JUDICIAL REVIEW: A THREE APPROACH EVALUATION

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INTRODUCTION

The utilization of three approaches is essential in understanding the concept of judicial review, its validity, and its necessity in the American system of government. An historical approach is necessary to briefly explain the Constitution, the Supreme Court, John Marshall, and *Marbury v. Madison* (the court case in which the concept was formally authorized) as major participants in the establishment of judicial review. Secondly, a comparative approach is necessary in relating the concept of judicial review in various Supreme Court cases. An approach of jurisprudence is necessary in determining whether or not the intentions of the framers of the Constitution have been kept in tact. Finally, some conclusions can be drawn as to the overall significance of the concept of judicial review.
JUDICIAL REVIEW: A THREE APPROACH EVALUATION

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosterity, do ordain and establish this Constitution for the United States of America.

Nearly every American with a high school diploma has read the Constitution of the United States of America at one time or another. The Preamble has been the object of memorization of many young school children, and it has been declaimed by orators and statesmen on public occasions for over two centuries. Even so, most do not realize the significance of the U.S. Constitution, nor the impact this document has had on the lives of Americans since it was put into effect June 21, 1788 after New Hampshire became the ninth state to ratify.

James Madison, in The Federalist no. 51 says the following about the development of the Constitution:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control 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. (Mitchell, p. 3).

The inadequacies of the Articles of Confederation, brought into sharp focus by Shays' Rebellion in 1786, provided fuel for the fire of an already growing movement
for change that culminated in the Philadelphia Convention the following year (Mitchell, p. 1). The delegates at the Convention voted to establish a new national governing system consisting of supreme legislative, judicial and executive branches (the "auxiliary precaution" of which Madison wrote).

The 55 delegates who gathered in Philadelphia in the summer of 1787 faced a very difficult challenge. Their task was to devise a system of government that would bind the 13 sovereign states into one firm union without threatening the traditional freedoms for which the American colonists had recently fought.

The final draft of the Constitution provided a broad framework from which the new government could work. Because of this, the document has proved flexible enough to meet the nation's changing needs without extensive formal revision for nearly 200 years. Although many modern governmental practices would seem foreign to the authors of the Constitution, the basic structure continues to operate in much the way the framers planned it.

Historically, the U.S. Constitution is the oldest surviving written national constitution (Enc. Britannica, p. 739). It inaugurated a period of constitution writing that has continued to the present day. Many other countries have less successfully attempted to establish similar documents.

Specifically, the Judiciary of the United States was outlined in Article III of the Constitution:
Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts 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 Continuance in Office.

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; (between a State and Citizens of another State;) between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, (and between a State, or the Citizens thereof, and foreign State, Citizens or Subjects.)

In all Cases affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have Directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article III seems to cover everything that the new
nation would need in its judicial branch of government. This Article is the basis for only one of the twenty-six amendments to the constitution. The Eleventh Amendment was ratified February 7, 1795. This amendment takes away the judicial power of the United States in suits in law and equity against one of the United States by citizens of another state or subjects of any foreign nation.

Even though the framers developed a Constitution that has remained virtually unscathed for over 200 years, the framers may have omitted the inclusion of an ideal, in Article III, that could have led to the nation's demise at the turn of the nineteenth century. The ideal in question is what is now established as the power of judicial review. What is judicial review and how did this concept evolve?

Judicial review, in its most widely accepted meaning, is the power exerted by the courts to examine the actions of the legislative, executive, and administrative arms of the government and to ensure that such actions conform to the provisions of the constitution. Actions that do not conform are declared "unconstitutional," and, therefore, are deemed null and void (Enc. Britannica, p. 641).

The concept of judicial review, even though not specifically outlined in the constitution, was discussed at the constitutional convention. A small number of the framers argued that all proposed legislation should be brought before the courts for a stamp of constitutionality. The majority believed otherwise. Henceforth, the power of judicial
review was not specifically discussed in the adopted document. It is obvious that there was dissent in the degree of power the courts should have in reviewing governmental acts. The mistake may have been in the framers omitting any guidelines for the justices to follow in Article III of the constitution, on the other hand, it may have been their genius in leaving this to judicial interpretation.

