Judicial Review and the Right To Resist

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INTRODUCTION

Judicial review has been a fixture of American government for two hundred years, but our anxiety about it only seems to deepen over time. Recently, two new assaults by leading scholars—Larry Kramer¹ and Jeremy Waldron²—have articulated further political and conceptual criticisms of this practice.³ That is

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3. To these a slightly earlier and equally spirited critique can be added: MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).
not necessarily a bad thing, of course; an important role of scholarship is to challenge institutions that might otherwise be taken for granted. In fact, as the Supreme Court, due to recent changes in personnel, begins to adopt positions that many legal scholars find legally or ethically questionable, such challenges to judicial review are likely to seem increasingly attractive.

This Article is a defense of judicial review, but it does not attempt to provide a comprehensive answer to all the criticisms, or even all the most recent ones. Rather, it focuses on only one theme, but it is a distinctive one in terms of its generality and length of historical perspective. To be sure, Waldron casts his criticisms in highly general terms, while Kramer reaches back before *Marbury v. Madison*\(^4\) to the founding of the American republic and to pre-Revolutionary practices in colonial America.\(^5\) The theme of this Article, however, is more general still and involves a much longer historical perspective.

The most basic feature of judicial review, one that is so general that it is not limited to the Judiciary, is that it is an effort to impose some sort of higher law upon the ruler of a political entity. This is fairly obvious, but it highlights a genuine conundrum. A political ruler\(^6\) can be defined as a compulsory organization whose “administrative staff successfully upholds the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.”\(^7\) The point of judicial review is to tell the ruler that it may not adopt certain courses of action that it wants to pursue. But why should the ruler obey? Other people in society obey the ruler because the ruler can deploy physical force at the end of the day, but why should the ruler submit to someone else?\(^8\) Clearly, judicial review depends on some set of relationships that cannot be reduced to matters of force and that operates in a less visible, more counterintuitive manner than ordinary legal or political constraints. In the case of judicial review, it depends

\(^4\) Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).


\(^6\) One can treat the ruler coterminus with the government, or speak of the government of a modern state as a complex collection of authoritative institutions, even if only one of them, the ruler according to the definition in the text, possesses the monopoly of force. See infra text accompanying notes 152–57.

\(^7\) 1 Max Weber, Economy and Society 54 (Guenther Roth & Claus Wittich eds., 1978) (1956).

\(^8\) Political theorists regularly maintain that the ruler is not subject to ordinary law. See Ernst H. Kantorowicz, The King’s Two Bodies: A Study in Medieval Political Theology 87–192 (1957); J.P. Canning, Law, Sovereignty and Corporation Theory, 1300-1450, in The Cambridge History of Medieval Political Thought c. 350–c. 1450, at 454, 456–60 (J.H. Burns ed., 1988) [hereinafter Cambridge History]; K. Pennington, Law, Legislative Authority and Theories of Government, 1150-1300, in Cambridge History, supra, at 424, 424–33. Not surprisingly, a particularly clear statement of this principle can be attributed to Thomas Hobbes: “The Soveraign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Lawes.” Thomas Hobbes, Leviathan, at bk. II, ch. 26 (C.B. MacPherson ed., 1968) (1651).
on the concept of higher law.

Stating the problem in this fashion opens up a longer historical perspective than is common in discussions of judicial review. The difficulty of imposing higher law upon a political ruler is a problem of governance that was first articulated in Western political literature in the middle of the twelfth century. During the six hundred years that followed, many of the best political thinkers in the European world wrestled with this problem. A ruler’s action that violates the higher law is invalid, they asserted, and those subject to that action have the right to resist or to revolt. But the theorists were then confronted with an apparently intractable conundrum. Resistance or revolution will almost always involve violence, particularly against a lawless ruler. This is always traumatic, typically dangerous, and often ineffective; and unsuccessful efforts generally lead to disastrous consequences for the participants. Moreover, how can those who undertake this fearsome course of action be certain that they have correctly understood the higher law? If they regularly resolve their doubts in favor of inaction, violations of the higher law go uncorrected; if they regularly resolve them in favor of resistance, the regime will be plunged into anarchy. By the eighteenth century, political theorists were no closer to a solution to this conundrum than they had been when they first articulated the problem in the twelfth and thirteenth centuries.

The American doctrine of judicial review provided a solution. It is remarkable that after the passage of so much time, and the expenditure of so much mental effort by the best political minds in the Western world, a bunch of distant and obscure colonials, from whom no one in Europe expected much of anything other than tobacco, fish, and trouble, discovered this solution. They stumbled on it almost inadvertently,9 made no great claims in its favor, and used it only intermittently in the half-century that followed. Yet the mechanism they devised has become a central feature of our governmental system and has been adopted by the majority of other democratic regimes throughout the world.10

9. The intentions of the Framers regarding judicial review are obscure. The Framers only raised the issue in conjunction with their decision to reject a proposed council of revision, see 2 Max Farrand, The Records of the Federal Convention of 1787, at 73–80 (1966), and never said anything particularly definitive about it. See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 258–62 (1996). One of the leading Framers, Hamilton, clearly contemplated judicial review when he participated in writing the Federalist Papers. See The Federalist No. 78 (Alexander Hamilton). Given two hundred years of settled practice, it would be rather extreme, even for a committed originalist, to argue that judicial review should be eliminated because it was beyond the contemplation of the Framers. In any event, this Article is concerned about the value of judicial review, not whether it was specifically incorporated in our own Constitution.

10. See generally Allan R. Brewer-Carias, Judicial Review in Comparative Law (1989); Mauro Cappelletti, Judicial Review in the Contemporary World (1971); Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin & Albert J. Rosenthal eds., 1990); The Global Expansion of Judicial Power (C. Neal Tate & Torbjörn Vallinder eds., 1995). With respect to constitutions adopted since the end of World War II, see, e.g., Constitution art. 30 (1973) (Bahamas); Constitution arts. 44, 101–102 (2004) (Bangladesh); Konstitutsia na Bulgaria [Constitution] art. 117 (1991) (Bulgaria); Suomen Perustuslaki [Constitution] § 106 (1999) (Finland); Constitu-
It is easy to lose sight of a problem that has been solved for two hundred years, and that has not been salient to political theorists since the time when people rode to work on horseback, sailed in wooden ships, and communicated over distances by writing letters. But just as a condemnation of automobiles would be incomplete without considering the inconveniences of dealing with a horse, so critiques of judicial review are incomplete without considering the anguish that political theorists experienced in their long-standing efforts to find a pragmatic means of imposing higher law upon the ruler.

Anxiety about judicial review has tended to cluster around three concerns, two of which are quite general and engage our basic theories of democracy. The first concern, which dominated discussion in the early American republic and probably remains the most politically important to this day, is that judicial review undermines states’ rights.11 This is not a general concern about democratic government, however; states’ rights is a component of federalism, and thus of concern only in federal regimes. While arguments for federalism often draw on democratic theory, federalism itself is tangential to that theory and is rarely raised in general discussions of it.13 But the other two concerns, which dominate current scholarly debate about judicial review, implicate essential...
features of our democratic theory. The first of these is generally described as the
countermajoritarian difficulty, while the second, for want of a better or more
familiar term, can be described as the antisupremacist critique.

The phrase “countermajoritarian difficulty” was coined by Alexander Bickel,14
but as Barry Friedman has demonstrated, the concern itself has afflicted judicial
review since its inception.15 Friedman defines it as follows: “to the extent that
democracy entails responsiveness to popular will, how to explain a branch of
government whose members are unaccountable to the people, yet have the
power to overturn popular decisions?”16 In a representative democracy, we rely
on elections to choose our leading government officials, and those officials are
expected to set basic public policy and supervise the inevitably large number of
unelected officials who implement that policy. Yet certain decisions that they
reach can be overturned by members of our constitutional courts who are, by
design, unelected and insulated from electoral control.

The countermajoritarian difficulty is probably the dominant theme in contem-
porary legal scholarship about judicial review.17 Pushed to its furthest limits, it
would suggest that the entire practice of judicial review be eliminated. In fact,
Mark Tushnet proposes a new constitutional amendment that says: “The provi-
sions of this Constitution shall not be cognizable by any court.”18 The federal
courts would continue to play an important governmental role in the interpreta-
tion of federal statutes—indeed, judicial enforcement is an essential means by
which elected officials implement their policies—but would no longer have the
authority to overturn duly enacted legislation.

The second critique of judicial review that implicates general questions about
democratic governance can be described as antisupremacism because it argues
that the Supreme Court should not be able to impose its interpretation of the
Constitution on political actors. Antisupremacism consists of two separate but

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POLITICS 16 (1962)
18. Tushnet, supra note 3, at 175.
related strands. The first, generally called departmentalism, argues that each branch of government should interpret the Constitution for itself, and within its own area of operation. Thus, the courts can refuse to enforce a statute they believe to be unconstitutional, but the Executive can reach an independent judgment to the contrary and enforce the statute on its own. The second strand, called popular constitutionalism, argues that the people at large possess this same power of independent interpretation. The courts remain valid interpreters of the Constitution, and possibly even the supreme interpreters within the government, but their interpretations can be overruled by concerted popular action. While these two critiques share many concerns with the countermajoritarian critique, they lead in a somewhat different and arguably less extreme direction. Unlike the most thorough-going countermajoritarians, proponents of departmentalism and popular constitutionalism do not challenge the practice of judicial review, but only judicial supremacy. That is, they are willing to grant the Judiciary the authority to invalidate statutes on constitutional grounds, but they insist that other branches of government, and the people at large, possess this same authority and can ignore the courts in exercising it.

This Article advances a response to these two sets of concerns that is derived from reviewing the six-hundred-year-long struggle to find a usable mechanism by which higher law could be imposed on the ruler of a political regime. Part I discusses that long struggle. Part II then presents the components of the solution we achieved—codification of the higher law, identification of an institution authorized to impose the higher law on the ruler, and recognition that the decisions of the identified institution are supreme over other governmental institutions. Finally, Part III indicates the response to the countermajoritarian difficulty and the antisupremacist concerns that this solution offers.


I. THE RIGHT TO RESIST IN WESTERN POLITICAL THOUGHT

The problem that judicial review ultimately solved stems from the Western world’s distinctive conception of law. Ever since the Middle Ages, political thinkers in the West have maintained that law assumes two different forms: an ordinary form, promulgated by governmental rulers, and a higher form that arises from some source beyond the government’s boundaries, binding the ruler as well as its subjects. In its latter form, law operates as a control or a constraint upon the ruler and thus fulfills one of the most basic purposes in the science of governance, namely, the control of authorized force.

Higher law can arise from a variety of sources. In the Middle Ages, it was attributed to God and described as natural law, a tradition that remains present, if not entirely robust, in modern thought. With the advent of secular theories of government in the seventeenth and eighteenth centuries, the source of higher law was identified as the people, who imposed that law on the government through the social contract. The argument, in essence, is that people possess natural liberty which they relinquish in exchange for civil order, but the government that rules the society remains subject to the terms of the originating bargain. Whatever its origin, the problem that higher law suffers from, as a means of constraining the ruler, is that it lacks an obvious mechanism for its enforcement. Neither God nor the social contract is present in the world of human experience, and any claim to speak on behalf of either can be met with countervailing claims.

Of course, higher law is not the only constraint on governmental power that political thinkers have considered over the course of Western history. One widely discussed alternative is moral education, which is featured in Plato’s

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24. HOBBS, supra note 8, bk. I, chs. 12–13; LOCKE, supra note 23, §§ 4–15; PUFENDORF, supra note 23, bk. II, ch. 1; see TUCK, supra note 21, at 26–27, 90–91, 120.
Republic and other classical sources, and appears in the Middle Ages as the “mirror of the princes” literature. Another is mixed government, which combines monarchic, aristocratic, and democratic elements within a single regime so that the ruler, however constituted, is answerable to multiple constituencies. This also goes back to classical times, appearing prominently in the work of Aristotle, Cicero, and Polybius, and it became a major theme in Western political thought as well. Still another constraint, conceptually distinct from mixed government but closely related to it, is separation of powers or checks and balances, an important element in our own Constitution. These approaches have, of course, spawned vast literatures of their own; the question for this Article is how the separate constraint of higher law originated and evolved.

A. OLD TESTAMENT ISRAEL

The idea that higher law can operate as a constraint on the ruler enters the Western tradition from biblical-era Judaism, where God appears preeminently as a law giver. Old Testament authors were well aware that this conception of God creates a potential conflict between God and the human rulers who
promulgate and enforce the law of their particular regimes. One of the most vivid depictions of this conflict and the difficulties it engenders appears in the story of King David’s murder of Uriah the Hittite. David, treated very much as a war leader at this point, sleeps with Bathsheba, Uriah’s wife, and conceives a child with her. When Bathsheba tells David she is pregnant, David assigns Uriah, who is fighting with the Hebrew army, to the forefront of a battle and orders the other troops to withdraw, ensuring Uriah’s death. As soon as Bathsheba ends her period of mourning for her husband, David marries her.

“But the thing that David had done displeased the Lord . . . . And the Lord sent Nathan unto David.” Nathan, who has been previously identified as a prophet, approaches the issue indirectly, telling David a story about a rich man who possesses many flocks and herds, and a poor man who has nothing but “one little ewe lamb, which he had bought and nourished up.” When a traveler comes to visit, the rich man slaughters the poor man’s ewe lamb for the dinner, rather than taking one from his own ample supply. “And David’s anger was greatly kindled against the man; and he said to Nathan, ‘As the Lord liveth, the man that hath done this thing shall surely die.’” Nathan, having elicited the desired reaction, pounces: “‘Thou art the man. Thus saith the Lord God of Israel . . . . [T]hou hast killed Uriah the Hittite with the sword, and hast taken his wife to be thy wife . . . .'”

One of the many striking aspects of this story is that it is not told about one of Israel’s unworthy kings, like Rehoboam, but about David himself, whom the Scripture identifies as a great king and also as a holy man and the author of the Psalms. Another is the courage that Nathan displays when he says to the King: “Thou art the man.” Both features emphasize the central Old Testament theme that all human beings, no matter how powerful or inspired, are subject to God’s universal laws. Read as a political text, however, the story raises complex questions. It presumes a community of believers and their unquestioned acceptance of the idea that their deity has proclaimed laws applicable to political

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32. See Exodus 5 (Pharaoh); 1 Samuel 15 (Saul); 1 Kings 11 (Solomon); 1 Kings 16 (Baasha). Old Testament writers evaluate almost every ruler in terms of the ruler’s obedience to God’s law, or state God’s judgments of the ruler’s acts through the voice of a prophet. With respect to David, the writer says: “David did that which was right in the eyes of the Lord, and turned not aside from any thing that he commanded him all the days of his life, save only in the matter of Uriah the Hittite.” 1 Kings 15:5 (King James).

33. 2 Samuel 11–12.


35. 2 Samuel 11:4–5.

36. Id. 11:5, 14–15.

37. Id. 11:26–27.

38. Id. 11:27, 12:1 (King James).

39. Id. 7:2.

40. Id. 12:3.

41. Id. 12:5.

42. Id. 12:7, 12:9.

43. Id. 23:1. Seventy-three of the Psalms are explicitly ascribed to David’s authorship.
affairs. In addition, it provides a character, Nathan, whom God has explicitly instructed about the application of those laws and who has been definitively identified as possessing the authority to receive and impart such instruction.\(^4^4\) Finally, it rests upon the King’s willingness, also previously established, to accept Nathan’s words as authoritative,\(^4^5\) despite the fact that his kingship is divinely granted\(^4^6\) and that he possesses his own direct relationship with God.\(^4^7\) The quandary, of course, is how to resolve a conflict between the earthly authority and higher law in situations where these fortunate conditions are lacking.

