have shown differing times of judicial activism and self-restraint. While the expansion of federal power had its apex in the early 19th century, the Supreme Court turned to the 14th Amendment in the 1950’s, 60’s, and 70’s to focus on individual liberties and expanding the national Bill of Rights to the states. The most important clauses of the 14th Amendment used in this process are the Due Process and Equal Protection of the Laws clauses found in Section I. It reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

The 1950’s began a revolution of social reform based on race and gender. The landmark case, *Brown v. Board of Education of Topeka I* was decided in 1954. The Court found that segregated schools violated the equal protection laws of the 14th amendment and ordered that schools be desegregated to avoid violation of these principles. *Brown II*
came to the Court in 1955 to ask how state compliance could be forced. The Court remanded the cases back to the individual states and demanded that desegregation be carried forth with 'all deliberate speed.' Not only had the Court deemed the state desegregation acts unconstitutional, it acted as a legislature in maintaining that school systems must be desegregated and acted as executive branch of the government, attempting to find a way to enforce its decision. The states that had maintained segregation did nothing short of rebel; thus slowing the desegregation efforts more than they had been slowed before *Brown II*.

*Engel v. Vitale* (1962) questioned the validity of a prayer that was recited in a New York school each morning. The prayer was instituted in schools governed by the New York State Board of Regents and read: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country”\(^{19}\). The Court held that the mandated prayer violated the Establishment Clause of Amendment I. By doing so it created a precedent that allowed the courts control state and local governments decisions concerning their school systems.

The Supreme Court decided *Miranda v. Arizona* in 1966. The facts of the case were as follows: Miranda was arrested for rape and gave a confession while being interrogated. He was 23, indigent, educated only through the ninth grade, and had a mental illness. Without being given any warnings, he changed his denial of guilt to a confession after only two hours of questioning. This case along with three others heard by the USSC concerned admissibility of statements obtained during custodial interrogations
and possible violations of the 5th, 6th, and 14th amendment guarantees. The constitutionality of state statutes, or lack thereof, which allowed for custodial interrogation without prior warning were questioned in consideration of these amendments. The Court held that no prior warning violated federal rights given in the 5th, 6th, and 14th amendments. It legislated state actions and even wrote the specific words of the Miranda rights now read to criminal suspects. The Court deemed unconstitutional any law allowing for negation of prior warning and/or a lack of state legislation ensuring the rights.

In a sex discrimination case called *Frontiero v. Richardson* (1973), Sharron Frontiero, an Air Force officer, brought suit against Secretary of Defense Elliot Richardson. She claimed that her 5th Amendment rights were violated when she was denied benefits for her husband equal to those her male peers received for their wives. The legal question involved denial of equal protection of the laws under the 14th Amendment being grossly distorted to become a denial of due process under the 5th Amendment. The USSC found that her right to due process had been violated and applied the 5th Amendment to the states by means of the 14th in gender related issues. The Court also defined gender as a suspect class, any case involving the same requiring the greatest judicial scrutiny for deciding if any rights had been violated.

*Roe v. Wade* (1973) is very possibly the most well known case in the history of the Supreme Court. A Texas abortion law existed which made it a felony for anyone to destroy a fetus except on “medical advice for the purpose of saving the life of the mother”20. Three plaintiffs brought suit against Wade: the district attorney of Dallas
County, for declaratory and injunctive relief: an unmarried pregnant woman, a licensed physician, and a childless married couple. The statute was challenged on the grounds that it denied equal protection, due process, and the mother’s right of privacy guaranteed under the 1st, 4th, 9th, and 14th amendments. A three-judge federal district court found the statute unconstitutional, and the Supreme Court granted review as a matter of right. The Supreme Court also went on to deem the statute unconstitutional and presented a judicial decision that was nothing short of judicial legislation. The decision gave a complete timeline of pregnancy, defined viability, explained when abortions could rightfully be performed and when they could not, and laid out detrimental guidelines for the states on the matter of abortion.

This is a very small sample of the cases used to apply the federal Bill of Rights to the states by means of the words of the 14th Amendment. On the surface, many people believe these cases and those like them are beneficial to society. However, the federal Bill of Rights was created as a protection for the people against the federal government. Each state has its own Bill of Rights designed to protect citizens from encroachments by the states. These cases originated in the states and were appealed to the federal judiciary, eventually finding themselves in the Supreme Court. State and local statues and policies were deemed unconstitutional in all of these cases, and federal law was applied to the states regardless of unique circumstances.