Fifteen months after New Hampshire voted to approve the proposed constitution, President Washington signed the Judiciary Act of 1789. This set in motion the creation of the entire system of federal courts. There was also a bold definition of jurisdiction, including that of the Supreme Court.

Even though this legislation granted more powers to the Supreme Court, there was still an element of doubt surrounding this body. On February 2, 1970, some of the men who had been appointed to justiceships failed to appear for the initial organizational meeting of the Supreme Court in the Royal Exchange Building in New York. Only four of six arrived, with Robert Harrison declining his appointment and John Rutledge staying away throughout the first three terms of the Court before resigning to become Chief Justice in South Carolina (Mott, p. 1).

The Judiciary began with a shaky start, and the Constitution did little to boost the confidence of Supreme Court members during the early years of its formation.
Judicial power was "vested in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish" (Article III, Section 1), but the makeup of the tribunal, and even the number of members, is left for Congress to determine. Another Constitutional factor attributed to the slow start of the Supreme Court is that there is no explicit statement about the nature of the Court's power even when a case falls within its jurisdiction.

The Judiciary remained a relatively weak branch during the first decade of the newly formed system of government. After having three Chief Justices in eleven years, John Marshall was appointed to the position by President John Adams in January 1801.

John Marshall was raised in the backwoods of Virginia. His mother was well educated and his father was a leader of the country and friend of George Washington. Even though Marshall had little formal education, he had an extraordinary mind and a good sense of fairness. These traits helped make him a natural leader as a young soldier of the Revolution (Enc. of the American Constitution, p. 1205).

Marshall became nationally prominent as a diplomat after outwitting Charles Talleyrand while negotiating with France's Directory (1797-98). He also received recognition as a legislator. He was a devout Federalist serving first in the Virginia Assembly (1782-1791, 1795-1797) and then in the House of Representatives (1799-1800). In June 1800,
President John Adams named Marshall to replace the Hamiltonian John Pickering as secretary of state. In January 1801, after the strife-ridden Federalist's defeat, Adams appointed Marshall Chief Justice of the Supreme Court when John Jay, the first Chief Justice, declined to again preside over "a system so defective" (Enc. of the American Constitution, p. 1205).

As Chief Justice, Marshall raised the office and the Supreme Court to stature and power that was not prevalent before his appointment. The Court had Marshall in the capacity of Chief Justice for a total of 34 years (1801-35), the longest tenure of any Chief Justice before or since that time.

Under Marshall's tenure, individual opinions seriatim (in a series; one after another) largely ceased, and dissenting opinions were discouraged. The court came to speak with one strong voice. Usually, the voice was Marshall's (Enc. of the American Constitution, p. 1206).

Chief Justice Marshall delivered the opinion of the Court in every case in which he participated during the decisive first five years. Marshall delivered three quarters of the opinions during the next seven years and almost all of the great Constitutional opinions throughout his tenure (Enc. of the American Constitution, p. 1206).

Marshall's captivating and equable temper helped unite a diverse group of justices, many appointed by Republican presidents. In the face of triumphant Jeffersonian
Republicans, suspicious of an unelected judiciary stocked with Federalists, Marshall was wary and astute.

Marshall's crucial judicial accomplishment came in his opinion of *Marbury v. Madison* [1 Cranch 137; 2 L. Ed. 60 (1803)]. This decision laid down the essential foundation in the establishment of the concept of judicial review as a part of the nation's Judiciary. The facts surrounding the case are lengthy in detail, but are necessary in analyzing and understanding what Chief Justice Marshall so brilliantly established from the case.

Although the election in the fall of 1800 brought the Federalists a defeat in the race to the presidency by Republican Thomas Jefferson, President Adams and his colleagues did not retire from office until March 1801. The Federalists had been considering plans to reform the federal courts by remodeling the Judiciary Act of 1789, and began to do this immediately before their retirement in March. The reasoning behind the plan was to insure a solid foundation for Federalist principles which could stand the test of time (Cushman, p. 1).

