

The Countermajoritarian Complaint

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ABSTRACT

This Article, part one in a series of two, offers an argument against the proposition that binding judicial review is inconsistent with democracy. The first section considers three versions of this countermajoritarian complaint, and concludes that the only potentially defensible version is the “respect complaint,” associated with the popular constitutionalists, according to which constitutional courts impermissibly override popular legal judgments. The second section offers an argument against the respect complaint, centered on the notion that courts express rather than override popular legal judgments. The third section draws on the second to argue that “weak judicial review systems,” in which legislatures may override constitutional rulings, function the same way as “strong judicial review systems,” such as the U.S, because the courts in each system can wield power over legislatures only to the extent they can generally recruit popular support. Since, empirically, the extent to which legislatures defer to constitutional courts varies widely in weak judicial review systems, the Article concludes that the question of the relationship between judicial review and democracy is really a fine-grained problem of institutional design, not the simple binary choice to have or not have what critics of the U.S. system have misguidedly named “judicial supremacy.”

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In the constitution of Great Britain—where the people carry on about their constitution as if it were the model for the whole world—we nevertheless find that it is quite silent about the authorization belonging to the people in case the monarch should transgress the contract of 1688, so that if he wanted to violate the constitution, there being no law about such a case, the people secretly reserves to itself rebellion against him. For, that the constitution should contain a law for such a case authorizing the overthrow of the existing constitution, from which all particular laws proceed (even supposing the contract violated) is an obvious contradiction; for then it would also have to contain a publicly constituted opposing power, so that there would have to be a second head of state to protect the people's rights against the first, and then yet a third to decide between the two, which of them had right on its side.

Kant¹

I. INTRODUCTION

Conventionally, scholars suppose that the countermajoritarian problem is that courts, exercising a binding power of judicial review over the actions of other branches, threaten popular sovereignty because they may bring about results that defy the policy preferences of democratic majorities.² Consequently, supporters of judicial review rely on two broad strategies to answer the countermajoritarian problem. First, they deny that courts have the incentive or power to make rulings that are systematically contrary to the policy preferences of democratic majorities.³ Second, they claim that it is good that courts override the policy preferences of democratic majorities, for a variety of reasons including, *inter alia*, that judicial review protects minority rights against tyrannical majorities and that it permits the polis to bind

¹ Immanuel Kant, *On the Common Saying: That May Be Correct in Theory But It Is of No Use in Practice*, in THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY 301 (Mary Gregor ed. and trans., 1996).

² See generally ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 19 (2d ed. 1986) (identifying countermajoritarian difficulty with claim that judicial review “works counter to” a “distinguishing characteristic” of democracy, namely “the policy-making power of representative institutions, born of the electoral process”).

³ See Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MARYLAND L. REV. 1, 2–3 (2006) (summarizing political science response to countermajoritarian problem, which largely focuses on denying that courts can stray too far from preferences of other political actors or that their rulings would be obeyed if they did so). One gloss on this strategy is to argue that questions are often committed to the courts by other—allegedly more democratically legitimate—actors, like elected officials, in order to pursue their own ends. *Id.* at 5–8 (summarizing this school of thought). See also Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L. J. 113 (2012) (arguing that sometimes the Supreme Court is better at tracking the public will than are the elected branches).

itself, and hence commit to policies that it might be tempted to break later.⁴

This Article argues that this debate is misconceived. Scholars should not be worried about the relationship between judicial rulings and the policy preferences of the majority, but about the relationship between judicial rulings and the *legal (constitutional) judgments* of the majority. The countermajoritarian problem ought to be interpreted as the worry that courts might override the legal judgments of the public. After explicating this version of the problem, this Article will describe a strategy for answering it, one that reconceives the courts as the instrument of popular legal judgments rather than their enemy. The conclusion is a partial, tentative, answer to the countermajoritarian problem.⁵

This Article has three sections. The first section considers three different versions of the countermajoritarian problem, and argues that only the third, *the respect complaint*, actually can count as a critique of judicial review.

The second section sketches, then evaluates, an approach to answering the respect complaint. This Article suggests that courts are capable of making elected officials obey their rulings only to the extent they can count on popular support, which will be true only if their rulings ordinarily track or shape popular legal judgments.

The third section considers the social scientific implications of this argument. If the second section is right, intuitively, there ought not to be a necessary difference in the extent to which elected officials obey the courts between binding and non-binding (or “strong” and “weak”) systems of judicial

⁴ See, e.g., RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION, 364–65 (1996) (articulating “mature, principled conception” of democracy which includes constitutional protection of rights against electoral majorities); JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88–174 (2000) (giving a theory of constitutions as tools for self-binding); Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & PHIL. 327, 329 (1990) (“judicial review can be construed as a shared precommitment by free and equal citizens to maintain the conditions of their sovereignty”).

⁵ However, even if the countermajoritarian problem is solved, there may be other democratic objections to judicial review. For example, one of the most interesting and potentially compelling objections is that judicial review undermines the practice of democracy by channeling those who object to current policies to the courts rather than to political action. Call this the *judicial-review-as-crutch* objection. See, e.g., Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1042–43 (2004) (“The danger of judicial supremacy is not that the people will be deprived of the authority to decide a particular case, but rather that they will cease to maintain a vibrant and energetic engagement with the process of constitutional self-governance.”) This Article will not specifically discuss that here, mainly because it is an empirical claim that depends on unknown answers to several questions—could those who succeed in the courts have succeeded in politics if they had just tried? Are litigation and politics substitutes or complements? Is the extent to which judicial review suppresses political activism counterbalanced by the extent to which it promotes activism by giving those opposed to a result something to fight against, and those in favor of it something to defend (the Author thanks his colleague, Stella Elias, for this point)?

review.⁶ Empirically, however, some, but not all, weak judicial review systems perform similarly to strong systems, such as the United States. This Article concludes by teasing out some potential theoretical implications of this difference, to understand the wide variety of institutional choices available to designers of judicial review systems. Ultimately, this leads to a critique of the existing debate about judicial review, which inappropriately collapses complex and multidimensional questions of institutional design into a one-dimensional debate between formal “judicial supremacy” and “parliamentary supremacy” or “departmentalism.”