The Supreme Court has not only been instrumental in expanding the power of the federal government and applied federal law to the states deeming state actions
unconstitutional, but has touched almost every facet of life for American citizens. It has decided cases on almost every imaginable issue, has repeatedly criticized local, state, and federal actions, and has served as little more than a judicial legislature for 200+ years. David O’Brien’s Storm Center charts the history of review in the United States Supreme Court. The number of overruled Supreme Court decisions, overturned acts of Congress, overturned state laws, and overturned ordinances numbers over 1400. Of these, over 900 are state laws which have been deemed unconstitutional. What is so perplexing about this history of judicial activism? This is the question we turn to and the question that has awaited all that has been covered thus far in this dissertation.

The Problems and Solutions of Review

Early in this paper we found that America was founded on a democratic principle. The people were to rule the nation through a medium of representatives chosen by popular election. The states were to retain their power and makes decisions directly affecting their citizens. The five elements of the Constitution meant to preserve America’s democratic ideal can be weighed against judicial review showing it to be an undemocratic policy tool rather than a democratic institution.

The first element considered earlier in this paper is federalism. As dictated in the Constitution, the federal and state governments were to remain almost entirely independent of one another. This principle allowed the federal government to be given only the powers necessary for meeting its goals. The states retained their powers in
making decisions that directly affected the citizens, allowing for attention to the
uniqueness and diversity of the several states. Judicial review has been used time and time
again throughout history to expand the power of the federal government. It has also been
used to limit and dictate the role of the states. The federal government was originally
intended to do little more than support a militia, raise taxes for its maintenance, preserve
the national welfare in international relations and assist in the development of a free
economy. This power has been expounded on, as shown previously, in cases such as
Marbury v. Madison (1803), McCulloch v. Maryland (1819), and Gibbons v. Ogden
(1824). State power has been limited by the Courts through many methods including the
application of the federal Bill of Rights by means of the 14th Amendment. The greatest fear
of the colonists at the time of the ratification was that the federal government would
possess too much power. It was not granted too much power in the Constitution, but it has
been awarded more than its share through the actions of the courts.

The second element of the Constitution aimed at preserving democracy is
popular sovereignty. The people were to remain the decision-makers and policy formers
through an arena of elected officials. As articulated in Article II, Section 2, the judiciary
was to consist of appointed officials. This would allow for fair and impartial judges who
would be, ideally, free of political influence or recourse. The power of review was not
written into the Constitution, nor, according to some, was it intended to exist. However,
the creation of this power by the courts shed new light on the role popular sovereignty
would play in the judiciary. Because federal judicial officials were not elected, the people
had little recourse for reprimanding decisions they found to be inconsistent with the majority will. Policy formation no longer belonged solely to the people and their representatives, but to a detached group of unelected officials who could not be voted out of office or directly influenced by the interests of individual citizens and states.

Third, the idea of limited government is integrated into the Constitution. The powers not specifically enumerated to the federal or state governments are left as implied powers to the states, allowing them to retain their power. Just as we noted with federalism, judicial review has been instrumental in expanding the powers of the federal government. What was originally a limited government is now a federal monster. The federal government has a role in almost all aspects of state government. The very thing the framers sought to control is the very thing the courts have produced through judicial review: a federal government far more powerful than the state governments. The states have retained much of their power, but the federal government has expanded on its own in a way that would possible prove quite disturbing to the founders of our country.

The supremacy of national law within the sphere of its delegated power is the fourth constitutional element meant to preserve democracy. The key word here is 'delegated.' National law was meant to be supreme over state law only in the areas it was delegated to control in the Constitution. Again, the courts have used review to expand not only the power of the federal government, but also the meaning of the supremacy clause of the Constitution. Review has been employed to make virtually all federal law supreme to state law; and review in itself allows any law interpreted as inconsistent with the
Constitution or federal law to be 'struck down' by the courts. The courts have expanded on the delegated powers of the federal government in a way that truly unwarranted by the democratic ideal. With this expansion of power comes an expansion of the laws which blanket the states and control their functions. The sphere of delegated power can now be said to touch virtually every facet of life in America, making it almost unnecessary for states to have their own unique laws. The federal government, if it is to wield legal supremacy, leaves little room for current state control thanks to judicial review.