In pursuit of this goal, the Federalists were able to pass the Judiciary Act of February 13, 1801. This relieved the Supreme Court justices of circuit court duty, reduced the size of the Supreme Court from six to five, and created six new circuit courts with 16 new judgeships. Two weeks later Congress passed an act providing the president the ability to appoint as many justices of the peace as he felt
necessary for the District of Columbia (for five-year terms). During the last 16 days of his administration, President Adams filled the newly created vacancies with loyal Federalists. The task of signing the commissions kept him busy well into the night before the inauguration of Jefferson on March 4, 1801. Among the judicial appointments made by Adams during the closing weeks of his administration, was the appointment of fellow Federalist John Marshall, to the position of Chief Justice of the Supreme Court.

The Republicans took office and were enraged by the Federalists enactment of the Judiciary Act of 1801. One of the first Republican efforts was to repeal this legislation. This was accomplished March 8, 1802. The repealing act restored the Supreme Court justices to circuit court duty, restored the size of the Court to six, and abolished the new circuit judgeships which had been created by the Judiciary Act of 1801. Jefferson also ordered the commissions for the 42 justices of the peace for the District of Columbia to be withheld, though he reappointed 25, originally commissioned by his political enemy John Adams (Enc. of the American Constitution, p. 1200).

The Federalists which remained in Congress were not in agreement with the statute and believed it to be unconstitutional. Marshall also held that view, and probably would have ruled the law void if it would have come before him immediately in his capacity of Chief Justice. The Republicans foresaw this action, and, in order to
prevent this from occurring, had so altered the sessions of the Supreme Court that it did not convene again for 14 months which made a decision of unconstitutionality impractical (Cushman, p. 2)

When the Court convened in February 1803, Marbury v. Madison was the case on the docket (Cushman, p. 2). At the time of the case, Jefferson's desire to replace Chief Justice John Marshall With Spencer Roane was public knowledge (Enc. of the American Constitution, p. 1200). The case arose from the refusal of the Jefferson administration to deliver the commissions of four of the persons appointed justices of the peace in the District of Columbia, including William Marbury. The appointments had been confirmed by the Senate and President Adams had signed the commissions, which Marshall (the outgoing secretary of state) had affixed with the great seal of the United States. On the evening of March 3, the last day before Jefferson took control of the presidency, Marshall neglected to deliver the commissions. Marbury and three others sought a writ of mandamus compelling James Madison (secretary of state under Jefferson) to issue their commissions. The case was brought by Marbury and party under original jurisdiction as outlined in Section 13 of the Judicial Act of 1789 (Corsi, p. 1).

Right before Marshall delivered the Court's opinion in Marbury, the Washington correspondent of a Republican paper wrote, "The attempt of the Supreme Court...by a mandamus, to control the Executive functions, is a new experiment. It
seems to be no less than a commencement of war.... The Court must be defeated and retreat from the attack; or march on, til they incur an impeachment and removal from office" (Enc. of the American Constitution, p. 1200).

Marshall and the members of the Court appeared to have been confronting a difficult situation. To have issued the writ would have been certain disaster for the Judiciary, as Jefferson had already announced that he would not allow Madison to issue the commissions. This action would have broken what had already been deemed "the least dangerous branch of the American government" (Bickel, p. 1). On the other hand, withholding the writ would have violated the Federalist principle that the Republican administration was accountable under the law (Enc. of the American Constitution, p. 1201).

The questions to be determined in the case, according to Marshall's opinion were the following:

(1) Has the applicant a right to the commission he demands?
(2) If that right had been violated, do the laws of the United States afford him a remedy?
(3) Is this remedy a mandamus issuing from this Supreme Court?