B. THE HIGH MIDDLE AGES

It is not possible to trace any direct connection between the political thought of Old Testament Israel and that of Western Europe, but educated Europeans were certainly familiar with the Old Testament itself, and the Hebrew conception of God-given higher law that imposes obligations upon earthly rulers is clearly present from the outset of the Western tradition. With that conception came its contradictions, and these appear immediately in the work that is generally regarded as the Western world’s first political treatise, John of Salisbury’s *Policraticus.*\(^4^8\) John was an English cleric whose formative years occurred during the mid-twelfth-century civil war between Stephen and Maude, an era of anarchy that ended when Henry II became King of England. A close associate of Thomas Becket, he fled to the Continent with him during Becket’s first dispute with Henry and returned with him in 1170.\(^4^9\) He wrote *Policraticus* in exile and dedicated it to Becket.\(^5^0\)

*Policraticus* deals with a number of topics;\(^5^1\) of relevance here is John’s

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44. 2 *Samuel* 7:1–2, 4 (King James) (“And it came to pass, when the king sat in his house . . . [t]hat the king said unto Nathan the prophet . . . And it came to pass that night, that the word of the Lord came unto Nathan, saying . . . ”). David asks Nathan, who functions as a sort of court advisor, whether he should create a building for the ark of God; Nathan, having received direct word from God, tells David that this should be done, but only by his son (Solomon, David’s child with Bathsheba). *See id.* 7:1–17.

45. After Nathan accuses him of killing Uriah, moreover, David acknowledges his wrongdoing. *Id.* 12:13; *see also Psalms* 51:1–3 (subtitled by some versions, “A Psalm of David, when Nathan the prophet came unto him, after he had gone in to Bathsheba”: “Have mercy upon me, O God . . . Wash me thoroughly from mine iniquity, and cleanse me from my sin. For I acknowledge my transgressions: and my sin is ever before me.”).

46. 1 *Samuel* 16:1–14.

47. Having received the advice about building the Temple from Nathan, he speaks directly to God to indicate his willingness to obey it. 2 *Samuel* 7:18–29.


50. *Id.* at xvi, xviii.

51. The book is famous, for example, for its extended analogy between government and the human body, an analogy that served as the dominant metaphor for governmental structure until replaced by the
influential distinction between a prince and a tyrant, that is, between a good ruler and a wicked one. He says: “There is wholly or mainly this difference between the tyrant and the prince: that the latter is obedient to law . . . ”

Law, John explains in the immediately following discussion, means God’s law or natural law, and particularly the moral considerations which must guide and sometimes modify the king’s own legal pronouncements. Since authority to rule comes from God, according to John, the tyrant, in his disobedience of God’s law, forfeits his source of authority and endangers the physical welfare and spiritual well-being of his subjects.

Up to this point, John’s account runs parallel to the biblical one in its insistence that God has established laws that govern political regimes and that the ruler of the regime is fully subject to those laws. But in the absence of a publicly recognized prophet who can definitively apply those laws to a given situation, John runs into difficulties and displays a deep ambivalence. He fully subscribes to the standard clerical view that the Church is superior to any temporal ruler in spiritual matters, but his political experience told him that the Church could never play the role of Nathan to the royal regimes of his day. At first, he seems to endorse an extreme alternative: “[t]he tyrant, as the image of depravity, is for the most part even to be killed.” He goes on, however, to assert that tyrants, like princes, are “ministers of God,” and that God grants them their authority when He wants their subjects to be punished for their sins. This suggests that sinful people should suffer a tyrant’s rule and remain obedient, but John immediately reiterates his view that tyrants may be killed. He then backtracks again, arguing that the tyrant should not be opposed or disobeyed by anyone “who is bound to him by the obligation of fealty or a


52. John of Salisbury, supra note 26, at 28; see also id. at 190–91. John also says that “the prince is one who rules by the laws,” id. at 190, which may seem to be a different thing, but the two passages make clear that he is talking about God’s law. To rule by law, for John, is to promulgate true laws, that is, human laws that comport with Divine guidance.

53. Id. at 30–31; see also id. at 35–38 (an interesting blend of Old Testament, Greek and Roman authorities).


55. As it happened, John was friendly with Nicholas Breakspear, who became Pope Adrian in 1154, the only English Pope in the entire history of the Church. See Nederman, supra note 49, at xvii; see also John of Salisbury, supra note 26, at 132–33.

56. John of Salisbury, supra note 26, at 191; see id. at 205. As in many other passages, John contrasts the tyrant with the prince: “As the image of the deity, the prince is to be loved, venerated and respected.” Id. at 191.

57. Id. at 201; see id. at 201–05. This idea is derived from St. Augustine. See Augustine of Hippo, The City of God 10–11, 361, 662 (Marcus Dods trans., 1950) (426).

58. John of Salisbury, supra note 26, at 205 (“From all these sources it will be readily evident that it has always been permitted to flatter tyrants [as opposed to telling them the truth], it has been permitted to deceive them and it has been honourable to kill them if they could not be otherwise restrained.”).
sacred oath."

He says: “this method of eradicating tyrants is the most useful and the safest: those who are oppressed should humbly resort to the protection of God’s clemency and, raising up pure hands to the Lord in devoted prayer, the scourge with which they are afflicted will be removed.” The tyrant, says John, will either repent or suffer an unpleasant fate at God’s command. John gives no contemporary examples at this point, but it would certainly have been clear to any reader that all the knights and nobles in a contemporary monarch’s realm were bound to him through the feudal system, “by the obligation of fealty or a sacred oath,” and were thus required to suffer rather than being permitted to rebel. Then John seems to reverse himself again, declaring that soldiers must disobey their commander if they are ordered to violate the higher law. Unfortunately, he does not go on to explain how a soldier in the field can safely do so. In general, John is clear and courageous in endorsing tyrannicide and conscientious disobedience, but he seems to leave his contemporaries with no pragmatic solution besides silent forbearance and other-worldly vindication.

The most important political theorist in the century after John (the thirteenth), and indeed, one of the most important in the entire Western tradition, is St.

59. Id. at 209. His examples are drawn from the Old Testament, most particularly David, who waited patiently for Saul’s natural death rather than overthrowing him. John describes David as “the best of the kings about whom I have read and one who (except for his plot against Uriah the Hittite) advanced blamelessly in all his affairs . . . .” Id. Because his concern is whether a tyrant should be disobeyed, rather than the means of correcting his tyrannical acts, he focuses on David’s obedience to Saul, see 1 Samuel 24, and refers to the passage involving Uriah, which indicates one means of controlling the ruler, only in passing.

60. JOHN OF SALISBURY, supra note 26, at 209.

61. Id. at 210–11.

62. In his insightful discussion of John, Harold Berman suggests that the lack of contemporary examples was John’s way of protecting himself from controversy. BERMAN, supra note 48, at 282–83. If that is true, John might have been expected to come up with an example in this case, since Henry had plenty of enemies whom John could have safely characterized as tyrants. In fact, John is more likely motivated, in his choice of examples, by his antiquarianism, the general sense among medieval scholars that the Bible or the classics are more convincing than contemporary cases. John was not really as timid as Berman suggests. He ends Policing with a withering condemnation of contemporary Church politics, JOHN OF SALISBURY, supra note 26, at 216 (“[t]here is often dispute by ambitious men over the Roman pontificate and . . . the pontiff does not enter the Holy of Holies without the blood of brothers”), of the recently deceased King Stephen, id. at 215, and of Henry himself. Id. at 230 (“[H]e terrorises not only Provencal all the way to the Rhone and the Alps but he has aroused fear in the princes of the Spanish and the French (as though he were presently threatening the whole world) . . . .”).


64. JOHN OF SALISBURY, supra note 26, at 114–18. He explains that Christians rightfully served as soldiers under the anti-Christian emperors Diocletian and Julian because they were fighting the enemies of the Empire; “yet if they had been ordered to violate the law, they would have preferred God to man.” Id. at 117. He goes on to say: “[t]his formula is to be prescribed for and fulfilled by every soldier: that he will keep unimpaired first the faith owed to God, and thereafter the loyalty owed to the prince and the republic. And the most important matters always precede the lesser ones because faith is to be kept neither with the republic nor the prince contrary to God but instead according to God . . . .” Id.
Thomas Aquinas. St. Thomas was heavily influenced by Aristotle’s *Politics*,\(^{65}\) which had recently been translated into Latin by St. Thomas’s fellow Dominican, William of Moerbeke.\(^{66}\) He follows Aristotle in defining tyranny as the rule of one person who acts for his own personal gain, rather than for the good of the community,\(^{67}\) but emphasizes that such actions constitute a violation of God’s commands, thus continuing John’s theme that a tyrant is someone who acts in violation of the higher law.\(^{68}\) St. Thomas also agrees with John that a tyrant is not owed a duty of obedience. Laws that are “conducive, not to the common good, but rather to [the ruler’s] own cupidity or vainglory”—the essence of a tyrant’s enactments—are acts of violence, not laws, and need not be obeyed; laws that are opposed to the divine good, like “the laws of tyrants inducing to idolatry” must not be obeyed.\(^{69}\) In discussing the sin of sedition, he says: “there is no sedition in disturbing a [tyrannical] government . . . . Indeed it is the tyrant rather that is guilty of sedition . . . .”\(^{70}\)

St. Thomas’s clear recognition that natural law takes precedence over human law brings him face-to-face with the same difficulty that confronted John—the difficulty of enforcing this higher law against the ruler of society. Although Aquinas was not trained as a lawyer, he had a legal mind, and he addresses the problem by focusing on the procedures by which a tyrannical ruler might be deposed. This leads him to a number of empirical considerations that undermine his more heroic moral declarations.\(^{71}\) In the *Summa Theologica*, he notes that unjust laws should be obeyed to “avoid giving scandal or inflicting a more grievous hurt.”\(^{72}\) He expands this cost-benefit analysis by saying “there is no sedition in disturbing a [tyrannical] government . . . unless indeed the tyrant’s rule be disturbed so inordinately that his subjects suffer greater harm from the consequent disturbance than from the tyrant’s government.”\(^{73}\) His fragmentary

\(^{65}\) Aristotle, *Politics*, supra note 27.

\(^{66}\) See R.R. Bolgar, *The Classical Heritage and Its Beneficiaries* 229 (1954); Canning, * supra* note 48, at 125–26. The translation dates from around 1260. Thus, the *Politics* was not available to John.


\(^{68}\) 1 Aquinas, *Summa Theologica*, supra note 21, at I-II Q. 96, art. 4; I-II Q. 92, art. 1, rep. 4; I-II Q. 93, art. 3, rep. 2.

\(^{69}\) Id. at I-II Q. 96, art. 4; 2 Aquinas, *Summa Theologica*, supra note 21, at II-II Q. 104, art. 5 (“Therefore if the emperor commands one thing and God another, you must disregard the former and obey God.”); id. at II-II. Q. 104, art. 6, rep. 3.

\(^{70}\) 2 Aquinas, *Summa Theologica*, supra note 21, at II-II Q. 42, art. 3, rep. 3.

\(^{71}\) Arguments of this sort support the contention that Aquinas, despite his undeniable religiosity, represents a major step in the process of secularizing political thought. See Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages* 153–54 (1963).

\(^{72}\) 1 Aquinas, *Summa Theologica*, supra note 21, at I-II Q. 96, art. 4, rep. 3; see 2 Aquinas, *Summa Theologica*, supra note 21, at II-II Q. 104, art. 6, rep. 3 (“Wherefore if the prince’s authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger.”).

\(^{73}\) 2 Aquinas, *Summa Theologica*, supra note 21, at II-II Q. 42, art. 2, rep. 3.
treatise, *On Kingship to the King of Cyprus*, advances further empirical reasons for private forbearance: a tyrant is likely to respond by becoming more tyrannical if his control is threatened, the process of overthrowing a tyrant may create factionalized, chaotic conditions, and the person who defeats the tyrant by force may be even more tyrannical in turn. St. Thomas then adds the deontological consideration that Scripture “admonishes us to be reverently subject to our masters . . . .” His most profound point, however, is that allowing private actors to slay a tyrant would create the risk that they might slay a good ruler instead, particularly because good rulers often create disadvantageous conditions for the wicked.

St. Thomas, however, exempts public authorities from these empirical and deontological concerns. His principal example, which would echo through the ages, is when the creation of the monarchy “belongs to the right of a given multitude.” In that case, the multitude may depose a tyrant, even if it has “previously subjected itself to him in perpetuity.” This is not the social contract of the Reformation and subsequent eras but the constitutional contract of medieval thought, where a group of people who already constitute a civil society establish a particular kingdom as their chosen mode of governance. The example that everyone had in mind at the time, of course, was Saul’s selection as king of the Jews. Thus, St. Thomas’s recourse to the judgment of the multitude is not a universal argument, but one which only applies to particular regimes that can be characterized as having established a kingdom in this manner. In other circumstances, Aquinas says, “recourse must be had to God . . . .”

Despite the legal and political sophistication of St. Thomas’s approach, his constitutional contract argument leaves all the major problems that arise in the post-prophetic era unresolved. How does one determine whether the harm that results from resisting a tyrant will be greater than the harm the tyrant causes by its continued rule? How does one know when the multitude has the right to

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75. Id. § 44.
76. Id. § 46.
77. Id. § 47. Given that St. Thomas was a moral realist, for whom an objectively perceptible good was inscribed in the structure of the universe, his recognition that private efforts to resist tyranny would be colored by subjective perceptions seems particularly insightful.
78. Id. § 49; see Paul E. Sigmund, *Law and Politics*, in *The Cambridge Companion to Aquinas* 217, 220–21 (Norman Kretzmann & Eleonore Stump eds., 1993) (arguing Aquinas was one the first political thinkers in the Western world to favor popular participation in government).
79. *Aquinas*, supra note 26, § 49.
81. 1 Samuel 11, 12.
82. *Aquinas*, supra note 26, § 51.
choose the king, particularly when the king and his successors rule in perpetuity? It is equally unclear, moreover, how the multitude can depose the king, other than through the same violent processes that create all the disadvantages that St. Thomas ascribes to private action. There is, moreover, no obvious way to determine whether those acting for the multitude are good persons deposing a tyrant or wicked persons deposing a just and legitimate ruler. To summarize, there are two major difficulties with the right of revolution as Aquinas formulates it. First, to be anachronistic for a moment, the only weapon it provides to combat the ruler’s violation of the higher law is an atomic bomb, which people will be highly reluctant to use and which will produce disastrous consequences if they do. Second, it is unclear who is being entrusted with this fearsome weapon—is it all the people, some of the people, or the people’s representatives?


The next five hundred years saw monumental developments in Western political theory, but the difficulties that afflicted the right of resistance remained unresolved. Western thinkers continued to insist that there was a law that lay beyond the positive enactments of the ruler and that this law was as binding on the ruler as it was on its subjects. But they never articulated any practical mechanism by which this higher law could be enforced. To trace the multitudinous attempts to solve this problem across five centuries would be impossible in an essay of this length. For present purposes, however, it should be sufficient to highlight some of the most notable and significant efforts to fashion some doctrine by which a political ruler’s decisions could be subjected to a higher legal standard.

William of Ockham was probably the leading philosopher of the fourteenth century.83 A Franciscan monk, Ockham was called to Avignon by Pope John XXII to defend his commitment to apostolic poverty against a charge of heresy.84 Suspecting that he would not receive a fair hearing, he fled to the court of Louis VI, the Holy Roman Emperor, where he proceeded to produce a series of political works directed primarily against the Pope.85 Because his basic

83. Ockham’s philosophic system serves as a rival to that of St. Thomas and was often described as the via moderna. He rejected St. Thomas’s realistic epistemology in favor of nominalism and rejected his neo-Platonic assertion that God is inherently good with the voluntarist claim that God could have created any world He wanted and simply chose to create one where good prevails. The relationship between his epistemological and theological theories and his political theories remains a subject of debate. See generally MARYLIN MCCORD ADAMS, WILLIAM OCKHAM (1987); HARRY KLOCKER, WILLIAM OF OCKHAM AND THE DIVINE FREEDOM (1992); GORDON LEFF, WILLIAM OF OCKHAM: THE METAMORPHOSIS OF SCHOLASTIC DISCOURSE (1975).