II. WHAT IS THE COUNTERMAJORITARIAN COMPLAINT?

The general idea of the countermajoritarian problem, of course, is that judicial review is objectionable because it substitutes the illegitimate authority of politically unaccountable judges for the legitimate authority of democratic majorities. But stated in abstract terms like that, it is not clear what precisely the countermajoritarian complaint actually is. This Article considers three possibilities.

A. *The Thwarting Complaint*

First, the complaint might be just that the policy will of a democratic public has been thwarted. The people wish to implement a policy, in their capacity as sources of democratic authority, but some meddling judges tell them they may not. Much talk about the countermajoritarian problem, even from the defenders of judicial review, appears to assume this version of the complaint.⁷

This thwarting complaint was behind what has to be the very first populist critique of judicial review in recorded history. In 406 BC, during the Peloponnesian War, Athens won a major sea battle against Sparta, the battle of Arginusae.⁸ Unfortunately, a storm hit after the battle, and many of the Athenian sailors were lost on the way home. Enraged at the failure to rescue

⁶ On the most prominent contemporary non-binding systems, see generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. LAW 707 (2001) [hereinafter *The New Commonwealth Model of Constitutionalism*].

⁷ See, e.g., BICKEL, *supra* note 2; Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1209 (1984) (“Yet, any judicial decision that overturns a policy enacted by a popularly elected legislature is antimajoritarian; even judicial review based on the intent of the Framers is, by the critics’ criteria, undemocratic.”); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 335 (1998) (“The problem is this: 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?”); Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT’L J. CONST. L. 617, 619–20 (2005).

⁸ See generally Paul Gowder, *Democracy, Solidarity and the Rule of Law: Lessons from Athens*, BUFF. L. REV. (forthcoming) [hereinafter *Lessons from Athens*].

their fellow citizens from the storm, the Athenian people, acting in their sovereign democratic capacity in the *ekklesia* (assembly), put the generals on trial en masse and executed them without giving them an adequate opportunity to defend themselves.⁹ Essentially, the *ekklesia* passed an act of attainder against the generals.¹⁰

This mass trial was illegal.¹¹ One citizen, Euryptolemus, attempted to put a stop to it by bringing a *graphe paranomon*—an indictment charging the proposers of the mass trial with making an illegal proposal. The indictment would have been tried by a citizen jury, itself a representative of the sovereign authority of the *polis*, randomly selected from ordinary citizens.¹² (Indeed, one prominent classical legal scholar has argued that the jury, rather than the assembly, eventually became the *primary* site of Athenian popular sovereignty.¹³) Nonetheless, according to Xenophon, the rest of the citizens responded with outrage at the prospect that Euryptolemus would dare to tell them that they could not exercise their authority in the assembly according to their collective whim: “the multitude shouted out that it was a terrible thing if someone prevented the people from doing whatever they wished.”¹⁴ Under the threat that he too would be executed by the runaway assembly, Euryptolemus withdrew the writ, and the generals were duly executed.¹⁵

Merely to utter that story is to reveal the problems with the thwarting complaint. The trial of the generals was illegal. If the rule of law means anything, it means that the governing body of a political community—democratically legitimate or otherwise—is not free to just casually ignore its own laws when it finds it expedient. Suppose that Euryptolemus had succeeded in his writ, and a jury had stopped the executions. We ought not to claim that the ruling would have been an objectionable instance of the countermajoritarian problem.

That conclusion is true even if we imagine that instead of the mass jury, the *graphe paranomon* were tried by some other, less populist, body. Under

⁹ *Id.*

¹⁰ *Id.*

¹¹ See generally *id.* There is some dispute about this conclusion but it does not matter—for illustrative purposes, we may assume that it was illegal.

¹² On the *graphe paranomon* (which is the most natural summons for Euryptolemus to have brought), see generally *id.* 10; MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES, 205–212 (1991); see also Melissa Schwartzberg, *Was the Graphe Paranomon a Form of Judicial Review?*, 34 CARDOZO L. REV. 1049 (2013) (an interesting recent take on the function of *graphe paranomon*).

¹³ HANSEN, *supra* note 12, at 303–04.

¹⁴ Xenophon, *Hellenika* 1.7.12, in THE LANDMARK XENOPHON’S HELLENIKA 34 (Robert B. Strassler, ed., John Marincola, trans., 2009).

¹⁵ See generally *Lessons from Athens*, *supra* note 8, Xenophon, *supra* note 14 at 1.7.13.

ordinary circumstances, the political preferences of the public should not trump preexisting law. This is the most basic idea of the rule of law: officials, including the public acting in its official capacity—either as electors or as direct participants in the conduct of government—may not violate the law.¹⁶ It follows that that requiring a democratic public to obey its own laws threatens democratic values only if the rule of law is inconsistent with democracy. And while the rule of law might be inconsistent with democracy, given the close connection between the two concepts in contemporary liberal democracies, we ought not to interpret the idea of democracy that way.¹⁷

Note that rejecting the thwarting complaint does not entail denying that a democratic public or legislature ultimately retains full control over its laws. It just amounts to denying that the democratic public or legislature gets to exercise its control retroactively by ignoring the laws it has already enacted. The Athenian people could have enacted a law: “from now on, if our generals make us mad, we may hold summary mass trials and then execute them.” But they did not. They wanted to execute *these generals, right now*, and so rather than prospectively changing the law, they ignored it.¹⁸

Taking democracy and the rule of law together leads to the principle that the people ultimately make the laws, including the constitution, but that once they make a law, they must obey it unless and until they change it. Call this *the principle of prospectivity*. That principle, which enforces a distinction between the legislative and the executive/judicial roles in a government—even if they are carried out by the same body (including the assembled *demos* itself, as in Athens)—necessarily excludes the thwarting complaint.¹⁹

This Article now addresses two objections. First, the foregoing argument assumes judges are actually enforcing the law against elected officials who break it. But this might not be true: it might be that elected branches are obeying the constitution, but that lawless judges are abusing their power to overturn their rulings, as the U.S. Supreme Court has been repeatedly accused of doing from both the left (*Lochner*) and the right (*Roe*).²⁰ Or the judges might simply be incompetent and make enough well-intentioned mistakes in constitutional law that they are no more reliable than the other

¹⁶ See generally Paul Gowder, *The Rule of Law and Equality*, 32 L. & PHIL. 565 (2013) (explaining the meaning of the rule of law) [hereinafter *The Rule of Law and Equality*].