The answers to the questions according to Marshall, are yes, yes, and no, respectively. The Court ruled that Marbury had a right to the commission and that the laws of the United States afford Marbury a remedy. The third question is the one that loses the case for Marbury and denies the issuance of a writ of mandamus (Bartholomew, pp.16-7).
The reasoning behind the Court's decision is that the statute on which Marbury had made his claim, Section 13 of the Judiciary Act of 1789, authorized the Supreme Court to issue writs of mandamus to public officials (such as the Secretary of State). The Constitution, in Article III, Section 2, specifies which kinds of cases the Supreme Court can try under original jurisdiction and this type of lawsuit is not included (Pollak, p. 165). The original jurisdiction of the Supreme Court is specifically stated by the Constitution, and Congress cannot enlarge or decrease this jurisdiction. The Court had no power to issue the writ because this would have been contrary to the Constitution. Therefore, Section 13 of the Judiciary Act was declared unconstitutional, making it null and void.

In his opinion on the case, Marshall explains his legal reasoning:

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply" [1 Cranch 137; 2 L. Ed. 60 (1803)]

In the decision, Marshall made Madison and Jefferson appear to the nation as though they were tyrants by not
issuing the commissions. Alexander Hamilton's newspaper reported the Court's opinion in a story headed "Constitution Violated by President," which informed readers that the President had trampled on the "charter of the people's liberties" by his malicious conduct against personal rights. (Enc. of the American Constitution, p. 1201).

On Marshall's opinion, Professor Robert G. McCloskey has written, "...a master work of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another" (Bickel, p.2).

This episode began the practice of judicial review in America. It is easy to see that the first U.S. case involving the concept of judicial review stemmed from a conflict between the Federalists and the Republicans, and the Judicial and Executive branches of government. The two individuals who were the most active participants were rival politicians Thomas Jefferson and John Marshall.

The power of judicial review is now exercised by courts at both the federal and state levels. These courts have the authority to declare actions of the legislative and executive branches invalid if they are contrary to the Constitution. The federal judiciary, and ultimately the Supreme Court, also has the power to strike down any state law or action that infringes on the constitutional authority of the central government or that authority held by other states (Enc. Americana, V. 16, p. 208).
Since *Marbury v. Madison* the Court has ruled only a slight number of acts unconstitutional. The Court has allowed several opportunities to rule on the constitutionality of acts of the president or congress to slip through its fingers. This stems from the different roles that the Court's members have played under the various Chief Justices throughout the nation's history. Some Courts have seized an approach of judicial activism and others have taken the approach of judicial restraint.

Judicial activism is an approach which emphasizes direct vigorous action in support of or opposition to one side of a controversial issue. Judicial restraint is the opposite. The Court avoids radical positions on controversial issues, or avoids them all together.

Obviously, John Marshall's approach in *Marbury* was quite activist in securing the concept of judicial review as an integral part of the American system of government. On the other hand, a degree of judicial restraint was also practiced by the Marshall court. Marshall allowed Marbury and his companions to go without their justice of the peace positions which he knew they deserved, but for fear of being chastised by the president, and further weakening the judiciary, he opted for an easier and more intelligent way out.

To further illustrate judicial activism and restraint, and to trace the growth of the concept of judicial review, a comparison of a few different Supreme Court cases is necessary. From the history of the Supreme Court, it is also obvious that judicial review had been a touchy issue
for the Court. The second act of Congress did not fall under the judicial axe until over 50 years later when the *Dred Scott* decision was delivered in 1857 (*Collier's Enc.*, p. 240).

Even though the *Dred Scott* decision, to be discussed shortly, is only the second case in which an act of congress is deemed unconstitutional, there were many cases involving judicial review which preceded. The Supreme Court and many state courts reviewed cases before the controversial decision of the *Dred Scott* case was rendered by Chief Justice John B. Taney.