84. See ADAMS, supra note 83, at xv–xvi.

85. See id. Marsilius of Padua had also fled to Louis VI’s court in Bavaria, ANTONY BLACK, POLITICAL THOUGHT IN EUROPE 1250–1450, at 55–56 (1992); CARY J. NEDERMAN, COMMUNITY AND CONSENT: THE SECULAR POLITICAL THEORY OF MARSIGLIO OF PADUA’S DEFENSOR PACIS 11–14 (1994), which certainly makes this court one of the greatest political science departments in history.
position is that the Pope and the Emperor possess separate and parallel jurisdictions, Ockham applies his criticism of papal power to the Emperor as well.

Ockham’s arguments against the Pope are one of the bases for the doctrine of conciliarism, which maintains that the Pope’s authority was subordinate to a general council of the Church. According to Ockham, this council can be assembled by representative mechanisms to discipline a heretical Pope. In the political sphere, a tyrannical king can be similarly disciplined. All people are free by divine law and all power comes from the people, Ockham maintains; the king serves as their minister, and retains his authority only if he meets their needs and remains obedient to the principles of natural law. Natural law can be instinctively perceived by all people, and “it is licit for each and every one to pronounce judgment” on a ruler who violates that law. Interestingly, Ockham’s precocious concept of representation, which he uses to explain how a general council of the Church can be constituted, is absent from his political theory, which simply asserts that any Christian may invoke God’s law in opposition to the king. He advances an impressive list of prohibitions on the ruler’s actions, much of which adumbrates modern human rights theory, but provides no practical guidance at all about the mechanisms that might be fashioned to achieve this goal.

Ockham’s separation of political and religious authority, together with the emphasis on individual faith and conscience in both his political and theological writings, can be regarded as an adumbration of Protestantism. But Protestant
political theory begins, in the first half of the sixteenth century, with the view that the king, far from being a representative of the people, derives his authority directly from God and must be obeyed without exception. The scriptural text that Luther emphasized is St. Paul’s directive: “Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that exist are appointed by God.” According to Luther, this applies to oppressive authorities as well, because “[a] Christian should be so disposed that he will suffer every evil and injustice without avenging himself.” If a tyrant forbids his subject from possessing copies of the Bible (this being the Catholic position), the subject should not obey, and if the tyrant punishes the subject for this disobedience, then, says Luther, “blessed are you; thank God that you are worth to suffer for the sake of the divine word.” In short, the early Lutherans reject the right of revolution, permit only passive disobedience, and offer no temporal solution to the punishment that would typically result from such disobedience. Without impugning their sincerity, one can readily discern a pragmatic motivation for their position, since early Protestantism was dependent on support from the German princes and later on northern European kings who resented the Church’s authority within their realms and cast covetous eyes on its extensive properties.

Counter-Reformation efforts by the Catholic Church, particularly after the Council of Trent, which met from 1545 to 1563, inspired the revival and expansion of St. Thomas’s philosophy in the middle and late sixteenth cen-


92. Romans 13:1 (New King James); see LUTHER, supra note 91, at 85–86. The passage continues: “Therefore whoever resists the authority resists the ordinance of God, and those who resist will bring judgment on themselves.” Romans 13:2. A citation such as this is particularly important for Luther, who established the principle of sola scriptura, the sole authority of scripture, as central to his concept of Christianity. See generally MARTIN LUTHER, THE BONDAGE OF THE WILL (J.R. Packer & O.R. Johnston trans., 1957) (1525).

93. LUTHER, supra note 91, at 101.

94. Id. at 112. This, of course, refers back to early Christian thinking about martyrdom under the pagan emperors of Rome. ROBIN LANE FOX, PAGANS AND CHRISTIANS 419–92 (1987). As Fox notes, some martyrs were so convinced that their suffering would secure their place in heaven that they would reject affirmative efforts by the Roman authorities to avoid imposing punishment. Id. at 421.

95. They also reiterated St. Thomas’s theme that even tyrants are established by God, with their depredations serving as punishment for their subjects’ sins. See SKINNER, supra note 91, at 19, 70.


Francisco Suarez developed what was probably the Thomists’ most extensive and sophisticated political theory, but his views are quite representative of a movement that was highly motivated to present a unified front against the Protestants. Suarez rejects the Lutheran belief that political authority is ordained by God. Rather, he argues, it is a human creation, which not only means that it is subordinate to the divinely ordained Church, but also that it is subject to divinely ordained natural law. With the benefit of intervening conceptual developments since St. Thomas, Suarez elaborates this idea by exploring the way in which political authority arises. In doing so, he and his fellow Thomists formulated an early version of the momentous idea that human beings once existed in a state of natural freedom and that they consented to relinquish their freedom in order to establish a civil society under government control. They thus transformed the constitutional contract theory of the Middle Ages into the social contract theory that became the Western world’s prevailing account of political legitimacy.

One might expect that this secularized vision of government would possess strong implications regarding resistance to political authority, and to some extent it did. Suarez and his fellow Thomists revive St. Thomas’s idea that positive enactments of a ruler that conflict with natural law are not binding on his subjects and that a ruler who enacts such laws is a tyrant who need not be obeyed. But Suarez also concludes that all people have a moral obligation to obey the laws and to do so voluntarily. Although political authority is not ordained by God, it is in harmony with natural law and human nature because...
people are naturally sociable and must have laws in order to live together in peace.\textsuperscript{105} He reiterates, at this point, that the commands of a tyrannical king are not binding on his subjects, then adds, somewhat unhelpfully: “[w]e deny that this is due to the essential character, or nature, of such principates, tracing it rather to the abuse of man.”\textsuperscript{106} The upshot is that Suarez is only willing to endorse a limited right of disobedience; when the ruler is not “engaged in an aggressive war designed to destroy the commonwealth, and kill large numbers of its citizens” but “merely injuring the commonwealth in other and less ways” then “there is no place for a defense of the community either by force or treachery directed against the life of the king.”\textsuperscript{107} And he fails to articulate any mechanism by which justified resistance could be undertaken.

During the middle and late years of the sixteenth century, when the Thomists were articulating their views, Protestant attitudes regarding secular authority began to change as political forces throughout Europe turned against them. The Calvinists, in particular, found themselves under threat of virtual annihilation from Charles V, the Holy Roman Emperor, his son, King Philip II of Spain, the anti-Huguenot turn of the Valois monarchy in France, the accession of the Catholic Mary Stuart, known to history as Mary Queen of Scots, to the throne of Scotland, and of the even more Catholic Mary Tudor, known to history as Bloody Mary, to the throne of England.\textsuperscript{108} Ideas about political resistance that had already begun to develop among the Lutherans during the Schmalkaldic War of 1548–49 in Germany were rapidly elaborated by Calvinist writers.\textsuperscript{109} They held fast to the idea that political rulers are ordained by God, in part because it was an essential basis for opposing the authority of the Catholic Church. But they responded to the awkward fact that these divinely authorized rulers were now seeking to destroy them by drawing, as the Thomists did, on the developing idea of political consent. Rulers are selected by the people, they argued, but this process can go wrong; when the people’s choice fails to reflect God’s will, they will get a tyrant, like Saul, rather than an ordained king like David.\textsuperscript{110} Then, relying on their theological beliefs about each individual’s

\textsuperscript{105} \textsc{Suarez, supra} note 21, at 362–72.
\textsuperscript{106} \textit{Id.} at 370.
\textsuperscript{107} \textsc{Skinner, supra} note 91, at 177.
\textsuperscript{108} For a summary of these events, see \textsc{Chadwick, supra} note 96, at 157–75, 211–47; \textsc{Winston Churchill, A History of the English Speaking Peoples: The New World} 86–101 (1956); \textsc{Elton, supra} note 96, at 239–73; \textsc{MacCulloch, supra} note 96, at 270–484. Mary Tudor’s sobriquet comes from her savage persecution of the Protestants, both Lutheran and Calvinist, in England.
\textsuperscript{109} \textsc{Skinner, supra} note 91, at 191–206.
\textsuperscript{110} \textsc{Christopher Goodman, How Superior Powers Ought To Be Obeyed Of Their Subjects: And Wherin They May Lawfully Be Disobeyed and Resisted} 49–51 (Geneva, John Crispin 1558); \textsc{John Ponnet, A Short Treatise of Politique Power and of the True Obedience Which Subjects Owe to Kings, and Other Civill Governour’s} 45–47 (1642) (1556). Goodman further explains that a rightful king can be known by two means; first, “the express commandement and promesse made to some especiall man,” and second, by God’s “worde, which he hathe now left to all men to be the ordinarie means to reveal his will and appointment.” \textsc{Goodman, supra} at 50. This does not provide a great deal of guidance for a secular theory of government.
personal relationship with God, the Calvinist writers argued that ungodly kings, representing the erroneous choice of an ungodly people, must be resisted.\textsuperscript{111} Calvin sounds this theme briefly at the end of his major work, \textit{Institutes of the Christian Religion}, where he says that “the king had exceeded his limits, and had not only been a wrong-doer against men, but in lifting up his horns against God, had himself abrogated his power.”\textsuperscript{112} Christopher Goodman expounds the same idea at greater length: kings who abuse their position, “liftinge themselves above God and above their brethren, to drawe them to idolatrie, and to oppresse them, and their contrie: then are they nomore to be obeyed in any commandements tending to that ende.”\textsuperscript{113} Ponnet goes beyond disobedience and recommends assassination, but he concedes that this might be difficult for people to carry out, and ultimately concludes that “God hath left unto them two weapons, able to conquer and destroy the greatest Tyrant that ever was, that is, \textit{Repentance} and \textit{Prayer.”}\textsuperscript{114} In other words, despite the sophistication and creativity of his analysis, he has no definitive solution to the problem.\textsuperscript{115}

Still another strategy that some of the Calvinists settled on was to assign the authority to resist a tyrannical ruler to popularly elected magistrates.\textsuperscript{116} Calvin takes this position in the \textit{Institutes}, treating the magistrates’ obedience to a despotic king as a dereliction of their duty to the people.\textsuperscript{117} This translates St. Thomas’s particularized concept of magisterial control, which was based on the constitutional contract theory of his day, into a generalized concept that at least suggests social contract theory. The idea of empowering subordinate magistrates to resist an ungodly monarch might appear to be the first pragmatic mechanism

\textsuperscript{111} GOODMAN, \textit{supra} note 110, at 55–56; PONNET, \textit{supra} note 110, at 52–53.

\textsuperscript{112} JOHN CALVIN, \textit{INSTITUTES OF THE CHRISTIAN RELIGION} 1520 (John McNeill, ed., 1960). The particular king to whom Calvin is referring is Darius. \textit{See} Daniel 6. Calvin does not indicate whether he is recommending anything beyond passive resistance; the thrust of the argument is simply that royal action that contradicts the word of God lacks the force of law and should “go unesteemed.” CALVIN, \textit{supra}. He answers the concern that this principle demeans the dignity of the king with the conventional point that there is no shame in any person’s humbling himself or herself before God.

\textsuperscript{113} GOODMAN, \textit{supra} note 110, at 59. He continues: “And in that case, to obeye God, and disobeye man, is true obedience, how so ever the worlde judgeth.” \textit{Id.} at 60–61; \textit{see also} DAVID BALL, \textit{THE HISTORICAL ORIGINS OF JUDICIAL REVIEW}, 1536-1803, at 86–103 (2005). I am indebted to my colleague, Dan Sharfstein, for bringing Professor Ball’s book to my attention.

\textsuperscript{114} PONNET, \textit{supra} note 110, at 58. He explains: “\textit{Repentance} for their owne sinnes, which provoke the anger and displeasure of God and make him to suffer Tyrants . . . And \textit{Prayer} that hee will withdraw his wrath, and shew his mercifull countenance.” \textit{Id.}; \textit{see also} BALL, \textit{supra} note 113, at 71–86.

\textsuperscript{115} In fact, Ponnet makes an intriguingly close approach to the idea of judicial review, but does not quite reach it. He asks “why Christian men never made expresse positive law of the kind of punishment of tyrants.” \textit{Id.} at 52. His response is that such laws already exist—the ordinary laws against theft, murder, rape, etc., which judges can apply to an unjust ruler. If the judges will not act, he continues, then ministers should condemn the ruler and “excommunicate” him. If the ministers fail to act, then it is proper for individuals to assassinate the tyrannical ruler. But he then recognizes that this entails risks, and resorts to repentance and prayer. \textit{Id.} at 52–58. In short, Ponnet has the general idea that the right to resist can only be effective if it can be exercised by designated officials, but he cannot quite perceive how this can be done.

\textsuperscript{116} BALL, \textit{supra} note 113, at 45–54; SKINNER, \textit{supra} note 91, at 230–36.

\textsuperscript{117} CALVIN, \textit{supra} note 112, at 1519.
for enforcing higher law against the ruler of a polity. In fact, it represents an important step toward controlling royal power, but on the basis of mixed government, not the enforcement of higher law.  

It incorporates either aristocratic or democratic elements into the constitution of the polity, thus counterbalancing, and potentially controlling, the power of the monarch. But it does not help in enforcing higher law against the ruler because the elected magistrates function as part of the ruler, not an outside force that acts upon it. In practical terms, the king and magistrates may disagree, and each may claim the support of higher law, but there is no definitive way to resolve this disagreement, as St. Thomas so presciently discerns. This means that such disagreements must be resolved by political mechanisms of one sort or another. Mixed government creates a more complex ruling authority with important internal controls, but it does not address the problem of compelling the ruler, however complex, to obey external limits on its actions. Society is thus thrown back, as before, on the fearsome and ungainly right of revolution or resistance.  

D. THE MODERN ERA

Social contract theory, already important to both the Thomist and Calvinist accounts of rightful kingship, became the prevailing justification for governmental power in the seventeenth and eighteenth centuries and probably remained so until relatively recent times. Every political writer was aware, of course, that the parties’ obligations in an ordinary contract are limited by the terms of the initial agreement. But this was the era where religious conflicts had led to civil war in Germany, France, England, Scotland, the Netherlands, and other places, as well as nearly continual war among these nations. People yearned for peace and many political writers continued the earlier reluctance to endorse resistance to established authority. They embodied this reluctance in the theoretical view that the social contract constituted a complete renunciation of the people’s natural freedom and in the pragmatic view that any lesser renunciation would inevitably lead to anarchy. Hobbes’s *Leviathan*, perhaps the best-known articulation of this position, argues that the purpose of the social contract is to preserve

118. According to Aristotle’s seminal formulation, there are three types of moral government: the rule of one, or monarchy; the rule of the few, or aristocracy; and the rule of the many, which we currently call democracy. Aristotle, supra note 27, bk. IV. A mixed government consists of institutions based on all three principles, potentially achieving the advantages of each while avoiding the danger of tyranny, oligarchy, or mobocracy into which each moral form of government can degenerate, in Aristotle’s formulation.  

119. Calvinist thought on the right to resist continued, not surprisingly, through the English Revolution, but with no advances on the troublesome question of implementation. For an excellent discussion of this body of work, see Ball, supra note 113, at 159–261.  

120. See, e.g., Hobbes, supra note 8, pt. I, chs. 13–14; Kant, supra note 102, §§ 43–49; Locke, supra note 23, §§ 77–122; Pufendorf, supra note 23, bk. VII; Rousseau, supra note 30, bk. I, chs. 5–9. For contemporary versions, see generally David Gauthier, *Morals by Agreement* (1986); John Rawls, *A Theory of Justice* (1971). Contractarian thinking serves as the theoretical basis for the interpretive stance of originalism. See infra section II.B. At present, it has probably been supplanted by deliberative democracy as the primary justification for our form of government. See infra section III.C.
people’s lives, which requires an all-powerful state.\textsuperscript{121} The only limits on the state is that, consistent with its purpose, it may not ask people to sacrifice their lives as soldiers and that it may not demand that they incriminate themselves when accused of a crime.\textsuperscript{122}

But the revolutionary implications of social contract theory were also widely recognized. According to Locke, the reason people enter society is not merely to preserve their lives, but to preserve their property.\textsuperscript{123} This leads to more extensive limits on the ruler than Hobbes was willing to acknowledge: “whenever the legislators [or executive] endeavor to take away and destroy the property of the people, or reduce them to slavery under arbitrary power, they put themselves in a state of war with the people, who are thereupon absolved from any further obedience . . . .”\textsuperscript{124} Locke is acutely conscious of the charge that allowing disobedience on these grounds will encourage rebellion and lead to anarchy. His theoretical response is essentially the same as St. Thomas’s: that unjust rule constitutes violence against the people, so there is no sense suffering such rule in the interest of avoiding violence. The blame for any further violence, Locke suggests, lies with the ruler, not the people. His pragmatic response is that the “slowness and aversion in the people to quit their old constitutions”\textsuperscript{125} means that “revolutions happen not upon every little mismanagement in public affairs” and that “[g]reat mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be born by
the people without mutiny or murmur.”