¹⁷ The second part of this project develops a conceptual argument for the necessity of the rule of law to democracy. See Paul Gowder, *The People's Will and the People's Laws* (forthcoming) [hereinafter *The People's Will and the People's Laws*].

¹⁸ See *Lessons from Athens*, *supra* note 8.

¹⁹ This article uses the Greek *demos* and the English term “the people” synonymously to refer to the sovereign citizen body of a democracy, i.e., that group of individuals in whose will the democratically legitimating authority of popular sovereignty rests. *Polis* is used to refer to the political community as a whole.

²⁰ *Lochner v. New York*, 198 U.S. 45 (1905); *Roe v. Wade*, 410 U.S. 113 (1973).

branches of government.

However, in such circumstances, the thwarting complaint need not be interpreted as an argument against the power of judicial review. Instead, it could be interpreted as an argument against the misbehavior or incompetence of those who exercise that power. This version of the complaint does not pose a problem for the defender of judicial review, who should be perfectly willing to accept that judicial review is only defensible to the extent judges can be relied on to be reasonably competent and faithful to the law. As long as it is reasonable to expect judges to do so in some realistic societies, we need not reject the entire institution of judicial review.²¹

The second objection is more philosophically technical. The rule of law gives elected officials and popular majorities a duty, of political morality, to obey the preexisting law. But it does not follow from the fact that *A* has a moral duty to *P* that some other agent *B* has either the moral or the legal right to coerce *A* to *P*. For example, one has a moral duty to refrain from insulting others, but no one has the right to use coercion to force another to comply with that duty.²² With this feature of moral duties in mind, one might attempt to resurrect the thwarting complaint by claiming that the *demos* has a moral duty to obey the law, but the judiciary does not have the authority to coerce it to comply with that duty.

Moreover, some moral obligations are defeasible, and can be overridden by other moral obligations. For example, the obligation not to lie might be overridden by the obligation to protect a friend from a murderer who is asking where he is.²³ This is particularly important in the context of a democratic *polis*, which might have obligations other than the rule of law to take into account. For example, when faced with an existential threat, it may be necessary for the people to ignore the law in order to preserve the democracy, and it might be morally worse to allow their democratic form of government to be destroyed than to break the law. If the people must break the law once to save themselves from being taken over by a fascist dictatorship, which will ignore the law routinely, it seems unreasonable to subject the people to all-things-considered moral condemnation for doing so.²⁴

²¹ The second section of this Article offers an account of the function of judicial review suggesting that judges may only be able to enforce their rulings to the extent they are ordinarily faithful to the correct understanding of the law, as the people understand it.

²² See generally ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 322 (1999) (explaining difference in Kantian philosophy between duties of ethics, which are not subject to external coercion, and duties of right, which are).

²³ This is an example of Kant's, although Kant infamously comes to the opposite conclusion than just about everyone else on the subject. See generally Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 PHIL. & PUB. AFF. 325 (1986).

²⁴ This issue also arises with that perennial bugbear of national security debate, the question of whether it is permissible to torture someone in order to determine the location of a hidden nuclear weapon set to go off somewhere in a major city.

As Lincoln asked:

Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?²⁵

Nor is it obviously appropriate for the courts rather than the people to make such a decision. The sovereign people might fairly claim “it is our responsibility, ultimately, to preserve the moral good represented by our political community, and hence to make the final decision about whether we must break the law to do so.” Interpreted this way, the thwarting complaint is the complaint that the judiciary is taking away that ultimate responsibility. Put in Schmitt’s terms, “[s]overeign is he who decides on the exception.”²⁶ If an exception is to be decided upon, that decision is properly reserved to the sovereign people.

In Europe, this version of the thwarting complaint may have more currency than in the United States. Under the rubric of “derogation,” European courts and commentators have considered the extent to which elected officials may abandon constitutional obligations in the face of emergency, as a property of political sovereignty.²⁷

But if that is the thwarting complaint, it gets rather overused. The rule of law is an extraordinarily important value, such that it takes a serious interest on the scale of the *demos*’s defense of its own sovereignty in order to justify discarding it.²⁸ No one in his or her right mind would say that the sorts of cases that conventionally raise a critique of judicial review are of that moral magnitude.

Consider the contemporary debate over gay rights cases, like *Lawrence v. Texas*,²⁹ which are often criticized on countermajoritarian grounds.³⁰ Suppose

²⁵ Aarthi Monica Natarajan, *Lincoln & Congress, Myths Aside*, 3 U. OF ST. THOMAS J. OF L. & PUB. POL’Y. 80, 90 n. 53 (2009) (quoting Lincoln’s address to Congress on July 4, 1861).

²⁶ CARL SCHMITT, *POLITICAL THEOLOGY* 5 (George Schwab trans., 1984).

²⁷ See Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben’s State of Exception*, 17 EUR. J. OF INT’L L. 677, 684–86 (2006).

²⁸ This is not just because of the great moral importance of the rule of law but also because the rule of law is (allegedly) an important feature of other social goods, including, for example, economic prosperity. See *The Rule of Law and Equality*, *supra* note 16; see also Paul Gowder, *Equal Law in an Unequal World*, IOWA L. REV. (forthcoming 2014), available at <http://papers.ssrn.com/so13/papers.cfm?abstract.id=2203735> (last visited Sept. 16, 2013); see generally Robert Barro, *Democracy and the Rule of Law*, in GOVERNING FOR PROSPERITY at 209 (Bruce Bueno de Mesquita & Hilton L. Root, eds., 2000).

²⁹ *Lawrence v. Texas*, 539 U.S. 558, 603 (2003).