*Eakin v. Raub* is an obscure Pennsylvania state supreme court case. It is an example of a state case involving the concept of judicial review. More importantly, Justice Gibson's dissent is an example of how many members of the nation's judiciary were opposed to the implied power of judicial review. In his dissent, Justice Gibson provides criticism of Marshall's logic behind the decision in the *Marbury* case. Justice Gibson takes some of his information from the writings of Sir William Blackstone and also provides many of his own thoughts. Gibson compares the review of passed legislation to "calling for the election returns or scrutinizing those who compose the legislature." He simply states that he believes judicial review is not warranted by the arguments that Marshall provides in *Marbury*, rather it is an example of overstepping authority.

The next case to be discussed is *Dred Scott v.*
Sandford [19 Howard 393 (1856)]. Dred Scott was a slave in Missouri. In 1834, his master had taken him from Missouri (a slave state) to Illinois (a free state), then into the Wisconsin Territory (a free territory under the provisions of the Missouri Compromise) and back into Missouri. In 1846, with the help of anti-slavery lawyers, Scott sued for his freedom in the Missouri State courts. He filed suit on the grounds that his residence in a free state and a free territory had made him a free man (Enc. Britannica, V. 4, p. 218).

The case was brought to the Supreme Court after the Missouri Supreme Court had overturned an initial ruling of a lower court that declared Scott free. The case was decided on March 6, 1857. Each justice wrote a separate opinion, although Chief Justice Roger B. Taney's opinion is most often cited.

Taney was one of seven justices that ruled to deny Scott his freedom, two justices wrote dissenting opinions. Taney said that negroes could not be entitled to rights as a U.S. citizen, therefore, he did not have the right to sue in federal courts.

The majority decision continued by declaring the Missouri Compromise 1820 unconstitutional. The Compromise had forbidden slavery in all parts of the Louisiana Purchase that were north of 36 degrees, 30 minutes of latitude, except for Missouri. The Court ruled that Congress had no power to prohibit slavery in the territories because slaves were property, and masters were guaranteed property rights.
under the Fifth Amendment.

This decision is another example of judicial activism. Chief Justice John B. Taney's court seized the opportunity to declare an act of Congress unconstitutional. However, this decision was a bad one because the Court overstepped it bounds. Unfortunately, this decision also led to antagonism between the states which resulted in the outbreak of war in 1861.

*Ex Parte McCordie* [7 Wall. 506 (1869)] is another case which shows the Courts role as the supreme arbiter of the Constitution. This case exhibits a limitation on the Court's power of appellate jurisdiction.

In March 1868, the Congress repealed an 1867 Reconstruction Era statute that granted federal judges the power to issue writs of habeas corpus to any person, held by military order, in violation of the Constitution or laws of the United States (Corsi, p.2).

Prior to repeal, the statute granted the Supreme Court the ability to review the habeas corpus decisions of lower federal judges via appellate jurisdiction. The Court had already heard oral arguments for the case when the Congress repealed the statute. Utilizing the concept of judicial review, the Court dismissed the appeal for lack of jurisdiction. The Court, under Chief Justice Salmon Portland Chase, reasoned that "jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case" (Corsi, p. 17).
The next case for comparison is *Ashwander v. Tennessee Valley Authority* [297 U.S. 288 (1936)]. In the concurring opinion of Justice Louis D. Brandeis, he discusses seven rules that the Court has developed to limit its consideration of constitutional issues. The rules place a few unwritten guidelines on the Court before it takes on the responsibility of deciding a constitutional issue. The rules also help maintain the separation of powers of government and display the Court's attempt to limit its political power in its role as supreme arbiter of the land.

The Brandeis' opinion shows how the court during his tenure was actually more interested in avoiding the making of a ruling on a constitutional issue than declaring acts unconstitutional. One of the rules given by Brandeis says, "when the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided" (Corsi, p. 18).

This case both strengthens and weakens the position of the Court. It strengthens the validity of judicial review by demonstrating that the Judiciary is not striving to take away an undue amount of power from the other branches of government. In this respect, the Court proves that it desires to maintain the intentions of the framers by not overstepping its bounds and assuming unwarrantable powers.
On the other hand, one could argue that the Court is limiting its own powers and making itself a weaker instrument of government by not taking on all cases that may go against the grain of the constitution.