Despite his endorsement of the right to disobey, and his assertion that this right can be triggered by a wide range of governmental misbehavior, Locke offers no workable procedures for implementing it in anything less than cataclysmic circumstances. If a disagreement arises between the ruler and some group of citizens, “the proper umpire, in such a case, should be the body of the people.”

His notion seems to be that the people will suffer patiently as violations of their rights accumulate, until finally they rise up en masse, overthrow the government and establish a new one. He offers a strong, indeed path-breaking account of legislative power and representative government in other sections of the Second Treatise, but he does not give popularly elected magistrates or legislators the role that even St. Thomas was prepared to grant.

Rousseau is traditionally regarded as one of the most important progenitors of the French Revolution, but he explicitly excludes any discussion of revolution from The Social Contract, contenting himself with the standard statements about popular forbearance and ultimate confrontation. He does, however, have a number of pragmatic things to say about controlling government officials. Most notably, he advances the idea that an institution, functioning as an integral component of the government, might be established to “maintain the equilibrium between the [executive and legislature], and preserve their respective rights.”

In an intriguing adumbration of Bickel’s characterization of the Supreme Court as the “least dangerous branch,” he says:

The tribunate should not possess any executive or legislative power whatever. It is precisely because it is itself unable to take any action whatever that it is in a position to prevent any action whatever. It is precisely because it confines itself to the defense of the laws that it is more inviolable, and held in

126. Id. § 225.
127. Id. § 242. He adds: “The power that every individual gave the society, when he entered into it, can never revert to the individuals again, as long as the society lasts, but will always remain in the community.” Id. § 243.
128. Id. §§ 134–171.
130. Rousseau, supra note 30, bk. 1, ch. 1 (“As long as a people is constrained to obey, and does obey, it is acting rightly, but once that people is capable of shaking off its yoke, and does shake it off, it is acting more rightly.”). This follows his famous opening where he says that “Man was born free but is everywhere in bondage,” and that he does not know how this situation has occurred. Id.
131. Id. at bk. 3, ch. 7. He conceives this institution as modeled on the ancient Roman Tribunate, although he also compares it to the Spartan Ephorate. Id. at bk. 4, ch. 5.
greater reverence, than the prince (who executes the laws) or the sovereign (who legislates them).133

Although the equilibrium between the Executive and the Legislature is a constitutional issue, Rousseau seems to have positive law in mind when he speaks of his Tribunate’s “defense of the law.” In fact, the entire mechanism is presented as a means of implementing enacted law rather than imposing any higher law upon the ruler, something that would not be necessary in the republic he envisions because that republic would embody the “general will.”134 Despite the obligatory classical references, his idea of a Tribunate may have been modeled on the Parlement of Paris, which was required to approve royal legislation, although its authority had been partially undermined by Bodin’s theory and Louis XIV’s practice.135 From this perspective, Rousseau’s Tribunate and the Parlement itself may be linked to Lord Coke’s opinion in Dr. Bonham’s Case,136 which modern scholars regard as a matter of statutory interpretation, not natural law.137 These governmental mechanisms were being developed or conceived during this period from the ground up, as it were, to guide the process of enacting legislation, but they were not linked to the right to resist or the effort to impose the external standards of higher law upon the ruler. The latter remained isolated in the more recondite realm of political theory.

This is not to say that the right to resist, or the entire concept of a higher law


134. RoussEau, supra note 30, at bk. 4, ch. 1. The general will can be regarded as an embodiment of higher law, in that citizens, in subjecting themselves to it, are in fact free because they are living in accordance with their innate reason, which is the standard way in which humans perceive higher law. See Peter Gay, The Enlightenment: The Science of Freedom 548–52 (1969); Murray Forsyth, Hobbes’ Contractarianism: A Comparative Analysis, in Hobbes to Rawls, supra note 80, at 35, 40–41. That would eliminate the need for revolution or judicial review, since the higher law and the policies of government would always coincide. It would also explain the pragmatic tone of the separation of powers analysis from this most emotional of Enlightenment authors; the point is to construct a government that allows the general will to be expressed. Thus, Rousseau, like Tushnet, see supra note 3, can be regarded as favoring legislative supremacy. But Rousseau’s legislature is not a representative body. See Rousseau, supra note 30, bk. 3, chs. 11–15. Rather it is a gathering of all the citizens, that is, a direct democracy as in Ancient Greece. Id. at bk. 4, chs. 2–3; see also J.G. Merquior, Rousseau and Weber: Two Studies in the Theory of Legitimacy 56–62 (1980) (arguing that Rousseau’s doctrine of the general will is best understood as endorsing participatory democracy). Thus, Rousseau’s Social Contract is ultimately more of an aspirational document than a pragmatic one, despite its discussion of the Tribunate. In particular, it has nothing pragmatic to say about the imposition of higher law on the ruler.


that binds the ruler, lacked practical significance. Clearly, it was important to people who actually wanted to rebel, as was true of many colonial Americans by the 1770s. In drafting the resulting Declaration of Independence, Jefferson, who was well versed in contemporary political theory, justified the American Revolution in terms of the social contract theory that had developed during the past two centuries and the natural rights theory that, although medieval in its origins, was less than a century old in the form that he employed. But with respect to the right of revolution itself, all he could say was the following: “A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.”139 “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed.”140

This language comes most directly from Locke, but it is essentially the same language about tyranny, the willingness of people to forbear, and the ultimate right of revolution, that John of Salisbury and St. Thomas Aquinas had used. King George could be charged with violating higher law, but he could not be charged with ignoring any mechanism for imposing higher law upon a monarch because no such mechanism had ever been developed. As the American revolutionaries realized when they declared their independence, this basic problem in the Western theory of governance had remained unsolved since its first articulation some six hundred years before.

II. JUDICIAL REVIEW AS AN ALTERNATIVE TO RESISTANCE

Perhaps as soon as the American colonies declared their freedom in 1776, and certainly as soon as they had definitively gained it in the early 1780s, they had to govern themselves.142 By 1803 at the latest, a mere twenty or twenty-five years after they had begun this process, they had solved the long-standing quandary of the right of revolution and resistance—how to enforce the principles of higher law against the ruler. This solution, of course, was judicial review, the authority of a duly-designated court to hold, as a matter of law, that a particular action of the ruler was void because it violated the jurisdiction’s written constitution.

The essential meaning of this device is that the ruler, however dominant, is not universally supreme, that there is some set of decisions that can be counter-
manded by another institution here on Earth and within society. That institution must be independent of the ruler’s control or it would not be able to reach conclusions that differed from the ruler’s. In addition, its operational authority—its authority to exercise control over society—must be delimited or the implementing institution would itself be a ruler exempt from external control. Creating such an institution is a complex political task because it contradicts the hierarchical command structure that so often serves as an organizing principle for governance.

To achieve this complex task, three basic components are required: the codification of higher law in a form accessible to all members of society; the identification of an institution that can apply definitive interpretations of that law to the ruler; and the agreement of all governmental actors that these interpretations are definitive or supreme. The United States stumbled upon this solution because of the possibly fortuitous interaction of the Constitution and the judicial system it had inherited from British rule. Having codified higher law in the document that created the nation’s government, it then found that the inherited Judiciary was able to interpret the document, willing to apply it to the ruler, and sufficiently familiar and prestigious to have these decisions accepted by the entire society.

A. THE MEANING OF JUDICIAL REVIEW

The traditional view is that the idea of judicial review was first articulated by Chief Justice John Marshall in the 1803 decision of *Marbury v. Madison*.143 Recent historical scholarship has emphasized the significant number of state court decisions holding legislative enactments in violation of their state constitution or Confederation law throughout the 1780s and 90s.144 In a widely cited study, Sylvia Snowiss argues that these decisions cannot be regarded as forerunners of *Marbury* because the state courts were not interpreting the language of the state constitutions.145 Rather, she argues, they viewed a written constitution as ending the state of nature to which the colonists had returned as a result of the Revolution, thus permitting courts to resist concededly unconstitutional enactments the same way that any other citizen was entitled to resist.146 She writes: “Enforcement of fundamental law was a political act, a peaceful substi-


144. KRAMER, supra note 1, at 49–72; Harrington, supra note 5, at 68; Hulsebosch, supra note 5, at 862; Treanor, supra note 5, at 474.

145. SNOWISS, supra note 5.

146. Id. at 23–30, 73–92.
tute for revolution presented as a superior alternative to petition or universal resistance.147 Larry Kramer follows this interpretation in formulating his argument that the founders looked to the people as well as the courts to interpret the American Constitution.148 In response, however, several other scholars have argued that the state courts were in fact interpreting the constitutional text and treating their decisions as ordinary legal interpretations.149

For present purposes, there is no need to resolve this issue. Everyone agrees that the principle of judicial review, which allows the courts to declare duly enacted national legislation invalid on constitutional grounds, had been articulated by 1803, even if doubts remained about its scope. Snowiss’s analysis is important, however, because its converse illuminates the essential meaning of judicial review: Whether or not judicial review before Marbury was seen as an act of revolution or resistance, the fact is that after Marbury, it served as an alternative to these extreme responses.150 It was no longer necessary for people to tolerate Legislative or Executive actions that violated the higher law that the rulers were supposed to obey. It was no longer necessary for them to wait until such violations accumulated to the point where they became intolerable. And it was no longer necessary for them to resort to violence, risking their lives and disrupting their society in order to enforce the higher law by means of disobedience or revolution. Rather, they could rely on an established institution, the Judiciary, to impose higher law on the rulers, whether Legislative or Executive, in the ordinary course of their assigned decisionmaking function.

In short, judicial review domesticates the right of revolution or resistance.151 It establishes an institution that can take the place of Nathan in a secular society

147. Id. at 50 (footnote omitted).


150. According to BALL, supra note 113, at 306–42, Marshall was aware of the Calvinist literature on the right to resist and may have been influenced by it.

151. Cf. Bruce Ackerman, Revolution on a Human Scale, 108 YALE L.J. 2279 (1999). Ackerman proposes that we differentiate among different levels of revolutionary change by recognizing that there are partial revolutions, that is, revolutionary changes in particular political or social institutions, that fall short of the total revolutions that attract so much attention, such as the Russian and the French. See, e.g., CRANE BRIGHTON, THE ANATOMY OF REVOLUTION (rev. ed. 1965); THEEDA SKOCPOL, SOCIAL REVOLUTIONS IN THE MODERN WORLD (1994). He labels these events unconventional, as opposed to ordinary change, their hallmarks being that the people are mobilized and the usual patterns of governance are circumvented or rejected, without a complete transformation of the existing governmental structure. While these events are less traumatic than total revolutions, they are necessarily unusual and typically disruptive. See ACKERMAN, TRANSFORMATIONS, supra note 17. The point here is that judicial review achieves a result that could only be achieved by one of Ackerman’s unconventional changes into ordinary change. It not only domesticates a total revolution, but also a partial revolution.
and enforce the higher law against the ruler. It creates a mechanism to reverse a particular action by the ruler on the basis that it violates this higher law without the need to confront the ruler’s general authority or to demand regime change as the means of enforcement. A pragmatically usable weapon has been added to the arsenal that previously included only the atomic bomb of revolution or resistance, or—to switch to a more domestic metaphor—it allows governmental action to be reversed at retail.

We are sufficiently familiar with judicial review to regard it as an obvious device, albeit far from an uncontroversial one. But consideration of the six-hundred-year-long effort to implement the right of revolution or resistance suggests that it is only obvious once a long process of conceptual development has reached its conclusion. People seem to believe instinctively that the ruling political authority in a society cannot be controlled by any other actor, that it must have the final word in any confrontation. Jean Bodin’s classic conception of sovereignty as indivisible remains with us to this day. The ruling authority in society, whether executive, legislature, or a complex combination of the two, must be supreme. To be controlled, according to this view, is to be subordinated, as the states are to the federal government or a conquered nation to its conqueror. The idea that someone who is subordinate to the ruler for most purposes, and in most situations, can nonetheless countermand the ruler’s actions in other situations appears to belong to the world of faith or myth that the Old Testament portrays. How could this function be contained within its proper boundaries? Why should the ruler, who by definition commands the physical forces of the government, obey? And how can the dominant theory of governmental legitimacy, whether based upon democracy or on some other rationale, also allow for this breach of the political decisionmaking process it has authorized and justified?

One possible answer, suggested by the Americans of the Revolutionary


153. One institution that has been somewhat entranced by this traditional notion of sovereignty is, interestingly, the Supreme Court. Although committed to judicial review in cases involving American citizens, it has deferred to congressional judgments in immigration cases, where the issue of national sovereignty is explicitly raised. See T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002). The result is that higher-law doctrines such as equal protection, due process, and individual rights, which have been imposed on government actions, involving citizens through judicial review, have not been imposed on actions involving immigrants. The government, as Aleinikoff describes, has chosen not to adopt these principles of higher law on its own. Aleinikoff’s recommendation is that the Court penetrate the barrier of sovereignty theory and apply the higher law to immigrants as well. Id. at 182–96. One can disagree with this recommendation, but it would be hard to disagree with Aleinikoff’s description about the consequences that follow in the absence of judicial review.
generation, is that sovereignty resides with the people and not with any governmental institution. This may have in fact provided the grounding for the development and recognition of judicial review, but there is an element of wordplay to it; the real question involves the relationship among different components of government, not the relationship between the people and the government. H.L.A. Hart’s analysis of the rule of recognition is more illuminating. According to Hart, a legal system is established when society agrees upon a master rule that identifies the subsidiary rules that govern the society and establishes the procedure by which additional rules can be created. While the rule of recognition might identify a single sovereign, it might also point to a complex set of institutional arrangements, such as the Constitution of the United States and the amendment process it incorporates. In a recent article, Bruce Ackerman argues that this view is itself too simple and that our legal system is defined by our political consciousness and institutions in addition to the Constitution. But Hart’s theory is sufficiently complex to allow him to distinguish between supreme and unlimited authority, which is the crucial point for present purposes. He says: “notions of a superior and a supreme criterion merely refer to a relative place on a scale and do not import any notion of legally unlimited legislative power.” The two are easy to confuse, and are conflated in many simple societies, but they are quite separate in constitutional regimes such as the United States.

Thus, in a sophisticated, well-ordered society, the ruler’s word does not always need to be the final one. It can be final in most circumstances, and yet be reversible in certain others, without displacing the ruler through the dangerous and generally violent act of revolution. When judicial review forbids the ruler

154. See Bernard Bailyn, The Ideological Origins of the American Constitution 198–229 (rev. ed. 1992); Wood, supra note 31, at 524–47, 596–615. This also provided a rationale for federalism, that is, a division of political authority between the state and federal governments.


from taking a specific action, the foundations of society do not crack and the ruler does not lose its authority in other areas. At the same time, the ruler does not disobey the judgment of illegality and does not, in an enraged attempt to restore its injured dignity, kill or imprison those who have rendered that judgment. Instead, it obeys and goes on ruling as before. Sometimes it apologizes, the way David did, sometimes it complains, and sometimes it harrumphs, but it accepts the judgment and is generally none the worse for it.

Gerald Rosenberg has characterized the expectation that constitutional courts can achieve significant political or social change as a “hollow hope,” and other political scientists, such as Donald Horowitz and Stuart Scheingold, concur with this assessment. For example, Rosenberg asserts that the federal agencies authorized by the President and Congress, not the courts, were responsible for integrating southern schools. As I have argued elsewhere, claims of this nature are necessarily based on speculative counterfactuals—would the federal government have acted in the absence of Brown v. Board of Education, would states have abolished their anti-abortion laws had they not been invalidated by Roe v. Wade? Moreover, these claims misunderstand the nature of political and social change, which by their nature cannot be attributed to a single actor, even in cases of foreign conquest. For present purposes, however, the point is simpler. As stated above, the ruler of a polity is the entity that “successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order.” In a regime where judicial review prevails, invalidation of the ruler’s action by the court denies that action one of the two definitional features of rulership; however much force the ruler deploys, its action is no longer legitimate in Weber’s sense—that is, it is no longer an authorized action of the ruler.