³⁰ See discussion *infra* at Part B.

that social conservatives are right that same-sex intercourse is morally wrong. Still, assuming (as one must for purposes of considering the thwarting complaint, for the reasons given above) that the Supreme Court faithfully and competently applied the constitution in *Lawrence*, the law prohibits criminal prosecutions for same-sex intercourse in the United States. Refraining from such prosecutions, unless and until the constitution is amended, is a requirement of the rule of law, and this obligation cannot be disregarded unless same-sex intercourse is not only wrong, but so dangerous that it threatens “all the laws but one.” That notion is mad.

Moreover, if a “state of exception” like Lincoln’s is justified at all, it is justified only when an imminent emergency makes it impossible for the *demos* to act prospectively by revising the law using ordinary means. Even if legal same-sex intercourse did threaten to cause the collapse of society, it would justify surrendering the rule of law to fix it only if that social collapse would happen in less time than it would take to amend the constitution to prohibit it in accordance with the forms of law. Even more mad.

And when we do finally get into the fascist dictatorship/ticking time bomb sorts of cases, where it might be justifiable to temporarily set aside the rule of law, there is likely to be little reason to worry about judicial obstreperousness. Even if the judiciary can sometimes effectively override executive or legislative wills in normal politics, in situations of extreme existential crisis, elected officials are likely to be able to coordinate to get around those features or simply ignore them. Just imagine the contrary situation: the United States is under threat from a military *coup d’état*. The President arrests several military officers and holds them without trial to stop the coup. Someone shows up in court and gets a writ of habeas corpus, while the threat is still imminent. And then what? Are we to believe that the President will not be able to go forward anyway—that Congress or the people or the loyal military officers will do something to stop him? Obviously not—when existential crises hit, the judiciary is unlikely to be able to enforce judgments that impede the system’s self-defense.³¹

It is no surprise, then, that the judiciary tends not to even try. Thus, the European courts have taken a fairly deferential stance toward the derogation powers of national legislatures.³² So has the U.S. Supreme Court—consider

³¹ In fact, one might wish that the judiciary were more equipped to stand in the way of popular response to such threats or perceived threats. History is rife with examples where the public has hastily thrown aside the rule of law in fear of a threat to the democracy, from the Athenian affair of the *herms*/mysteries to *Korematsu*. (The Athenian affair of the *herms*/mysteries was a public hysteria following the mutilation of some statues and profanation of the religious ceremony of the Eleusinian Mysteries; the two incidents were generally thought to indicate an oligarchic threat to the democracy, and resulted in numerous persecutions. See generally James F. McGlew, *Politics on the Margins: The Athenian “Hetaireiai” in 415 B.C.*, 48 *HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE* 1 (1999).

³² Humphreys, *supra* note 27, at 685.

Korematsu and *Ex parte Vallandigham*.³³ Not only do judges tend to feel no particular desire to turn their constitutions into suicide pacts, they have self-interested incentives not to do so, since their power and prestige also depends on the continuing existence of the democratic legal systems from which they draw authority. In those rare cases when the judiciary has tried to stand against the other branches in emergencies, it has found itself powerless: consider Lincoln's defiance of Chief Justice Taney's decision in *Ex parte Merryman*.³⁴

Finally, democracies may be unable to ignore the rule of law and still maintain their character as democracies. If so, the thwarting complaint is self-defeating: a democratic public cannot defend its alleged right to ignore the rule of law on grounds of its legitimacy as a sovereign democracy, because that legitimacy dissolves when it does so. I cannot fully defend this point here, though I intend to do so in a future work.³⁵

There are, however, versions of the countermajoritarian complaint that are consistent with the rule of law. The next version of the complaint takes the "majoritarian" part of the countermajoritarian problem seriously.

B. *The Entrenchment Complaint*

To answer the thwarting complaint, I pointed out that democratic publics retain ultimate authority to change the law prospectively, while holding on to judicial review. But the real story isn't so simple. Constitutional law, at least in countries like the United States, is entrenched because of the onerous requirements of the amendment process—such as supermajorities. The majoritarian legislature does not have full prospective control over the laws that regulate its behavior. This gives rise to another version of the countermajoritarian complaint, which this Article calls "the entrenchment complaint." Essentially, this is an objection to the dead hand of yesterday's legislature getting to control the living hand of today's.³⁶

But that point allows us to see how the entrenchment complaint can be quickly disposed of: it is not an objection to judicial review. Judicial review and constitutional entrenchment need not go together. A state may have an entrenched constitution enforced by "the people themselves," as was the case

³³ See generally *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Vallandigham*, 68 U.S. 243 (1864).

³⁴ See generally Joseph C. Long, *Ex Parte Merryman: The Showdown Between Two Great Antagonists: Lincoln and Taney*, 14 S.D. L. REV. 207 (1969).

³⁵ *The People's Will and the People's Laws*, *supra* note 17.

³⁶ See, e.g., LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 11–12 (Geoffrey R. Stone ed., 2012) ("The sheer oddity of making modern decisions based upon an old and archaic text ought to give constitutionalists pause. They insist that we follow the commands of people who knew nothing of our problems and have nothing to do with us, who are not even biologically related to most of us.")

in Athens, where citizen juries enforced a constitution that was entrenched a few years after the trial of the generals.³⁷ Or a state may have an unentrenched constitution enforced by judges. California's constitution is like that: if the California Supreme Court strikes down a law, the people can reverse the ruling by directly putting an amendment on the ballot and enacting it on a simple majority vote.³⁸ Those who accept the entrenchment complaint seem to be committed to accepting judicial review in California and rejecting Athenian constitutionalism, notwithstanding its populist bona fides.