Cooper v. Aaron [358 U.S. 1 (1958)] is another case where the Court seized an activist approach to a highly controversial issue and reaffirmed its role as the final interpreter of the constitution. Briefly describing the events of the case, the governor and the legislature of Arkansas claimed that it was not their duty to obey federal court orders. Earlier the Supreme Court ruled in Brown v. Board of Education [347 U.S. 483 (1954)] that states could not use governmental powers to bar children from public schools on racial grounds. Arkansas refused to follow the ruling of the Court in this highly controversial case.

In Cooper v. Aaron, the Court ruled that the violent resistance of the Little Rock school board's desegregation plan was linked to the governor and state legislature. Because of this, the Court ordered the desegregation of the Arkansas schools to be carried out in accordance with its previous rulings on desegregation.

The final case to be examined is Baker v. Carr [369 U.S. 186 (1962)]. This case is an example of how the Court elected to rule on a controversial issue even though it was of a politically sensitive nature. The case revolved around the reapportionment of Tennessee's legislative districts. Mr. Justice Brennan delivered the opinion of the Court which declared that the city voters did have a complaint
suitable for the courts because their rights under the Equal Protection Clause of the Fourteenth Amendment were being violated.

Although the majority sent the case back to the lower court for a ruling, Mr. Justice Frankfurter and Mr. Justice Harlan dissented from the decision. In his dissent, Mr. Justice Frankfurter asserted that the Court's decision could "impair the Court's position as the ultimate organ of 'the Supreme Law of the Land,'" [369 U.S. 267 (1962)]. His assertion is based upon the idea that the "Court's authority--possessed of neither the purse nor the sword--ultimately rests on sustained public confidence in its moral sanction" (Ibid). Mr. Justice Frankfurter argued that any time the Court should become involved, in any way, with "political entanglements" it only weakens the Judiciary. It is his belief that the Court made a huge mistake by even considering the challenge of Baker v. Carr.

It is obvious that various Courts have played a variety of different roles in the development of the concept of judicial review throughout the years. Since Marbury, different Courts have handled constitutional issues with different degrees of enthusiasm. Constitutional issues are always the subject of heated debate, and it is generally only those Courts that have a high degree of judicial activism that take on these cases. It is clear from Justice Brandeis' concurring opinion in the Ashwander case that many resources are exhausted before the Court is ready
to make a ruling on the constitutionality of an act.

Judicial review has been handled differently, and in varying degrees by the various justices. It is a power that has been abused by some, and under used by many. However, it is a power that has survived the test of time and will continue to be a part of our system of government. A possible reason for the lack of official and popular opposition to this power is due to the limitation which the Supreme Court placed upon its own power, as evidenced by the Brandeis opinion.

The third approach to understanding judicial review is that of jurisprudence. In other words, were the intentions of the framers of the Constitution kept in tact during the introduction and maintenance of the concept of judicial review?

According to John Marshall there is evidence of the implied power contained in the body of the Constitution itself. In his opinion from Marbury v. Madison, Marshall argues that judicial review is a judicial power that can be logically deduced from Article III, Section 1.

According to Alexander Bickel, the Supremacy Clause of Article VI, "has seemed to many the most persuasive textual support" for the validity of judicial review (Bickel, p. 8). This is another argument which lends credence to the idea that judicial review was a part of the ideology of the framers of the Constitution. Marshall also briefly touched on the Supremacy Clause at the end of his Marbury opinion by saying, "it is also not
entirely unworthy of observation, that in declaring what
shall be the supreme law of the land, the Constitution
itself is first mentioned" (Cotton, p. 43).

The Supremacy Clause is as follows:

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, any Thing in the
Constitution or Laws of any State to the Contrary
notwithstanding (Article VI).