Enabling a governmental institution to remove the authority behind the act of

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Thought, 89 Minn. L. Rev. 342 (2005); Lars Noah, Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority, 1997 Wis. L. Rev. 873.

For a critique of this approach, cast in terms of sovereignty, see Paul R. Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It (2007).


165. 1 WEBER, supra note 7.

166. I have previously noted that there are severe conceptual problems with the notion of legitimacy in a modern state. Rubin, supra note 51, at 144–78. What Weber really means is authority, a concept more closely related to Hart’s rule of recognition, see Hart, supra note 155, than to the medieval notion
the ruler is a tremendous thing, no matter what its immediate consequences may be. It reverses the presumption of validity that ordinarily accompanies the ruler’s actions. Prior to judicial invalidation, the actions of the ruler are viewed as lawful and place certain demands on law-abiding citizens, even if those demands are not always obeyed. Once invalidated, the same action, by the same ruler, is no longer binding law, and is no longer supposed to be obeyed at all. Acts of resistance that were previously illegal are now lawful, and continued implementation of the action must be either clandestine or insubordinate.167

Consider Rosenberg’s principal example, the Supreme Court’s decision in Brown.168 While it is certainly true that there was widespread resistance,169 those who resisted had lost the legal authority that they possessed before the cases were decided. They were necessarily on the defensive, no matter how forceful or prolonged their resistance. That lack of authority, and the defensiveness it necessarily engenders, makes a difference in itself, no matter how difficult it may be to measure the pragmatic impact of the decision in isolation from other political, social, and legal developments.

B. THE COMPONENTS OF JUDICIAL REVIEW

In order for higher law to function as a pragmatically effective constraint upon the ruler, there must be some set of procedures by which that law can be translated into real-world actions. These procedures are the codification of the higher law in legally cognizable language, reliance on an institution that is recognized as competent to interpret this law, and a social agreement that the interpretations of that institution are supreme and must therefore be obeyed.

From the Middle Ages through the Enlightenment, higher law meant natural law—the law of God that was revealed to human beings through faith or reason.170 The problem with it, then as now, is that it did not appear in any

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167. David Halberstam reaches a similar conclusion in his historical study of the era. Brown not only legally ended segregation, it deprived segregationist practices of their moral legitimacy. It was therefore perhaps the single most important moment in the decade, the moment that separated the old order from the new and helped create the tumultuous era just arriving . . . . Because of Brown, reporters for the national press, print and now television, felt emboldened to cover stories of racial prejudice.


168. See also Bolling v. Sharpe, 347 U.S. 497 (1954) (declaring school segregation in the District of Columbia unconstitutional). Bolling is a simpler case because it does not implicate the complex issue of federal-state relations that were involved in the four states whose school systems were considered in Brown. State governments are not rulers in Weber’s sense and can be constrained by the federal government.


170. See sources cited supra note 21.
authoritative written form, that is, in any written form that the majority of social actors could agree upon. Everyone at the time agreed on the authoritative nature of the Bible, which contains the Ten Commandments. This is presumably the law that Nathan accused David of having violated, but the general principles of morality embodied in the Decalogue are not sufficient to constrain the ruler of a complex society. The crucial question, as identified by John of Salisbury and St. Thomas, is whether the ruler will follow the dictates of natural law by acting for the benefit of the people, or whether it will fail to do so and thus become a tyrant. 171 But what this means—what specific requirements natural law imposes and what oppressions or dissipations it forbids—will always be a matter of debate. Among other vectors of disagreement, the ruler will have one view and its critics will have a different one.

The codification of higher law in a definitive and accessible form does not eliminate uncertainties in interpretation, but it does eliminate uncertainty about what is being interpreted. 172 This is true for natural law that is presumed to originate with God or nature, and it is equally true for the mutual understandings of society presumed to originate with the social contract. In other words, while codification of these widely held but vaguely articulated principles does not terminate debate about the issues that the codification addresses, it channels this debate into a reasonably coherent social discourse. This provides a significant increase in certainty, even if it falls short of the total certainty that many people wish for. Moreover, for those, like the proponents of discursive democracy, who believe that such debate has intrinsic or pragmatic value, 173 this channelling may be more valuable than certainty, the theory being that it allows genuine disagreements to be expressed and resolved rather than suppressing them with an artificial certainty that will explode in violent conflict at some future time. 174

Another advantage of codifying higher law, and one that is more subtle than certainty, is that it brings that law down to earth. This is not the same as

171. 1 Aquinas, supra note 21, pt. I-II Q. 96, art. 4; see id. at pt. I-II Q. 92, art. 1, rep. 4; pt. I-II Q. 93, art. 3, rep. 2; John of Salisbury, supra note 26, at 28, 190–91.

172. Thomas Grey seems to have suggested a contrary view, namely, that judges were basing their decisions on natural law considerations that reflected the existence of an unwritten constitution. See Thomas Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 705–06 (1975). Even this does not deny the significance of a written constitution as a platform for the judges’ natural law excursions. But in a subsequent article, Grey acknowledged that the divergent opinions he was describing could be better attributed to differing interpretations of the written document. Thomas Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 1–2 (1984).

173. See infra note 272 and sources cited therein.

174. For discussions of this notion of deliberative or discursive democracy with specific reference to judicial review, see generally John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999); Robert Cover, The Supreme Court 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983); Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4 (1996). The classic statement of the idea that judicial review can disrupt the preferable processes of democracy, Bickel, supra note 14, draws on the Legal Process notion of democracy, which is related to the theory of deliberative democracy, but pre-dates its modern efflorescence.
secularism. Many deeply religious people believe that God is beyond human comprehension and that His will is beyond the reach of human effort. If the source of higher law lies in the supernatural realm, they are likely to conclude that it is similarly incomprehensible and impenetrable, despite the fact that it is supposedly directed toward human relations. These attitudes may be partially responsible for the medieval beliefs that tyrants serve God’s obscure purposes, such as punishing a society for its sins and that a tyrant’s punishment must be consigned to the afterlife. Neither belief is likely to induce people to search out pragmatic methods for imposing higher law upon the ruler, however. And when secularism does take hold, as it did during the Enlightenment,\textsuperscript{175} an uncodified natural law will be still less likely to yield pragmatic consequences. Even if people believe that it can be discerned from observation of the natural order, without reliance upon faith, its supernatural origins will impede its application. Moreover, the social contract, although regarded as of naturalistic origin, suffers from this same ethereality because it is always assigned to some remote, quasi-mystic past. Once the higher law is codified, once it becomes definitely part of this world, the argument that it should produce real-world results becomes substantially easier to maintain.

The second aspect of judicial review that enables it to domesticate the right of revolution is its location in an institution that can interpret higher law in a politically and socially acceptable manner. Revolution is justified, according to the view that Western political theorists have maintained since the twelfth century, when the ruler acts contrary to higher law. That convincing but unwieldy right can be domesticated if there is some social actor capable of making demands upon the ruler in the name of higher law, as Nathan made on David. This is not to say that the higher law has no intrinsic impact on the ruler, but rather that an understanding of the higher law that diverges from the ruler’s understanding cannot be imposed upon the ruler unless there is some institution in society that can articulate and impose that divergent view. It is probably the case that any ruler, no matter how oppressive or depraved, will believe itself justified by higher law; the more perverse the ruler is, the more perverse its understanding of the higher law will be. But it is not even necessary to assert this empirical hypothesis. As a general matter, a view of higher law that diverges from the ruler’s view simply cannot be imposed upon the ruler by any means other than disobedience and rebellion unless there is an institution—a human actor—that is authorized to impose it. Lacking such an institution, the ruler’s view, whether it is an interpretation of higher law or a conscious violation of that law, necessarily prevails. In response to this troublesome but ineluctable circumstance pre-modern thinkers fell back on the religiously motivated view that unjust rulers were punishing their sinful subjects in this world and would be punished for their own sins in the next world. A secular theory of government denies us the sense of reconciliation and vindication that this view

provides and makes the felt need for an institutional actor more insistent than before.

If divergent ideas of what the codified higher law requires cannot be effectively imposed upon the ruler in a real-world setting without an authoritative institution, the obvious question is what that institution should be. It is equally obvious that it cannot be the ruler or anyone directly subject to the ruler. When the ruler or its subordinate interprets the higher law, it will generally find an interpretation that favors its own position and any constraining effect of higher law will be lost. This creates a quandary, however, because the ruler, in a stable situation, is the institution that the society accepts as the controlling political authority. Consequently, the institution that interprets the higher law and uses that interpretation to constrain the ruler must have a considerable amount of political prestige and popular support. To be more precise, the institution needs to possess this prestige and support for the particular, politically challenging role that it must play: confronting the ruler and reversing the ruler’s decision in specific instances.

The Catholic Church, going all the way back to its legalization by the Emperor Constantine, never succeeded in establishing this authority, despite the tremendous prestige that it commanded. European political rulers, although not themselves priests, were able to assert that they were Christians and that their interpretation of natural law in the realm of governance was just as valid as the Church’s. The controversies ensuing from this assertion raged throughout the Middle Ages. But it is clear from the Holy Roman Emperor’s almost continuous intransigence, the royal dominance of Church facilities in Spain and France, and the vigorous theoretical opposition to papal claims from towering intellectual figures such as Ockham, Dante, and Marsilius of Padua, that the Church never made much headway in its effort to impose its view of higher law on Western rulers who held different views.

Given this history, the rapid success of judicial review in the United States is particularly notable. The crucial insight was that courts could be used to impose the higher law. It would of course have been preferable to state this choice in the founding document, but the founders did not have this insight clearly in mind when they drafted the written constitution; rather, it seems to have gradually dawned on Americans as they began to live under their new constitu-


177. See Dante, Monarchy (Prue Shaw ed. & trans., 1996) (asserting that secular and religious authority are entirely separate and that human needs can only be met through a comprehensive and plenary political regime); Marsilius of Padua, The Defender of the Peace (Annabel Brett trans., 2005) (asserting that coercive force can only be wielded by representative or duly constituted government and that the clergy is subject to that government); Ockham, supra note 88; A Translation of William of Ockham’s Work of Ninety Days (John Kilcullen & John Scott trans., 2001) (asserting that secular and religious authority are separate and that secular authority comes from the people).
tional regime. Courts were familiar to the citizens of the new republic as interpreters andappers of ordinary law, having done so in the Western world for hundreds of years.178 By the time of the Revolution, their role was established beyond any doubt or controversy; every colony used courts for this purpose, and every one of the new states continued using them in largely the same manner.179 The Revolution itself did nothing to disrupt the courts’ authority and did not even change the doctrines they applied: American courts continued to rely upon the same mélange of partially remembered English cases, general principles of law and mediating equitable considerations as they had before.180 In fact, the event that probably produced the most significant impact on the courts during this era was not the Revolution but the publication of Blackstone’s *Commentaries*, something that clearly reflected continuity, not change.181 To be sure, some state constitutions drafted in the immediate aftermath of the Revolution seemed to ignore or suppress the role of courts in their fervent commitment to legislative supremacy, but a few short years of experience with the practical consequences of this enthusiasm were sufficient to restore courts to their quondam importance and prestige.182

The combination of an institution that regularly interpreted and applied ordinary law with the codification of the higher law into a form that made it structurally similar to ordinary law generated our modern institution of judicial review. The Constitution, though designed to be higher law, looked like a statute—a set of written legal prescriptions that granted the courts jurisdiction to

178. Jeremy Waldron suggests that the institutional structure of judicial decisionmaking in the Anglo-American world creates a conceptual conflict that undermines the legitimacy of judicial review. Waldron, supra note 2, at 1386–93. Specifically, multimember courts such as the U.S. Supreme Court reach decisions by majority vote but, unlike legislatures, are nonrepresentative institutions. A representative institution, he argues, can justify majority voting because the majority of the institution reflects, roughly speaking, the majority of the voters, but a court cannot offer the same justification. All it can say is that majority voting is a convenient device for reaching a decision. This is insightful and emphasizes the countermajoritarian feature of judicial review. See infra section III.B. There is, however, a good deal more that courts can say. Majority voting is a decisionmaking device of enormous familiarity and acceptability in our society that extends far beyond representation or even democracy. It was used by the Spartan Council of Elders and the Roman Senate in the Ancient world and by the College of Cardinals and the Electors of the Holy Roman Empire in the Western world, none of which were conceived as representative bodies. Thus, majority voting contributes to the social acceptability of courts as a means of imposing higher law upon the ruler. In addition, as Weber, supra note 7, at 276–82, points out, “voting collegiality” has been an essential means of opposing autocratic rulers. “It is thus by no means fortuitous that the history of modern administration in the Western World begins with the development of collegial bodies composed of technical specialists . . . . Only collegial bodies of officials, which were capable of standing together, could gradually expropriate the Occidental monarch, who had become a ‘dilettante.’” Id. at 281. Consequently, there is a direct link between the effort to impose higher law upon the ruler and the principle of majority voting by a multimember panel.


182. Wood, supra note 31, at 161, 303–05, 453–63. It was during this period that the earliest examples of judicial review can be found.
enforce its terms. Moreover, the courts that the Americans had become familiar with—English and colonial courts—not only applied statutes enacted by Parliament or the colonial legislatures, but also applied the common law. While Pollock and Maitland subsequently discovered that common law was explicitly authorized by twelfth century statutory enactments, people at the time of the founding did not know this and generally regarded common law as a direct embodiment of enduring legal principles whose origins extended back into a misty, unremembered past. Thus, the Anglo-American courts were not only well established as interpreters of law, but as interpreters of a vaguely defined higher law, even if this higher law was nested within a general principle of legislative supremacy. In fact, David Strauss has argued that constitutional interpretation is, in its operation as opposed to its source of authority, essentially a common-law process. Thus, once Americans had codified higher law in the Constitution, they found they had inherited an institution that possessed both the authority and expertise necessary to impose that law on political rulers who were otherwise supreme.

Of course, the mere fact that the courts can interpret higher law the way they interpret ordinary law and that this role is generally accepted within our society does not mean that everyone will agree with the Judiciary’s particular interpretations. Some of our Supreme Court’s decisions, such as Dred Scott v. Sandford, Plessy v. Ferguson, and Lochner v. New York are now generally rejected. Others, too numerous to list, remain controversial. This is, however, true for any governmental mechanism. Congress enacts statutes that many people regard as unwise; the President makes executive decisions that engender widespread condemnation; administrative agencies are criticized for virtually every action of significance. Perhaps, as William Nelson argues, the early Supreme Court aspired to limit its decisions to uncontroversial topics, but we would now regard this as indicating a naïveté that further experience with judicial review quickly corrected. If the test for the value of a governmental mechanism were universal approbation, no mechanism would survive. The inevitability of disagreement argues for, not against, the use of mechanisms.
such as judicial review that can place limits on the authority of other mechanisms and particularly on the mechanism that commands the monopoly of authorized force.