However, this dismissal of the entrenchment complaint may be slightly too hasty. It might be that entrenchment is more objectionable in the presence of non-popular judicial review than it is in its absence. This is because the combination of an entrenched constitution and an elite constitutional court with the authority to interpret that constitution entails that the process of constitutional change becomes an interpretive task for judges rather than a legislative task for the people.³⁹ This is a complaint that has real-world salience. Consider Justice Scalia's dissent in *Lawrence v. Texas*, in which he argued that gay rights are to be achieved by "persuading one's fellow citizens" rather than by "the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."⁴⁰

Yet it is not clear that this is an objection to entrenchment and judicial review, as such, rather than an objection to entrenchment and judicial review under the mode of constitutional interpretation known as living constitutionalism. The Court in *Lawrence* could have upheld Texas's sodomy law; had it done so, it would not have seized the reins of political change for itself. The entrenchment complaint does not seem to work against a court that adopts an inflexible approach to the constitution. Moreover, it depends on a controversial originalist conception of constitutional interpretation. It does not work against conceptions of constitutional law that view cases like *Lawrence* not as changes to the law, but as doctrinal changes that track a consistent underlying law as applied to changed circumstances.⁴¹

C. *The Respect Complaint*

This leaves the third version of the complaint, which concerns the fact that judges determine when the people are breaking their own laws. The objection is not to the "review," it is to the "judicial." This version of the

³⁷ See *Lessons from Athens*, *supra* note 8.

³⁸ CAL. CONST., art. 2, § 8, 10; art. 18, § 3.

³⁹ See Melissa Schwartzberg, *Democracy and Legal Change* 150 (2009).

⁴⁰ *Lawrence*, 539 U.S. at 603.

⁴¹ See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993) (arguing that faithfulness to constitutional text may require that interpretations change with social circumstances).

complaint asks, “Aren’t the people perfectly capable of interpreting their own fundamental law?” Interpretation, as well as legislation, is a function and privilege of sovereignty. Recall the Athenian example, where the people reserved interpretation for their direct exercise via the mass jury. Perhaps, it is objectionable to remove interpretation too far from popular control.⁴²

Put differently, in a community characterized by legal as well as political disagreement, those who are worried about the countermajoritarian problem may worry that the court will impose the court’s own view of what the law requires over the public’s different view of what the law requires. After all, reasonable citizens often disagree among themselves about the law’s requirements. One might think that these disagreements are to be resolved by democratic means. If judges resolve these disagreements, or if they make rulings that differ from majority legal interpretations, perhaps popular sovereignty as well as the rule of law have been thwarted. The sovereign *demos*, or some significant section of its membership, thought it was enacting one thing—or today’s sovereign *demos* thinks that yesterday it was enacting one thing in the form of constitutional text—but some court has intervened and told it that actually, it enacted something else. Why does the court get to tell the *demos* what its own laws mean? Exacerbating these worries, institutional features of the political environment—such as the difficulties of coordinating to bring about political change, the presence of veto points, supermajority requirements, etc.—may prevent the *demos* from mobilizing to correct the court’s error.⁴³ Thus, the people have lost control of their own laws. Moreover, losing the power of interpretation might effectively mean losing the power of legislation: a sufficiently aggressive judiciary might interpret the constitution to mean whatever the judges want it to mean, despite the people’s attempt to change it.⁴⁴

This complaint is distinctively associated with popular constitutionalists like Tushnet and Kramer.⁴⁵ But I think the strongest version draws on Waldron’s claim that writing judicial review into a constitution represents a lack of respect for one’s fellow citizens.⁴⁶ To fill the claim out: perhaps by

⁴² See Tremblay, *supra* note 7, at 622.

⁴³ There is an immense literature in political science on the action-impeding effects of political institutions such as those written into the U.S. constitution. See generally George Tsebelis, *Veto Players: How Political Institutions Work* (2002) (analyzing political systems in terms of the distribution of “veto players”—people whose assent must be gotten to achieve political change—in an institutional environment).

⁴⁴ See, e.g., David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* 231–32 (2010) (suggesting that judges can aggressively read rule-of-law requirements into the law, even when the legislature means to abolish them, absent an extremely clear statement to the contrary).

⁴⁵ See, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2005); Mark Tushnet, *Taking the Constitution Away from the Courts* (2000).

⁴⁶ Jeremy Waldron, *Democracy and Disagreement* 221–23 (1999). See also Jeremy Waldron,

taking the power of constitutional interpretation away from the public and giving it to judges, we express distrust either for our fellow citizens' ability or their virtue. We deny that they either have the competence to interpret the law, or the honesty and self-restraint to apply it in the face of a political desire to the contrary.

Both of those attitudes are objectionable, not least because they rest on false premises. On the competence point, ordinary citizens might not be capable of interpreting international tax treaties, but constitutional law is different. Many constitutions are best understood not in terms of technical legal doctrines but as repositories of the fundamental values of their political communities, values that the people are in at least as good an epistemic position to access as judges, and probably in an even better position.⁴⁷

On the honesty and self-restraint point, any claims with which we might besmirch the public can just as easily be directed to the courts themselves, as is evidenced by the cases that both the left and the right in the United States condemn as nakedly political. That is not to say that the judiciary actually is nakedly political (a claim denied in the previous section, which must be denied in order to defeat the thwarting complaint). Rather, it is to say that we should not accuse the people of being more nakedly political than the judiciary. Without evidence, we have no reason to think that the people would be more likely to disregard the law than judges would.

Those who would defend judicial review against the disrespect complaint also must surrender some of their standard arguments. For example, the oft-heard claim that the courts ordinarily do not get too far from the policy preferences of the public⁴⁸ is just a non sequitur. The disrespect complaint is not addressed to the relationship between courts' legal rulings and the public's policy preferences, but to the institutional choice to locate the power to make those rulings in courts rather than in the public, and to the possibility that the courts' legal rulings will differ from what the public thinks the law is—not from their policy preferences, but from their legal judgments.

The respect complaint appears, on its face, to be a grave challenge to judicial review. The next Section shall answer it.

Disagreement and Response, 39 *Isr. L. Rev.* 50, 57–60 (2006) (elaborating on the argument).

⁴⁷ However, this is not to say that popular values and the constitution might not diverge. See generally Mila Versteeg, *Unpopular Constitutionalism*, *IND. L.J.* (forthcoming 2014) (suggesting that values enshrined in constitutions are often unpopular in their states).

⁴⁸ See, e.g., Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 *J. POL.* 1018 (2004) (summarizing research and offering additional empirical evidence for judicial conformity to public policy preferences).