Continuing with the argument of Marshall, he implies
that this clause mentions the Constitution first and only
those laws that are made in pursuance of the Constitution,
not merely the laws of the United State generally (Cotton,
p. 43). So in order for a law to be valid, it must be made
in pursuance of the Constitution. The only logical choice
is for the Judiciary of the United States to be responsible
for determining if a law is made in pursuance of the
Constitution. With the responsibility on the shoulders of
the Judicial branch, the burden ultimately lies with the
Supreme Court in declaring acts unconstitutional.

Support for the concept of judicial review also came
from the people after the decision was rendered for Marbury
v. Madison. The general public was pleased with the
decision because it eradicated the pre-Revolutionary feeling
that was beginning to develop due to the excessive power
that Jefferson was seizing as chief executive.

Another support for the idea that judicial review can
be linked with the intentions of the framers is found in a
writing of one of the framers. In the *Federalist* no. 78, Alexander Hamilton examines the judiciary department of the proposed government and discusses the idea of judicial review. It is from this document that John Marshall borrowed many ideas while formulating his opinion for *Marbury v. Madison*.

Hamilton suggests that the independence of judges is necessary to guard the constitution and the rights of individuals from the devious planning of corrupt personalities. The independence that Hamilton describes is the principle of judicial review. He asserts that without this power for the courts, there will be a universal distrust and distress.

Judicial review is a necessity in maintaining the intentions of the framers. The maintenance of a strong democratic system of government with three individual branches could not be a reality without it. The concept of judicial review allows the Judiciary to have an equally strong role in maintaining a system of checks and balances.

Congress can amend the Constitution to check the actions of the Judiciary and can override the president's veto to establish a check on the Executive. The president can veto acts of Congress and has the ability to appoint justices to the Supreme Court, which are his checks on the legislature and judiciary, respectively. Without the power of judicial review the Judiciary would have no checks on the other two branches, thereby rendering it defenseless. This
would truly establish the Judiciary as the "least dangerous branch."

According to Franklin D. Roosevelt, "It is now academic to discuss whether it was originally intended that the courts should exercise this power (judicial review)" (Pollak, p. 328). This is true, at no time in our history has the power of judicial review been seriously endangered. Despite a number of attacks on the Court's decisions, its personnel, and even the procedures by which review has been exercised, no major political party has ever urged the complete abolition of the power of review itself (Cushman, p. 4). Nevertheless, it is interesting to research the concept and speculate where the country would be without judicial review.

Two more modern ideas on how the Court should utilize the power of judicial review come from Justice William J. Brennan, Jr. and former Attorney General, Edwin Meese. The two men rest at nearly opposite ends of the spectrum of judicial review.

Mr. Justice Brennan has been a dominant liberal force on the Supreme Court since his appointment to the position in 1956 by President Eisenhower. He has often disagreed with the majority since the seventies when the Court became more conservative. It is Brennan's view that the Supreme Court's role is to fill in the blanks that the framers left in the Constitution. The most powerful tool to aid in this process is judicial review.

On the other end of the spectrum stands Edwin Meese, a
man who has labeled "infamous" such decisions as *Miranda* and *Mapp* (Lieberman, p. 466). Meese is a conservative who served under President Ronald Reagan. It is his belief that the Court has seized more power than the framers had intended to dole out to the Judiciary. He argues that the Court must maintain a much more strict interpretation of the Constitution if they are to truly follow the intent of the framers. He asserts that judicial review is only a valid tool of the Court when a strict interpretation of the Constitution is followed in deciding a case.
CONCLUSION

Judicial review has maintained the great nation that our forefathers fought so hard to develop into an independent state. The power has enabled the Judiciary to be maintained as a strong independent branch, just as the framers of the Constitution had so earnestly desired.

From the information presented, there is no doubt that the United States would not have evolved into the great nation that it is today without John Marshall's decision in *Marbury*. The Judiciary would have lost credibility and withered away, yielding all power to the Executive and Legislative branches. Instead the Supreme Court maintains the central task of protecting, defining and refining the living Constitution, with the aid of the power of judicial review, in a way that maintains the intentions of the framers.
WORKS CITED


Bibliography