The final element that is necessary for judicial review is that the institution assigned to interpret and apply the higher law must have the final word regarding its interpretation. The other individuals and institutions in society, and particularly the governmental rulers, may not contravene the interpreter’s decision. In his canonical opinion, Justice Marshall wrote: “It is emphatically the province and duty of the judicial department to say what the law is.”190 This language is not free from ambiguity because Marshall could have been stating merely the principle of departmentalism: that each branch, including the Judiciary, must follow the Constitution.191 But, although Kramer argues to the contrary,192 the general understanding of modern constitutional law was that the Court’s judgments are not only emphatic but final.193 The Court made this position explicit in Cooper v. Aaron,194 where it interpreted Marbury as declaring “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system.”195

Without this final element, judicial review could not fulfill its goal of imposing higher law upon the ruler. Once the Executive or the Legislature or some other ruling force can dispute the Judiciary’s conclusions, the problem that bedeviled European thinkers for the six centuries between John of Salisbury and John Marshall will immediately reassert itself. The ruler will always have a justification for its actions; it will always be able to claim obedience to the higher law, even if that higher law is codified and even if a recognized interpreter has decided to the contrary. Moreover, as Calvin noted, rulers generally “bear defiance with the greatest displeasure.”196 Mixed or divided government cannot solve this problem. No matter how many different institutions exercise political authority, each of them will simply assert its own position and invoke its own interpretation of the higher law to justify that position. Unless one institution has final authority, it will not be able to impose

190. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Marshall went on to state the basic principle of enforceable higher law: “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.” Id. at 178.
192. See Kramer, supra note 1, at 189–90.
193. When Justice Jackson wrote: “We are not final because we are infallible, but we are infallible only because we are final,” in Brown v. Allen, 344 U.S. 443, 540 (1953), he was really stating a well-accepted principle. Bickel’s countermajoritarian difficulty, Bickel, supra note 14, only exists, at least in the form he discussed it, if the Court’s authority is final.
195. Id. at 18.
196. Calvin, supra note 112, at 1521.
its interpretation on the other parts of government, and the problem of enforcing higher law will remain unsolved. Instead, the higher law will simply serve as one more discursive element in the political controversy among governmental institutions. It might affect the discourse, in the sense that the ruler will use the concepts or terminology of the codified higher law to explain and justify its actions. But it would be unlikely to alter the result.

Jeremy Waldron has recently pointed out that legal rights need not be defined in constitutional terms and constitutional rights need not be enforced through judicial review.197 In other words, he argues, the connections embedded in our current legal system are not logically necessary ones, and alternative mechanisms or approaches could be devised at each step in the sequence. This seems correct—the connections are not logical but cultural. Some institution other than a court can grant people rights or protections against governmental action or, more generally, can impose higher law upon the ruler. In ancient Israel, prophets like Nathan performed this role. In a secular state, we can readily imagine a council of elders or tribunes of the people doing so. The problem is that the institution that imposes higher law upon the ruler must possess sufficient prestige and popular support to stand against a ruler who is otherwise supreme. This is likely to require an institution that has a well-established place in the social or governmental system and a convincing claim to expertise in the interpretation of the higher law. Western civilization has only one such institution available to it, an institution that it had been developing and validating for some seven hundred years prior to the American Revolution, and that institution is the Judiciary. The Framers could have concocted a different institution for this purpose—they were, after all, drafting the constitution for a new regime—but that invention, however logically designed, would never have possessed the authority, prestige, and support necessary for the intimidating task of invalidating the decisions of the ruler.198

III. THE THEORETICAL OBJECTIONS TO JUDICIAL REVIEW

But what about the objections to judicial review that loom so large in current scholarship? As stated at the outset, there are three major objections. The first, which is largely restricted to political discourse, is that judicial review, and specifically judicial review by the federal courts, undermines states’ rights. The other two, which dominate scholarly discussion of the subject, are that judicial review is countermajoritarian and that it is improperly supreme over interpretations of the Constitution by other political actors. While the intensity of these latter criticisms tends to ebb and flow in conjunction with political events, the criticisms themselves derive from democratic theory.

197. WALDRON, supra note 2, at 219–21.
198. The Framers of the Constitution, as is well known, explored the idea of creating a council of revision to review enacted legislation but quickly abandoned the idea. See 2 FARRAND, supra note 9, at 73–80; RAKOVE, supra note 9, at 261–62.
The following section does not attempt to provide a complete answer to the extensive scholarly literature that presents these latter two objections. Rather, its purpose is to clarify exactly what each of the objections is asserting by focusing on the function of judicial review as developed above—that is, a mechanism for imposing higher law upon the ruler. It then argues that the latter two objections fail to account for the principal value of judicial review that flows from this function. In essence, they retreat from America’s surprisingly effective solution to the six-hundred-year–long quandary of Western political thought—how to implement higher law without resort to the traumatic, dangerous process of revolution.

A. STATES’ RIGHTS

The states’ rights objection to judicial review can be quickly dismissed. As noted above, the doctrine of states’ rights is an aspect of federalism and is thus available only in federal regimes. Even if one is willing to limit the objection to such regimes, its applicability is much narrower than it may at first appear. Federalism is generally defined as a government structure that grants partial autonomy to geographically defined subdivisions of the polity. It is distinguished from managerial decentralization, a principle which every large or even moderately sized nation must adopt to some extent, in that regional or local governments not only exercise authority in certain areas, but do so as a matter of right. While the central government can always reclaim authority that it has granted in a decentralized regime, it is subject to legal constraints against invading regional or local authority in a federal system. Thus, states’ rights are aptly named; like individual rights, they act as limits on the authority of the central government.

It seems clear that, as a general matter, judicial review functions in support of states’ rights and not in opposition to them. As in the case of individual rights, judicial review gives the courts the authority to reverse Executive or Legislative decisions because they violate the higher law, in this case the law that has
organized the polity and granted partial autonomy to its sub-units. That is, of course, precisely the role that the U.S. Supreme Court has played in recent years in the Commerce Clause and commandeering cases. Without judicial review, the sub-units would need to rely exclusively on political mechanisms to protect their autonomy and would not have access to any legal ones.

Now it is certainly true that particular decisions by national courts exercising the power of judicial review might be seen as favoring the national government over its sub-units or as projecting national authority in violation of the sub-units’ autonomy rights. But such decisions would generally fall into one of two categories. First, the national courts may declare some particular action by the national government is constitutional in response to a claim by the sub-units that the action violates the federal arrangement established by the higher law. Justice Marshall’s decision in *McCulloch v. Maryland* is the seminal case and the canonical example. A decision of this sort may be deeply disappointing to proponents of states’ rights, but it does not interfere with those rights; it simply refuses to protect the states from a decision by the national legislature that arguably does so. The states would be no better off in this case if judicial review were abolished.

The second category consists of situations where the national courts are able to impose national policy on the sub-units that could not be imposed by the national Executive or Legislature. This might occur if the constitution grants courts some special authority denied to other parts of the national government.

201. For a general, cross-national discussion of this point, see GERALD BAIER, COURTS AND FEDERALISM: JUDICIAL DOCTRINE IN THE UNITED STATES, AUSTRALIA, AND CANADA (2006).


203. A number of scholars have suggested that this should be the case, namely, that the states can protect themselves by political means and do not need the Judiciary’s protection. See generally CHOPER, supra note 17; ELY, supra note 17; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Court seemed to have adopted this position in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). For recent cases rejecting this principle and providing legal protection to the states, in addition to the political protections, see *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992). These cases demonstrate the way that judicial review can function in favor of states’ rights.

204. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that the national government has the authority to create a national bank and invalidating a state tax on that bank).

205. For a detailed account of the case, see ELLIS, supra note 11. Its posture was that the Bank of the United States had been created by Congress, and the cashier of the Maryland branch of the Bank refused to pay the Maryland tax. Marshall’s nationalist decision simply left the Bank, and its refusal to pay the tax, where it had been before the case was initiated.
and would only involve judicial review if that authority consisted of the ability to invalidate state legislative or executive action on constitutional grounds. Far from being a general objection to judicial review, however, this is an objection that depends upon the existence of a specific and rather unusual constitutional provision. It may have been applicable to the U.S. prior to the Civil War, but the adoption of the Fourteenth Amendment, and specifically Section Five, essentially eliminates any special judicial authority by giving Congress power to enforce the bulk of the constitutional provisions that would affect the states. Of course, in a given regime, at a given time, the courts might be politically able or willing to strike down state legislation that the national legislature was unwilling to preempt or displace, even though the legislature had the authority to do so. This has of course occurred in the U.S., but unlike the protection afforded to states’ rights, it can hardly be viewed as a general feature of judicial review.


207. Cf. City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as exceeding Congress’s power by establishing the meaning of the First Amendment, rather than enforcing the meaning established by the Court). In Boerne, the Court held that Congress could not exceed the scope of preexisting judicial decisions in carrying out this mandate, which is clearly a decision favoring states’ rights. Even if the case had gone the other way, however, it would only mean that the Court was refusing to protect the states from Congressional action; again, the states would be in the same position if judicial review did not exist. For a discussion of the case, and a criticism of its conclusion on departmentalist grounds, see Post & Siegel, supra note 19.

208. The Dormant Commerce Clause cases may be regarded examples of this approach, as Rob Mikos has suggested to me. By definition, a case invalidating a state or local provision on Dormant Commerce Clause grounds imposes national policy in the absence of national legislation. See, e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hunt v. Wash. State Apple Adver. Comm’n, 432 U.S. 333 (1977); H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949). This would seem to make the phenomenon of independent judicial action more widespread than it would otherwise appear to be, but there is a further question whether a Dormant Commerce Clause decision, as opposed to a McCulloch-style Commerce Clause decision, is anti-federalist at all. That is, are the courts imposing national policy or are they protecting each state’s right to be treated fairly by other states, as they do in a full faith and credit case? The Dormant Commerce Clause cases, although based on a grant of power to the national legislature, recognize each state’s right to benefit from membership in the nation and (taking a strong state sovereignty position) compensate the state for giving up the right to exclude out-of-state commerce by forbidding other states to exclude its commerce.


210. States might also object to the national courts’ authority to construe statutes or treaties in a manner that contravenes their own policies or decisions, see Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816) (reversing a state court ruling in a land dispute on grounds that a national treaty required the opposite result), or to the national courts’ ability to interpret state law. See Haelan Labs. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953) (concluding that New York courts would recognize a new personal right, the right of publicity, as a matter of their
B. THE COUNTERMAJORITY DIFFICULTY

The countermajoritarian difficulty clearly poses a more formidable argument against the validity and value of judicial review. Before exploring the way in which judicial review’s role as a domesticated form of the right to resist or revolt addresses this difficulty, it is necessary to clarify one important issue. The countermajoritarian difficulty is frequently identified as connected to our concept of democracy, but this same connection appears to make the argument quite vulnerable. As many scholars have pointed out, the structure established by the Constitution is not particularly majoritarian. Even after the Seventeenth Amendment provided for the direct election of Senators, the Nineteenth Amendment gave women the right to vote, and the Fourteenth Amendment gave African Americans the right to vote and abolished the indignity of the Three-Fifths Clause, we are still left with the allocation of Senators to states, not people, the disproportionate votes in the Electoral College, the Presidential veto, the supermajority provisions needed to override a Presidential veto, and the super-supermajority provisions needed to amend the document itself. The actual operation of the government created by the Constitution produces further divergences from the majoritarian ideal. While political practice defuses some of the Electoral College’s countermajoritarianism, it adds the differential participation rates among groups of voters, the disproportionate impact of special-interest groups on elected officials, and the insulation of the administrative process from these officials, either by law or practice. In comparison, a

common law). These are relevant questions for federalist theory, but they lie outside the scope of this Article.

211. This connection is extensively documented by Friedman, Parts One through Five, supra note 15.


213. U.S. Const., art I, § 2, cl. 3.


216. See Levinson, supra note 212, at 38–49.

Judiciary that is appointed by the President, confirmed by the Senate, and generally composed of pragmatic, politically sophisticated people who take public opinion seriously does not seem particularly countermajoritarian.

This response, however, depends on a confusion of terminology that underestimates the seriousness of the countermajoritarian difficulty. If the United States is a democracy, it is not a democracy as the term was originally defined, but rather a specialized version of democracy that can be called a representative republic. The term “democracy” comes from Ancient Greece, and to the Greeks it meant a direct democracy, where the citizens meet in an assembly to decide the major policies of government and where public officials are chosen by lot from among the citizens. While everyone understands that this is not our current system of government, the original meaning of the term, amplified by our admiration for Ancient Greece, sometimes operates as an accusatory norm that obscures the real nature of the government we actually possess. In fact, the essence of our system is representation; the people elect representatives and the representatives constitute the ruler. This is not an unfortunate compromise with inconveniences of mass society, but an epochal innovation by the Western world in the art of governance.

The real thrust of the countermajoritarian critique of courts is not that they are antidemocratic, but that they are antirepresentational. Our basic theory of government is that the people elect representatives, and these representatives rule in their name, standing for reelection at regular intervals so that their performance can be reevaluated by their constituents. Courts are not representative entities, however. Even when the judges are elected, they do not conform to our basic mode of governance because they are not conceived as playing a representative role. This is not a problem as long as the courts are implementing policies that have been established by the representative organs of government; many crucial tasks in a representative government are necessarily performed by appointees, one of the most common being exactly what the Judiciary does in nonconstitutional cases, namely, interpreting the statutes enacted by the representative legislature. But when the courts also undertake the role of imposing

218. See Aristotle, supra note 27, bk. III, chs. 7–8; bk. IV, ch. 4.  
219. Id. at bk. VI, ch. 2. Choosing citizens by election, rather than by lottery, is oligarchy in Aristotle’s view, that is, the rule of a selected few.  
221. The Ancient Greeks and Romans never thought of it, and as a result were unable to sustain any government that was answerable to the populace or subject to constraint. It was an invention of the twelfth and thirteenth centuries, that long-despised era of “Gothic” ignorance and superstition that was one of the most politically creative eras in human history, having invented common law, jury trials, universities, and perhaps the state itself, in addition to representative legislatures. See Charles Homer Haskins, The Renaissance of the Twelfth Century 368–96 (1957) (universities); Leonard W. Levy, The Palladium of Justice: The Origins of Trial by Jury 6–19 (1999) (jury trial); Pollock & Maitland, supra note 183 (common law); Joseph Strayer, On the Medieval Origins of the Modern State (1970) (the state).
higher law on the representative rulers, when they invalidate decisions that the people’s representatives have reached, a real difficulty arises. The Constitution may not be fully democratic, and perhaps not democratic at all according to the ancient meaning of the term, but it certainly establishes a representative government. Judicial review runs counter to that principle. 222

The role of judicial review as a substitute for the right of resistance and revolution offers an answer to this difficulty. 223 In order to articulate this answer, however, it is necessary to retrieve another theme from pre-modern political theory. Throughout the classical era, the Middle Ages, the Renaissance, the Reformation, and the Enlightenment, the primary subject of discussion in political theory was whether monarchy, aristocracy, or democracy was the ideal form of government. Was it better to be ruled by one person, by a select few, or by the multitude? Political theorists regularly catalogued the arguments for and against each alternative. 224 Theories of mixed government 225 drew upon these alternatives, using the examples of Sparta, the Venetian Republic, or England to argue that a government which combined the three modalities in the proper way could obtain the advantages of each while avoiding its characteristic liabilities. 226 Mixed government, in turn, exercised a powerful influence on political

222. The same problem might arise with respect to independent agencies that are not supervised by the President. See generally Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153 (1992); Geoffrey P. Miller, Independent Agencies, 1986 SUP. CT. REV. 41. The Supreme Court has resolved this issue, but never quite explained the principle that underlies its resolution. See Wiener v. United States, 357 U.S. 349 (1958) (holding that the limitation on the President’s power to remove an agency head can be created by implication); Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935) (holding that Congress may create an agency whose heads cannot be removed from office by the President); Myers v. United States, 272 U.S. 52 (1926) (holding that the President possesses inherent power to remove Executive officials). In the final analysis, however, whatever problems independent agencies create are less severe because they are supposed to follow enacted laws, not overturn them.

223. A number of commentators have criticized countermajoritarian rejections of judicial review on the basis of its consequences; they are concerned that eliminating judicial review will decrease protection for human rights. See, e.g., Erwin Chemerinsky, In Defense of Judicial Review: A Reply to Professor Kramer, 92 CALIF. L. REV. 1013 (2004); Cornelia T. L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 MICH. L. REV. 676 (2005); Michel Rosenfeld, Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers, 15 CARDOZO L. REV. 137 (1993). While this can be seen as a partisan political position, it gains theoretical force from the Legal Process theory of judicial review drawn from United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). See Jack M. Balkin, The Footnote, 83 NW. U. L. REV. 275 (1989). This is not the critique suggested here, however. Even if the higher law of a particular culture protected values other than human rights, that culture would still want those values imposed on its governmental rulers. See supra text accompanying notes 151–68.