III. WHO SPEAKS FOR THE PEOPLE?

Recall that, in the Athenian trial of the generals, the jury that would have tried the *graphe paranomon* (had it not been withdrawn) was itself a direct outlet for popular sovereignty. There is nothing odd about this; nothing in the concept of popular sovereignty requires that it be institutionally located in a legislative body rather than in a judicial body. In the contemporary context, it is unfortunately easy to simply assume rather than argue that popular sovereignty is located in Parliaments and Congresses (or, in the United States, the combined action of President and Congress), rather than in the courts.

Of course, arguments for that proposition are available. The most obvious is that Parliaments and Congresses and Presidents tend to be directly elected by the people, while judges tend to be appointed by elected officials. But this is merely a contingent fact about these offices, and it is not true in all places and at all times.⁴⁹ Until the passage of the Seventeenth Amendment in 1913, the U.S. Senate was appointed by state legislatures rather than directly elected.⁵⁰ Today, the President of the United States is selected by an electoral college whose members are appointed under the plenary power of state legislatures, and, at least in principle, a state legislature might not choose to allocate its electoral votes according to the popular vote.⁵¹ In Egypt, the Shura Council is partially appointed by the President.⁵² And, of course, the British House of Lords was an appointed legislative body for centuries, yet played an important democratic role.⁵³ On the other hand, judges in many U.S. states are elected, as are some judges in Switzerland and France,⁵⁴ and Supreme Court judges in Japan are subject to retention elections.⁵⁵ If being elected by the people is what makes a body an instrument of popular sovereignty, then it is not obvious that the early-republic Senate or the

⁴⁹ Another argument that might be made is that judges tend to have longer terms than other officials, and are designed that way in order to be insulated from political control. But this, too, is a contingent fact about political states rather than a necessary one.

⁵⁰ See generally Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997) (recounting the history of the Seventeenth Amendment).

⁵¹ See *McPherson v. Blacker*, 146 U.S. 1 (1892). But see *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (state electoral college rules must comply with the equal protection clause).

⁵² CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 128, 26 Dec. 2012.

⁵³ For example, the Lords participated in the attack on the Stuart attempts to increase the power of the Crown. See Jess Stoddart Flemion, *The Struggle for the Petition of Right in the House of Lords: The Study of an Opposition Party Victory*, 45 J. MOD. HIST. 193, 210 (1973).

⁵⁴ Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L. J. 1349, 1351 n.3 (2010).

⁵⁵ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 79 (Japan).

President today are such instruments any more than is the Supreme Court.⁵⁶ For this reason, 19th-century departmentalism is not an obviously more democratic mode of constitutional authority than contemporary “judicial supremacy.”⁵⁷

Moreover, in day-to-day politics, claims about the countermajoritarian problem do not seem to have much to do with the electoral character of the respective bodies. For example, the California Supreme Court’s decision in *In Re Marriage Cases*, finding a right to same-sex marriage under the California Constitution, was criticized for violating democratic principles—even though judges in California are subject to election, and elections have been used in the past to police the conformity of the California judiciary to public opinion.⁵⁸ Justice Baxter’s partial dissent, for example, castigates the majority for “forclos[ing] the] ordinary democratic process,”⁵⁹ and “substitut[ing], by judicial fiat, its own social policy views for those expressed by the People themselves,”⁶⁰ and utters dark words about “infringing upon our society’s most basic shared premise—the People’s general right, directly or [indirectly] through their chosen legislators, to decide fundamental issues of public policy for themselves.”⁶¹ One might ask Justice Baxter why the people cannot make those decisions through their chosen judges.

The foregoing discussion gives us an angle into answering the disrespect complaint. That complaint fails to specify exactly how it is that the people express their legal judgments. We cannot suppose that legislatures and executives will express the people’s legal judgments, because part of the point of constitutional law is to keep legislatures and executives from running afoul of the legal judgments of the people, as expressed in the constitution.⁶² Put

⁵⁶ Even in states in which judges are not elected, many constitutions take pains to ensure that the judiciary is at least somewhat representative of the population as a whole. See Lisa Hilbink, *Beyond Manicheanism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15, 23–25 (2006) (describing states in which judges are appointed for limited terms with a conscious attention to their political representativeness).

⁵⁷ Departmentalism is “the view that each of the three branches of the federal government possesses independent and coordinate authority to interpret the constitution.” Post & Siegel, *supra* note 3 at 1031. By contrast, judicial supremacy is the view that the judiciary has superior interpretive authority to other branches. *Id.* at 1027.

⁵⁸ See generally Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2036–2043 (1987) (recounting a famous California election in which Chief Justice Rose Bird and two other justices were removed from office).

⁵⁹ *In re Marriage Cases*, 43 Cal. 4th 757, 861 (Cal. 2008) (Baxter, J., concurring and dissenting).

⁶⁰ *Id.* at 863.

⁶¹ *Id.* at 865.

⁶² Alexander Hamilton, defending judicial review in Federalist 78:

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is

differently, constitutional law partly exists to solve a principal-agent problem between the people and elected officials—when the President or Prime Minister or Parliament violates, or arguably violates, the constitution, we cannot just assume that the policy choices those officials make are the same as the legal judgments of the people.

The Athenians recognized this, and sometimes saw politicians not as tools of the democratic will, but as threats to it, in the form of the wily *rhetor*, capable of using words to corrupt the laws and the *polis*.⁶³ The power of the courts was a guardian against that threat.⁶⁴ This is the antidemocratic face of politics, and the democratic face of law.

Facing the same problem as the Athenians did, we might just directly transpose their solution to the contemporary world and create full-fledged popular judicial institutions, like their citizen-jury, in which the people themselves directly enforce their legal judgments on public officials.⁶⁵ Or we could expand the role of the lay magistrates in many countries, to introduce a sample of community judgment into constitutional decisionmaking.⁶⁶ But those are not the only options. We can conceive of judicial review itself not as an imposition on the *demos*, replacing popular legal judgments with those of judges, but as an institutional tool for expressing and enforcing popular legal judgments, and, for that reason, an aspect of popular sovereignty.

Some work has already been done in this area. David Law has argued that the function of judicial review is to help solve the principal-agent problem between the public and elected officials by serving as a coordination device to enable the public to resist unconstitutional conduct.⁶⁷ The basic

superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

⁶³ See generally Jeffrey Arthurs, *The Term Rhetor in Fifth- and Fourth-Century B.C.E. Greek Texts*, 23 RHETORIC SOC'Y Q. 1, 5–7 (1994).