The fifth and final element of the Constitution to be considered here is the separation of powers. Judicial review has served as a contradiction to this principle even though proponents use it as a representation of the judiciary's check on the other branches of government. Separation of powers maintains that the branches are to remain independent of one another, exercising checks over one another, with none becoming all-powerful. It is review that allows the courts to denounce and deem unconstitutional any or all acts of the legislative and executive branches. It has used review to expand and limit other branches of government without their consent, and has, for most, earned itself the moniker of the most powerful branch of the federal government.

By contradicting specific tenants of the Constitution meant to preserve democracy, judicial review goes against the ideals upon which our country was founded. Even when review serves to protect people's rights or the welfare of the nation, it goes against the inherent principles set forth in the first contracts of the country. Decisions and policies meant to affect entire constituencies or large segments of society are meant to be left in
the hands of elected representatives. This ensures the application of the majority will and allows for political recourse should government become tyrannical or unresponsive to the popular interests of the nation. The judiciary is supposed to wield power in individual cases only, having affect only on the particular parties of a case.

It is incorrect to assume that there is no recourse when the judiciary steps outside of its bounds. Federal appointed court officials can be impeached if they commit serious offenses. The legislative and executive branches can create legislation or amend the Constitution to overturn court decisions and/or change court-created policy. And we cannot forget that court decisions require enforcement to have effect. However there is a paradox that usually deters recourse of the judiciary. The phenomenon of activist judges and a society which is somewhat unaware of the courts' power tends to lead to indifference and ambivalence toward court decisions and their effects. The American public is almost like the monkey that ‘sees no evil, hears no evil, and speaks no evil’ when comes to the actions of the judiciary. The legislature and executive have recognized court decisions which could have seriously negative effects and have acted accordingly. Yet the last 200+ years have been dominated by judicial policy formation with a relatively unresponsive audience.

**Future Prospects for Review and Conclusion**

Judicial review has endured in our nation for over 200 years. It is unlikely that the institution will instantaneously cease to exist or be legislated out of existence. Therefore it
must be understood by the American public and practiced only when absolutely necessary.

Primarily, the educational system must act to teach students about the power of review and its effects. In a democratic nation, it is the duty of the citizens to know and understand their government. Americans must come to understand that judgements in individual cases apply only to that case, and that while common law exists, a group of non-activist judges will be less willing to employ precedents involving negative review. Secondarily, judicial officials willing to practice judicial self-restraint must be appointed. It is wise to retain the idea of appointed judges. Fair and impartial judgements are still a necessity for the integrity of individual cases. However, the judges who decide cases must be willing to pass judgements based on individual merit with no intent to create policy in mind.

It is still the function and intent of our government to be driven by republicanism. Everyone must be united in reaching the goals set forth at the founding, and everyone who is able must participate. If everyone understands an institution such as review and its effects and still wishes it to exist, then the ideal of democracy is fulfilled. However, my research concluded that there is little if any understanding of the institution. Misunderstanding cannot be taken as acceptance. If America is to thrive on republican and democratic ideals, it cannot succumb to institutions that defeat those ideals.
Notes

1 Judicial review can be practiced by all courts at the local, state, and federal levels. Because the history of review is so extensive, I only analyze the United States Supreme Court in this paper. When I speak of the “courts,” I am referring to federal courts. When I speak of the “Court,” I am referring to the United States Supreme Court.

2 The use of masculine pronouns in this paper is not meant to offend. Many historical texts use the masculine form, and I have chose to do the same in this dissertation. Any masculine pronoun is meant to include both men and women.


8 Until I acknowledge the Bill of Rights and other amendments, I am referring solely to the original Constitution.

9 Ladd 73.

10 Ladd 95.
It must be noted here that at the time of the ratification of the Constitution there was a limited constituency in the nation. Many people were not allowed to participate in government based on their race and gender. However, the attitude at the time, maintained that all who were willing and able could participate. Voting rights have been extended under amendments to the Constitution allowing for a more representative constituency in present-day America.

13*Calder v. Bull* 3 Dallas, 1 L. Ed. (1789).

14*Calder*

15The power of review was granted to all courts by the merit of Marshall's decision.


18Hand 55.


20Ducat 846.

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*Calder v. Bull* 3 Dallas, I L. Ed. (1798).


*Hayburn's Case* 2 Dallas, 1 L. Ed. (1793).


*Hylton v. United States* 3 Dallas, 1 L. Ed. (1796).


*Marbury v. Madison* 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).