224. ARISTOTLE, supra note 27, bk. IV, V & VI; HOBSES, supra note 8, pt. II, ch. 19; Rousseau, supra note 30, bk. 3, chs. 3–6.

225. See sources cited supra notes 23 and 27.

226. Aristotle pointed to Sparta. See ARISTOTLE, supra note 27, bk. II, ch. 9; bk. 4, ch. 9. Throughout the Renaissance, writers ascribed the admirable stability and freedom of Venetian government to principle of mixed government that they saw embodied in the Venetian constitution. Gilbert, supra note 30. Montesquieu perceived the same attribute in English government and ascribed them to the same cause. See MONTESQUIEU, supra note 30, bk. 11, ch. 6.
theory that continued until recent times.227

Sometime during the late nineteenth or early twentieth century, this debate about the preferable form of government collapsed and democracy emerged triumphant. What had seemed like a revolutionary experiment in the late eighteenth century became the only acceptable alternative less than a century later, so that even modern Communist regimes, dictatorships by any plausible account, felt obligated to call themselves “democratic republics.” As a result, this two-thousand-year-long debate has been consigned to the netherworld of discarded ideas, together with phrenology, trial by ordeal, and the geocentric universe. The theory of governance has become virtually synonymous with democratic theory; discussion about the best way to govern our society is now limited to choosing among different models of democracy.228

Given democracy’s dominance as a theory of government, the criticism that judicial review is antidemocratic, countermajoritarian, or counterrepresentational appears to be a fearsome one. If democracy is seen as good, then any governmental mechanism that runs counter to it must be bad. But we can defuse the impact of this criticism if we recall that democracy is simply one of several modes of governance, despite its current dominance. A means of imposing higher law upon the ruler, and thereby invalidating an action by the ruler that is deemed to violate that higher law, will always run counter to the dominant modality of governance, whatever that modality may be. In a monarchy, it is antimonarchical, as it was when Nathan accused David of killing Uriah. In an aristocracy, it is anti-aristocratic. In short, the imposition of higher law is a countermechanism; it is necessarily opposed to the dominant rationale of governance because the ruler, in any but the most dysfunctional of polities, will base

227. In fact, the appeal of mixed government is probably the best explanation for the nondemocratic features of our Constitution that are described above. When Montesquieu visited England in 1729–30, he interpreted the system that he saw and so admired as a mixed government, with the monarch serving as the executive, the aristocracy as the legislature’s upper house, and the multitude being represented by the lower house. Id. This vision exercised considerable influence on the American Constitution. See Bernard Bailyn, The Ideological Origins of the American Constitution 70–77 (rev. ed. 1992); Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 245–48 (1996); Wood, supra note 31, at 10–11; Gordon S. Wood, The Radicalism of the American Revolution 97–98 (1991) [hereinafter Wood, Radicalism]. Familiarity with English government itself, and a lurking admiration for that government despite their revolutionary mood, added further appeal for the Framers to the notion of mixed government. See Rakove, supra, at 245–48, 271–75; Wood, Radicalism, supra, at 197–255, 553–62, 602–15. Thus, the reason why the U.S. Constitution contains all the nonmajoritarian provisions described above is that it embeds a theory of government that gave equal or greater dignity to monarchy and aristocracy as it did to democracy. While these two principles were explicitly rejected, the virtues that they had been historically understood to possess seemed too valuable to entirely abandon.

228. The distinction suggested above between democracy and representative government does nothing to undermine this unanimity because representative government is widely regarded as a version of democracy and can properly be treated as such if we are careful to rid ourselves of the outmoded connotations of direct democracy that are often attached to the term.
its authority on that dominant rationale. The rationale on which the counter-
mechanism rests is not the dominant one, but the remote, often recondite
provisions of higher law. The fact that this rationale differs from the rationale
that justifies the ruler is not a defect of judicial review. It is the essence of
judicial review.

To say that we should reject judicial review because it is nonrepresentational
or nondemocratic is not simply to assert that representative democracy should
be the guiding principle of government, but that we do not want another
institution in the government that can impose a different set of constraints from
those inherent in that guiding principle. If we do say that, we are giving up a lot.
Specifically, we are giving up the only practical mechanism ever developed in
the Western world to impose principles of higher law upon the ruler. We are
depriving higher law of its essential effect, even though that law was regarded,
and continues to be regarded, as a set of principles by which government should
be constrained. And we are consigning those who believe the government is
violating higher law to the brutally hard choice of tolerating that violation or
risking injury, imprisonment, or death. Another way of saying this is that the
courts can be regarded as serving a representational role if representation is not
regarded solely as a means of selecting rulers, but also as a means of acting in
the populace’s interest—in this case, its interest that the government be subject
to the higher law.

Thus, judicial review is not some lacuna in our normative system that we
tolerate because of its historical pedigree or pragmatic advantages. Rather, it
represents the meta-principle that no rationale for government, no matter how
convincing it may seem to its proponents, can produce results comporting with
the critical morality of its more thoughtful citizens without some moderating
force, some pressure applied from outside the ambit of the mechanisms that it
generates. Whether this is true for an abstract principle like “truth” is an
interesting question that can be deferred for present purposes. What is at stake
in the theory of democracy is not an abstract principle but a rationale for the
governance of a complex society. Any such rationale must rest on the moral
quality of its results and can thus be frustrated by circumstances, no matter how
scrupulously the rationale may be applied. It is easy to regard our nation’s
mistreatment of African Americans as a failure to abide by our own principles,
rather than any defect in those principles themselves. But can we be equally
reassured that these principles produce morally acceptable results when demo-
ocratic society is confronted with those whom it justifiably despises—racists,
tolerant ideologues, terrorists, hardened criminals, and traitors in the service

(arguing that judicial review creates inevitable feelings of ambivalence because it imposes intertempo-
ral commitments, that is, it authorizes courts to use society’s prior views in opposition to its current
views). While Seidman locates this argument within democratic theory, it can be generalized to any
form of government and highlights the inevitable sense of conflict that judicial review will generate.

230. For this concept of representation, see Hanna Pitkin, The Concept of Representation (1967).
of a dictatorial regime? And can we be assured that our representative machinery will react with proper empathy to communities that are centered on divergent values and that seem to spurn the very political and economic advantages that our prevailing principles provide? Even if we dismiss the “tyranny of the majority” as an abstraction that relies more on oxymoronic irony than on convincing evidence, we are left with the possibility that the principled actions of the people and their representatives can produce morally unacceptable results. The advantage of a countermechanism resides in its ability to combat the lapses to which even the most exalted and deeply felt principle of governance is inevitably subject.

C. THE ANTISUPREMACIST CRITIQUE

The role of judicial review as a domesticated form of the right to resist also addresses the antisupremacist critique of judicial review—that is, the arguments based on departmentalism and popular constitutionalism. Once again, however, the issue must be clarified before it is assessed. The first clarification, which relates primarily to the issue of departmentalism, is that judicial supremacy does not relieve other government institutions of their obligation to obey the Constitution on their own. Higher law is supposed to operate as a constraint on government in general; thus, we want all the components of the government to comply with it, and to do so voluntarily. Members of Congress should not vote for statutes that they regard as unconstitutional, and the President and his administrative appointees should not implement statutes by unconstitutional means. Of course, if the ruler never takes action that violates the higher law, or more precisely, if the ruler’s interpretations of higher law comport with those of the institution that enforces this higher law, then the enforcing institution will never need to act. That can only be regarded as advantageous. It avoids the inevitably awkward situation where the Judiciary must invoke a mechanism that after all runs counter to the dominant principle of government and one that poses dangers for the enforcing institution. Unless Nathan had a death wish, he must have preferred to avoid confronting the King and accusing him of murder. Unless the Supreme Court had an institutional death wish, it must have preferred the state governments to voluntarily desegregate their schools. Domesticated though it may be, invalidating a decision of the ruler necessarily conveys a sense of confrontation and generates a political tension that is best avoided.

Moreover, as a practical matter, we want all the components of government to comply with higher law because the institution assigned to enforce that law will necessarily be limited in its ability to reach and adjudicate potential violations.

232. Cf. David A. Strauss, Presidential Interpretation of the Constitution, 15 Cardozo L. Rev. 113 (1993) (arguing that Executive and Legislative interpreters should respect judicial decisions as part of the Constitution’s meaning).
In a modern administrative state, the ruling parts of government are vast, intricate, and recondite; most of their decisions, even if they arguably violate the Constitution, will never reach the courts.233 Even those violations of higher law that come before the courts cannot always be invalidated by them because institutional considerations may intervene. The legislation that permitted the CIA not to disclose its budget appeared to violate the Constitution, specifically the Reporting Clause,234 but the Court held that the appellant, and indeed all possible appellants, lacked standing to initiate the suit.235 Thus the Court’s decision means that the Reporting Clause, despite its constitutional status and the Court’s power of judicial review, cannot be imposed upon the ruler.236

Second, there is no conflict with the principle of judicial supremacy if the ruler takes action that does not violate the higher law, in the Judiciary’s view, even if the action is based on an interpretation of the higher law that the ruler believes to be in direct conflict with the Judiciary’s interpretation of that law.237 The mere fact that the ruler thinks it is disobeying the Judiciary is of no significance as long as the Judiciary does not think so, because the principle of judicial supremacy means that the Judiciary, not the ruler, decides. Perhaps the most famous example of this situation in American history is Andrew Jackson’s veto of the bill re-authorizing the Second Bank of the United States.238 Jackson explicitly stated that he was vetoing the bill because he thought the Bank was unconstitutional.239 The Supreme Court had declared in several previous cases that the Bank was constitutional.240 But the Court had not said, and never did say, that Jackson could not constitutionally veto the Bank Bill.241 It is widely

234. U.S. CONST. art. I, § 9, cl. 7 (“[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).
236. The Court said: “It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.” Id. at 179. To put this another way, the preclusion of judicial review meant that there was no means of enforcing the higher law against the ruler. This might be deemed a good thing in the circumstances, on national security grounds or whatever, but it gives the ruler the untrammeled authority that the Constitution apparently intended to deny.
240. Most notably in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), See generally ELLIS, supra note 11.
241. Precisely what Jackson’s own interpretation of his veto was is less than clear. See RICHARD ELLIS, THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS 39
accepted that the President has the authority to veto legislation for any reason that he chooses, and he does not lose this authority by stating a reason that the Court thinks is incorrect.

Third, it does not contradict the principle of judicial supremacy if courts possessing that authority desist from deploying it for either doctrinal or institutional reasons. Alexander Bickel has suggested that the Supreme Court use various prudential devices to avoid making definitive declarations in situations where the contours of an issue are unclear, particularly where the issue is so controversial that the Court would endanger its legitimacy by wading into that issue prematurely. Cass Sunstein has extended and theorized Bickel’s idea, arguing that premature decisions can disrupt the process of democratic dialogue that not only clarifies issues but represents the essential decisionmaking process in a democratic society. He has also suggested that courts recognize their own conceptual and cognitive limitations and desist from confronting issues that would be better resolved if a wider range of voices, ideas, and experiences were brought to bear. Sanford Levinson suggests that the courts might use the Ninth Amendment to encourage states to reconsider statutes that might be unconstitutional, thereby encouraging the states themselves to confront constitutional issues before the Court is required to rule. These approaches may be good or bad, but none of them necessarily conflicts with the principle that when

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242. See Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power To Say What the Law Is, 83 GEO. L.J. 217, 265 (1994). An elected official, unlike a judge, need not necessarily give reasons for a particular action because he or she will be required to answer to the voters for it.

243. Federal courts, acting in a statutory or common-law capacity, have declared that an administrative agency may not validly adjudicate a case on the basis of an invalid rationale, even if the agency could have reached the same decision on some other ground. SEC v. Chenery Corp. (Chenery I), 318 U.S. 80 (1943); see also Interstate Commerce Comm’n v. Bhd. of Locomotive Eng’rs, 482 U.S. 270, 278–83 (1987) (applying and explaining Chenery I doctrine). In other words, the agency’s action must stand or fall on its stated reason. This rule applies to agencies because they are subordinate institutions that can only exercise the authority assigned to them by their superiors, and ultimately by elected officials, if they follow certain procedural regularities. See Kevin Stack, The Constitutional Foundations of Chenery, 116 YALE L.J. 952 (2007) (arguing that the Chenery rule has constitutional implications because of the subordinate position of administrative agents). The rule can also be explained as enforcing a norm of decisionmaking rationality on administrative agencies. See Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative, 89 CORNELL L. REV. 95, 181–88 (2003). But it does not apply to elected officials, for whom the prevailing decisionmaking norms are based on their representative role.

244. Bickel, supra note 14, at 25. For a critique, see Gunther, supra note 191.


the Court chooses to issue a definitive decision, that decision must be obeyed by all governmental actors.

The reference to public dialogue leads to a final distinction that relates to popular constitutionalism as well as departmentalism. Despite the implications of some prominent critiques, judicial supremacy does not preclude debate about the wisdom of the Judiciary’s rulings. The anti-abortion movement alone seems sufficient to demonstrate this point. Judicial supremacy refers to the relationship between the institution charged with enforcing the higher law and the other institutions of government, and also to the people’s general obligation to obey the law. Nothing in this doctrine suggests that there is any prohibition on continued debate, nor that such debate might not be effective in convincing the Judiciary to change its ruling or convincing the legislature and the populace to amend the Constitution. In fact, the Judiciary has been an important proponent and protector of political debate, which necessarily includes criticisms of its own position.

This might seem obvious, but the influence of social movements on our public consciousness in general, and the Judiciary in particular, can obscure the distinction. As William Eskridge has recently demonstrated, it is impossible to write the doctrinal history of the Supreme Court without taking account of

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248. See, e.g., BICKEL, supra note 14, at 264 (suggesting that one interpretation of Cooper v. Aaron, 358 U.S. 1 (1958), is that “[w]hatever the Court lays down is right, even if wrong, because the Court and only the Court speaks in the name of the Constitution. Its doctrines are not to be questioned; indeed, they are hardly a fit subject for comment.”); TRIBE, supra note 19, at 256–57 (one interpretation of Cooper ignores the fact the “the ‘meaning’ of the Constitution is subject to legitimate dispute, and the Court is not alone in its responsibility to address that meaning”) (footnotes omitted).


250. See, e.g., Texas v. Johnson, 491 U.S. 397, 420 (1989) (invalidating statute that criminalized burning of the American flag); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (invalidating Ohio criminal syndicalism statute that prohibited advocacy of overthrowing the government by violent means); N.Y. Times v. Sullivan, 376 U.S. 254, 264 (1964) (generally precluding public officials from using state libel laws to defend themselves against false criticism). While the reference here is to American law, the Court’s position on this issue is likely to be a fairly general one. Rulers do not like being criticized, and will often take action to prevent such criticism, if permitted to do so.

the influence of social movements on the Justices.252 The Court has reversed itself on a number of notable occasions in a manner that can be convincingly attributed to the effect of social movements.253 But no matter how great the influence of social movements on the Judiciary may be, that influence does not contradict the principle of judicial supremacy because the Judiciary is making the final decision, not “the people” or the social movement. These cases are better explained by Bruce Ackerman’s theory of constitutional moments than by popular constitutionalism;254 the people are mobilized and exert extraordinary pressure on the Court but constitutional doctrine does not change unless the Court responds, as it did in overruling Lochner:255 In fact, the impact of social movements supports the principle of judicial supremacy by indicating that the Judiciary is not as countermajoritarian as some of its critics suggest, since it does in fact respond to popular sentiment.256

With these clarifications, it is now possible to be more precise about the claims that departmentalism and popular constitutionalism advance. The essential notion is that governmental institutions, or the people at large, can validly disobey the Judiciary on the basis of their own vision of the Constitution. According to the departmentalists, the Executive or Legislature can reach its own conclusions about the constitutionality of a particular action and maintain that action in the face of a contrary Supreme Court ruling.257 The courts may choose not to enforce the Executive and Legislative decisions, but that would not invalidate the decision; it would merely deny the other branches the Judiciary’s assistance in enforcing their policies. Given the nonjudicial enforcement capacities of the administrative state, such judicial nonparticipation may be of little moment. The Brown decision and its sequels were, first and foremost, about public institutions that are owned and operated by the administrative state—public schools or recreational facilities—and about the staff members of public agencies, such as police and fire departments. Policies determining the

254. See generally Ackerman, Foundations, supra note 17; Ackerman, Transformations, supra note 17.
255. W. Coast Hotel, 300 U.S. 379, overruling Lochner, 198 U.S. 45. The doctrine can also change, of course, if the Constitution is amended.
256. This is particularly true given the nonmajoritarian features of the legislative process. See supra section III.B.
257. For examples, see note 19 and sources cited therein.
operation of these institutions and agencies can be maintained without relying on the courts at all. African Americans can be excluded from the police force, for example, by the civil service system. If the courts order a city to administer the test to them, it can simply disobey; if they award damages, it can refuse to pay. Thus, genuine departmentalism, although its implications are not as far-reaching as genuine majoritarianism, would represent a significant retrenchment of judicial review.