⁶⁴ See, e.g., Aeschines, *Oration Against Ctesiphon* (Aes. 3.235): “οὐδεὶς πόποτε ἐπέθετο πρότερον δήμου καταλύσει πρὶν ἂν μείζον τῶν δικαστηρίων ἰσχύσῃ”—“no one has ever attempted to end the democracy until he was stronger than the courts” (translation mine).

⁶⁵ Many democratic theorists have proposed using citizen-juries to model deliberative public opinion, either to have a direct legislative role or an information-forcing role in political campaigns. See, e.g., ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 340 (1989) (proposing deliberative “mini-populus”), ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2005) (proposing deliberative popular branch of government); JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991) (proposing “deliberative polls” in electoral campaigns). Similar institutions could be used for constitutional adjudication.

⁶⁶ On lay judges, see generally Sanja Kutnjak Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Popular Tribunals*, 40 CORNELL INT. L.J. 429 (2007).

⁶⁷ See generally David Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009).

logic of this account is that judicial review is a signaling device in a strategic equilibrium in which each citizen can rely on all other citizens' agreement to resist those official actions that the court says are unconstitutional. This explains why judicial decisions are successfully enforced against other branches despite courts having neither the power of the purse nor the sword: because the people accept judicial decisions as a way of expressing their otherwise inchoate collective interpretation of the constitution, and are willing to sanction officials who ignore judicial rulings.⁶⁸ This device allows the public to solve two problems: first, that each may be uncertain whether or not others are willing to take a risk or expend a cost to resist unconstitutional behavior, and second, that they may disagree about what is unconstitutional.⁶⁹

This account has several important implications. First, if judges' decisions get enforced to the extent people are willing to treat them as a signal to resist the other branches, then that puts some upper limit on the extent to which judges' decisions can diverge too greatly from the decisions the public itself would make, if it could act as a unitary entity. It is not clear how tight this limit is: there is a lot of potential wriggle room where people may be willing to support decisions they think are incorrect in order to avoid destabilizing the legal system as a whole. But there is some limit.

More importantly, the David Law analysis may make it possible to conceive of judicial review as a full-fledged popular constitutionalist institution. The coordination account licenses us to deny that courts actually have ultimate legal interpretive authority, even as a theoretical matter, even in strong judicial review systems, characterized by so-called "judicial supremacy," like the United States. Rather, they have *defeasible* authority, subject to the ultimate imprimatur of the public.⁷⁰

⁶⁸ A subsequent Article will explore the implications of this account in more detail, and offer some modifications to Law's strategic analysis. Gowder, *The People's Will and the People's Laws*, *supra* note 17.

⁶⁹ The "cost" here is the sacrifice of their policy preferences. Citizens may not know whether their fellows are willing to defend the law even when they prefer the illegal policy.

⁷⁰ That being said, constitutional courts in systems like the U.S. have *formal* authority: if the text of the law is to be believed, they have the final say on what the law is, even if in practice they may exercise their authority only with the assent of the people. This may give rise to an independent objection, based on an expressive idea: maybe merely saying they have final authority gives insult to the independent sovereignty of the democratic people. (For a general account of expressive meanings in law, see *Equal Law in an Unequal World*, *supra* note 28.) However, this seems implausible, because in democratic states the people still reserve ultimate formal authority over their courts through the power to revise the constitution, and even if a given constitution does not explicitly provide for that power, we can conceive of it as reserved as a constituent power, as, for example, was carried out in the United States abandonment of the Articles of Federation. See generally Alexander Somek, *The Owl of Minerva: Constitutional Discourse Before Its Conclusion*, 71 MODERN L. REV. 473, 477 (2008) (discussing the question of lingering constituent power after a state is formed).

To see this, consider the position of elected officials who find their decisions overturned by a constitutional court. From the standpoint of these officials, the courts have imposed on them a view of the law that the other officials don't agree with. The president thinks it is constitutional for her to imprison accused terrorists without trial, the court disagrees, and the court gets its way.

The president might fairly ask 'why should I have to accept the court's version of what the law is?' Note that this is a different question from 'why should I obey the law?' The president thinks—in good faith—that the law permits her to hold accused terrorists without trial. And she is a departmentalist, who thinks that she is entitled to follow her own good faith interpretation of what the law requires. Unfortunately for the president, on Law's theoretical analysis, she has a prudential reason to obey the court: she is afraid of the ire of the voters.

That prudential reason can be turned into a normative reason of political morality by asking what must be true of the public will in order for the president to fear political punishment for her disobedience. The public must support the judicial role—at least a critical mass of the people must think that it is right, most of the time, that politicians be made to obey the courts.

Thus, there are two practically equivalent things we might say to the president: either 1) the people are the authoritative expositors of the law, and the people assent to the Supreme Court's interpretations in general, or 2) there is no authoritative expositor of the law, however, in the face of irreconcilable legal disagreement, the people, as the ultimate political authority, must resolve the question, and they assent to the Supreme Court's interpretations in general. The President ought to obey the Supreme Court because the people have decided that she should, and we know they have made that decision because a politically savvy elected official fears electoral punishment for disobeying. Thus, we have vested ultimate authority in the people themselves, without changing anything about how judicial review actually works.

This is not far from how popular constitutionalists, like Kramer, argue that constitutional interpretation was carried out at the United States' founding—through the action, and under the authority, of the people en masse. The Federalists, on Kramer's account, thought that the people would resist unconstitutional behavior by the legislature, with or without judicial review. According to one federalist, quoted by Kramer, "[i]f the Congress make laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them. A universal resistance will ensue."⁷¹ While Kramer points out that most of the Federalists did not rely on judicial action to spark this resistance, this hardly matters for the ultimate

⁷¹ KRAMER, *supra* note 45, at 84.

normative analysis of the practice: if the rulings of a constitutional court like the U.S. Supreme Court are ultimately effective because they signal the people that unconstitutional behavior is going on, and help them to mobilize to stop it, then the question is not whether “judicial supremacy” is permissible—judicial supremacy does not exist—but whether a constitutional court is better or worse than other communication and coordination devices through which the people might exercise their legal authority.