Similarly, popular constitutionalism would allow groups of people to disobey judicial decisions. The actual operation of this principle, in contrast to departmentalism, is difficult to determine. Kramer, a strong proponent, never quite explains which groups should be allowed to disobey, how large they must be, what happens if there are opposing groups, or how we determine the boundaries of their permitted opposition. Most important, he does not explain what it means to allow popular disobedience. He cannot simply mean that the courts should treat people’s disobedience as an interpretive or pragmatic argument addressed to them, since this is fully consistent with judicial supremacy and arguably part of the Judiciary’s normal decisionmaking process, as discussed above. Perhaps he means that the Executive and Legislature should not treat disobedience of judicial decisions as a violation of the law, but departmentalism would allow such nonenforcement anyway, as long as those authorities disagreed with the Court and supported the people’s views. Perhaps he means that a critical or external observer, noting widespread popular disagreement with the Court, should treat this disagreement as a constitutional interpretation,

258. See generally Kramer, supra note 1.
260. See supra notes 251–54 and accompanying text.
261. In discussing Bush v. Gore, 351 U.S. 98 (2000), for example, Kramer condemns contemporary Americans for lacking the gumption and self-assurance of their nineteenth-century forbears. Had the Supreme Court attempted to resolve the disputed Tilden-Hayes election, he suggests:

    the half the country that supported the loser would not have stood passively by. They might have attempted to impeach the Justices or to impose new responsibilities designed to make their lives miserable (as Jefferson did). They might have sought to ignore or frustrate the Court’s judgment (as Jackson and Lincoln did). They might have moved to slash the Court’s budget or strip it of jurisdiction (as the Reconstruction Congress did), or tried to pack the Court with new members (as the Reconstruction Congress did and Roosevelt tried to do).

Kramer, supra note 1, at 231. To begin with, it is unclear who “they” are in this passage. It cannot be the people because most of the things he mentions, such as impeaching the Justices or slashing their budget, cannot be done by the people, but only by the Executive or Legislature. The one thing he mentions that the people can do is to ignore the Court’s judgment, but the examples he gives are Jackson and Lincoln, who were Presidents, not “the people.”

It is also notable that most of the strategies he suggests are not inconsistent with judicial supremacy. Efforts to impeach the Justices, jurisdiction-stripping measures, and court-packing plans do not challenge judicial supremacy per se, and are constitutionally authorized actions. Cutting the Court’s budget is just petulance and would interfere with important functions that are entirely uncontroversial, such as its adjudication of statutory cases.
rather than mass violation of the law.\textsuperscript{262} Or perhaps the point is simply the descriptive one that people will disobey judicial decisions in certain circumstances. This is certainly correct, but it is not inconsistent with a legal rule that judicial decisions are supreme, and it does not distinguish people’s disobedience of a court’s constitutional decision from the inevitable lack of full compliance to which virtually every governmental policy is subject, including criminal laws, tax laws, and regulatory laws.\textsuperscript{263} The clearest operative principle that can be extracted from popular constitutionalism may be that the Executive and Legislature should rely on popular opposition to judicial decisions as a basis for disobeying or intimidating the Court, even in situations where they themselves do not have serious constitutional concerns.\textsuperscript{264} As such, it is really a subset of departmentalism.

The problem with departmentalism and popular democracy is that they cast us back into the situation that prevailed in the period between John of Salisbury and John Marshall. If there is no institution that can definitively interpret and apply the higher law, then there is no way that the higher law can be enforced. This does not mean that the higher law will have no effect at all; it may well, based on a variety of complex institutional, cultural, and adventitious factors. But in situations where different groups in the society disagree about the meaning of higher law, the ruler’s vision of that law will prevail, and the possibility of enforcing higher law against the ruler in the ordinary course of government will be lost.

Proponents of departmentalism and popular constitutionalism sometimes look back to the early history of the republic, asserting that Americans at that time did not treat judicial decisions as supreme.\textsuperscript{265} But unless one is prepared to make some fairly heroic originalist assumptions,\textsuperscript{266} there is good reason to question the relevance of this period for contemporary practice. Repeated secession movements, nullification crises, and disputes about the organization of the national government indicate that a high level of conceptual instability

\textsuperscript{262} For example, Kramer condemns “histories that ignore resistance to the Court’s view of the Constitution, unless it is to demonize and disparage the opposition as populist excess or political opportunism.” Kramer, supra note 1, at 229.

\textsuperscript{263} Kramer’s many historical examples, which occupy the bulk of his book, see generally id., establish nothing more than this final proposition. They may be designed to demonstrate that popular disobedience can be allowed to flourish without seriously destabilizing the nation, but they do not do so very convincingly; first, because he does not distinguish between social movements designed to influence the Court and those that led to real disobedience, and second, because he offers us no metric of social stability by which the claim can be evaluated.

\textsuperscript{264} See Katyal, supra note 19, at 1336.

\textsuperscript{265} Kramer, supra note 1, at 93–170; Cornell, supra note 20.

\textsuperscript{266} Specifically, that people at this time had some privileged position for evaluating the intent of the Framers on the issue of judicial review. Given the complete lack of clarity in the historical record, see sources cited supra note 19, it is difficult to see how this could possibly be the case. What is clear is that the citizens of the early republic were living in a very different political context from anything contemplated by the Framers. See generally Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy (2005).
prevailed. Many situations were occurring for the first time, patterns of governance had yet to be established, and the implications of various constitutional provisions remained unexplored. The significance of judicial review for the Executive and Legislature were difficult to discern when the Supreme Court had seen fit to strike down only two federal statutes in the entire antebellum era, and when, as William Nelson notes, most judicial review cases were regarded as nonpolitical applications of the law. There does not seem to be much reason to value the confusions of a distant period—confusions that were largely put to rest by the Civil War, which expanded and secured the central government’s authority—over the settled practice of our more recent past.

Moreover, the departmentalist position that judicial authority is limited to noncooperation with statutes that it deems unconstitutional meant something very different in the nineteenth century than it does today. Before the advent of the national administrative state, courts were the primary means by which statutes were enforced; judicial non-cooperation would not entirely eviscerate the statute, but would ensure that it was unlikely to be applied to any individual. The extensive development of administrative agencies, with their panoply of enforcement mechanisms, and the proliferation of government-run institutions, with the vast array of benefits that they dispense, means that the government regularly affects the lives of individuals without any need for judicial enforcement. When the Executive and administrative apparatus can deny essential benefits, impose costs, inflict preliminary sanctions that are difficult to oppose in pragmatic terms, and determine the operation of schools, prisons, hospitals, parks and other institutions, judicial non-cooperation, by itself, becomes weak to the point of ineffectuality.

267. See Brands, supra note 238, at 439–82; George Dangerfield, The Era of Good Feelings 85–89 (1952); Kramer, supra note 1, at 170–206; McDonald, supra note 11, at 40–48, 66–120; Wilentz, supra note 238, at 78–83, 159–68, 379–88. As Dangerfield says of the Hartford Convention, it “could be excused only on the assumption that the Union itself was still an experiment.” Dangerfield, supra, at 86.


270. Nearly all of Kramer’s arguments relate to this early period; his claim that judicial supremacy did not prevail until the past few decades has been strongly challenged. See William E. Forbath, Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule, 81 Chi.-Kent L. Rev. 967, 967–69 (2006); Keith E. Wittington, Give “The People” What They Want?, 81 Chi.-Kent L. Rev. 911, 913–14 (2006).

271. This occurred in the latter part of the nineteenth century. See generally Richard Franklin Bensel, Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877 (1990); Stephen Skowroneck, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920 (1982). Recent scholarship has illuminated the extensive development of state administrative government at an earlier time, see, e.g., William E. Nelson, The Roots of American Bureaucracy, 1830–1900 (1982), but the debate about judicial review centers on the national courts; their non-cooperation would have left the nineteenth-century national government without a means of enforcing its laws.
A more theoretical basis for departmentalism and popular constitutionalism involves deliberative democracy, the idea that courts should not preempt a wider discourse about the meaning of the Constitution. Deliberation has probably replaced social contract theory as the prevailing account of political legitimacy in a democratic regime. A quick answer is that a judicial decision holding a statute unconstitutional does not preclude continued debate, for reasons that have already been discussed, but this is too quick to serve as a theoretical answer. In the theory of deliberative democracy, deliberation does not simply mean debate, or even debate with some remote possibility of future effect. Rather, it refers to an open, fully discussed decisionmaking process, where debate is focused on determining a future course of action.

The defect of deliberative democracy is its assertion that when people disagree, their typical response should be to resolve the disagreement by reasoned argument. Human history and individual psychology proves this to be unlikely, as Madison, the most unromantic of political thinkers, understood. When people disagree, their typical response is to kill each other. In settled societies, they will be constrained from doing so by an institutional structure that prohibits this response, punishes those who indulge in it, and most importantly, provides alternative methods of resolving the disagreement. As time goes on, these constraints may become internalized by people and develop into the settled habits that Aristotle regarded as the basis of morality. But history and psychology teach us that those habits can be rapidly undone by circumstances.

As a result of these lugubrious realities, dialogue, though wonderful, is not the basic way that stable democracies resolve disagreements among people. Rather, as in other types of governmental regimes, disagreements in a democracy are resolved by assigning ultimate decisionmaking authority to a particular institution, such as the legislature, and articulating a decision rule for the members of that institution, such as a majority vote. What distinguishes modern democracies from other regimes, including ancient democracies, is that the ultimate decisionmaking authority is granted to representatives elected by a majority vote of defined constituencies, and that those representatives are typically organized in a legislature that itself reaches decisions by a majority vote of its members. Of course, such regimes can manage without judicial

272. See, e.g., Bruce A. Ackerman, Social Justice and the Liberal State (1980); John S. Dryzek, Discursive Democracy: Politics, Policy, and Political Science (1990); James S. Fishkin, Democracy and Deliberation: New Directions for Democratic Reform (1991); Amy Gutmann & Dennis Thompson, Democracy and Disagreement (1996); Habermas, supra note 13; Rawls, supra note 13; Joshua Cohen, Deliberation and Democratic Legitimacy, in Deliberative Democracy 67 (James Bohman & William Rehg eds., 1967).

273. See Robert Dahl, A Preface to Democratic Theory 4–33 (1956). Dahl argues that the behavioral premises of Madison’s theory of government include the idea that people will tyrannize others if unrestrained, and that they will divide into factions that will disadvantage other groups, and the community at large, if uncontrolled.

274. See generally Aristotle, Nicomachean Ethics (Christopher Rowe trans., 2002).
review. But if we want judicial review, that is, if we want a governmental mechanism that can impose the higher law upon this ruling body, we must follow the same principle and place that decisionmaking authority in a single, specified institution that follows a clearly defined decision rule.

The point can be clarified by a story. Quite appropriately, it involves race relations, the issue that has troubled and tested American democracy since its inception, and it comes from Jason Sokol’s recently published book about white Southerners’ response to integration.275 In January 1961, a federal district court ordered the University of Georgia at Athens to immediately admit two African American students, Charlayne Hunter and Hamilton Holmes, for the spring semester. Governor Ernest Vandiver threatened to close the University rather than allowing it to become integrated, but the students held a vigil in the University chapel, and one third of them—2,776 students—signed a petition to keep the University open. This did not indicate, however, an equivalent level of support for integration. As the mood on campus turned ugly, columns and editorials in the Atlanta Constitution and the student newspaper urged the students to remain calm and accept the court decision. On the evening of January 11, an angry mob variously estimated as 500 to 2,000 students surrounded Hunter’s dormitory and started throwing bricks and rocks through the windows. This demonstration had apparently been planned in advance, although a disappointing loss by the Georgia basketball team earlier that evening seems to have augmented the mob and contributed to its mood. As Sokol recounts: “At one point, all the lights went out in the dorm except for those in Hunter’s room, so as to provide an easy target—an episode that further suggests that the riot was a planned affair.”276 Only one University official confronted the students and the police did not arrive to disperse them for several hours. In the wake of this incident, the University’s Dean of Students, at Governor Vandiver’s order, suspended Hunter and Holmes for their own safety.277 Further statements, news stories, and letters to the editor of the Atlanta Constitution appeared in the next few days. On January 13, however, the same district court ordered that Hunter and Holmes be re-admitted, and they returned to the University three days later.278

Judicial review was responsible for the original decision to integrate the University of Georgia. In response, there was plenty of dialogue of the sort that proponents of deliberative democracy rely on—newspaper articles, editorials, and letters to the editor, student meetings, petitions, statements by public officials—all centered on a well-defined issue and responding directly to each

275. Sokol, supra note 11, at 148–52.
276. Id. at 151.
277. Id. at 152.
278. Id. After their return, a Calculus professor at Georgia had his class write essays describing their feelings about integration. Sokol uses these essays, which are archived at the University library, to provide insight into the feeling of white Southerners at the time, which is the main thrust of his book. See id. at 152–59.
other. There were also the “people themselves,” energetically resisting an unpopular government decision. The result of all this truly democratic activity—not surprisingly, given the mood of the time—was a decision by the Dean of Students, the government administrator with direct responsibility for the matter, to continue the state’s original policy, namely, excluding African American students from the University. He was acting under orders by the state’s highest elected official, the rationale he advanced for his decision was at least plausible on its face, and he did not need judicial cooperation to implement it. With the principles of accountability and rationality thus joined, and backed by a genuinely deliberative process, the only way to impose higher law on the government was by giving the courts the final say, by insisting, through another judicial decision, that the original decision could not be disobeyed, no matter how much democratic dialogue had occurred.

CONCLUSION

Judicial review is not the only means of constraining the ruling authorities in a democratic government, and it is almost certainly not the most effective means. Elections, the defining feature of modern democracy, probably deserve that title, and mixed government, with its associated checks and balances, probably ranks next. Unlike these other means, moreover, judicial review is based on a rationale that runs counter to our leading moral argument for granting public officials the authority to control our lives. To these general limitations can be added a more immediate, but certainly not insignificant, concern as the Supreme Court and lower federal courts have been filled by a President who has now lost the nation’s confidence and support. Under these circumstances, it is natural for many scholars to question the desirability of judicial review and seek methods to avoid or circumvent its consequences.

This Article suggests that it would be impulsive and short-sighted to reject or undermine judicial review. One of the enduring aspects of Western political thought, one that long pre-dates democracy, is the idea that the rulers are subject to a higher law, a set of guiding principles beyond the reach of the rules that they enact. For at least six centuries, political thinkers who held fast to this belief found themselves unable to devise some mechanism to apply it. As a result, they had to content themselves with abstract assertions that the people possessed the right to resist or revolt when their rulers violated higher law, while conceding that the exercise of that right was dangerous for both those who possessed it and society at large, and speculating that people would not take that risk unless they were correct in their judgment and sure of their success. Then, in a few short decades, the people of the United States solved this problem. They realized that once higher law had been codified in definitive form, they could rely on the courts, a familiar, well-regarded governmental mechanism, to apply that law in the same way that the courts applied the ordinary law enacted by the rulers. For the first time in Western history, there
was a mechanism that could reverse a decision made by the ruling force of the society in the ordinary course of governance, without disrupting the government or endangering the populace. For the first time since our mythic past, there was an institution that could confront the ruler and say to it: “Thou art the man.”