On this understanding, judicial review is not costless—sometimes, the people might disagree with a discrete judicial ruling, and might only grudgingly accept it in order to preserve the authority of their courts for cases when they need it. Nonetheless, it provides powerful coordination benefits, enough that the citizens of judicial review states appear, by their evident willingness to hold politicians to obedience (which in turn appears by the fact that politicians do obey) to think that on the whole, constitutions with judicial review will bring it about that their governments obey their conceptions of what the law is more than will constitutions without it. That is enough to license the claim that judicial review is a tool of popular sovereignty.

But, perhaps this Article has gone in the wrong direction even to talk about the notion of “legal authority.” Snowiss has argued that the U.S. constitution originally was understood as “fundamental law,” a sort of law not amenable to judicial enforcement, but only enforceable against a recalcitrant legislature through direct political action (voting, petitioning, revolting) of the people.⁷² As “fundamental law,” it was not subject to ordinary legal exposition. Marshall changed the sort of thing the Constitution was when he applied the ordinary methods of legal interpretation to it, converting it from “fundamental law” to “supreme ordinary law,” and in doing so, arrogated to the Court the authority to say what it meant, rather than simply refusing to enforce laws that clearly and concededly violate it.⁷³

But suppose Snowiss is right. By the account in this Article, nothing follows. Concededly, on this pre-Marshall conception of judicial review, the courts would have had no authority to rule on debatable constitutional questions. However, on political as on legal questions, the legislature does not get the final word, the sovereign people do. The sovereign people, by their willingness to hold the other branches accountable to the Court’s legal interpretations of the Constitution, appear to be of the opinion that their political judgment should track the Court’s legal judgment. In this light, the introduction of judges and the methods of ordinary law into constitutional dispute resolution need not matter for the ultimate allocation of power. It is up to the people to decide whether the Constitution is to be treated like ordinary law, to be interpreted by judges, or like fundamental law, to be

⁷² Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 5–6 (1990).

⁷³ *Id.* at ch. 1–3.

interpreted in the political realm. They make this decision by their collective and independent choices whether or not to hold the legislature and executive accountable to legalistic judgments issued about the Constitution by the courts. If the people go along with it, as they must if judicial rulings are to be enforced, the Constitution can have whatever political or legal status they want it to have, without violating democratic principles.⁷⁴

Another way to understand the argument of this section is in terms of the difference between how political scientists and lawyers think about legal systems. Lawyers tend to take the internal point of view on the law.⁷⁵ They tend to take its formal commands seriously, and think of it in terms of the obligations it imposes. In evaluating the law, lawyers tend to think of whether or not it ought to demand people do the things it does demand of them, as well as whether or not the world will be a better place if people do those things. By contrast, political scientists have traditionally thought about power—the ability to get what one wants regardless of the preferences of others.⁷⁶ A political scientist takes the external point of view on the law, and views it, like other institutions, fundamentally as a way of influencing the beliefs of others. A legal rule changes the power relationships in the community because of the way it changes the expectations of some in society about how others will behave (e.g., the expectations of criminals about how the police will behave), and thereby alters incentives.⁷⁷

Both perspectives are valuable. But they are appropriate for different questions. When we are asking whether judicial review violates democratic principles, we are really asking the political scientist's question: does judicial review take power away from the people? The answer must depend on the extent to which judicial review can function without the willingness of the people to enforce the judgments of courts. If it cannot, then judges simply facilitate the legal or political judgments of the public. This dissolves the odd notion of "judicial supremacy."

Yet a further question remains: why should judges serve this function? Even if judges can be made democratically acceptable, why do we need them? Why not, for example, a constitutional jury on the Athenian model, which could serve the same function without the prospect of lingering anti-

⁷⁴ The people could even choose to treat the constitution as an altogether unenforceable statement of principles, as advocated by Seidman, *supra* note 36. The point is, they have not. The U.S. Supreme Court has not forced the people to take it, or the Constitution, seriously. The Supreme Court does not have the practical, real-world power to do so. Only the people have that power.

⁷⁵ See generally Scott J. Shapiro, *What is the Internal Point of View?* 75 Fordham L. Rev. 1157 (2006) (explaining the internal point of view).

⁷⁶ See generally Terry M. Moe, *Power and Political Institutions*, 3 Persp. on Pol. 215 (2005).

⁷⁷ See Avner Greif, *Institutions and the Path to the Modern Economy: Lessons From Medieval Trade* 30–40 (2006) (providing a fuller account of an approach to institutions, including legal institutions, characteristic of political scientists).

democratic worries?

Or, instead, why not elect judges? Some U.S. states operate this way, and it does not seem to compromise the rule of law or deter judges from striking down laws pursuant to the state constitution. Moreover, if David Law's model is correct, and citizens genuinely want the laws to be obeyed, we would not expect citizens to regularly punish judges in the polls for striking down laws. Rather, it would be in the interests of citizens' effective exercise of their sovereignty to protect the independent judgment of their judiciary.⁷⁸

There may not be a satisfactory answer to this yet. Two preliminary passes at it seem to suggest themselves. First, unelected judges may be easier to insulate from pressure from other branches than citizen-juries or elected judges—courts tend to be composed of socioeconomic elites, and can be given things like life tenure, etc. Second, against citizen-juries in particular, consider the liberal ideal of the citizen who has other things going on in her life, and who ought not to be needlessly drafted to serve in some kind of constitutional court. This is a familiar objection to Athenian models of democracy—they are just too demanding on the labors of ordinary citizens. If we limit the citizen-jury to those who volunteer, the self-selection effects could be a problem—imagine the jury addict from Aristophanes' *Wasps*. Still, there are arguments against both of these ideas, and no obvious resolution is in sight.

Thus, the debate ought not to be about the defensibility of judicial review, but about its comparative advantage over more populist alternative institutions. The countermajoritarian complaint might be revived as an argument for judicial elections or constitutional juries.

⁷⁸ Of course, judges have been punished in the polls in the United States before. See discussion *supra* n. 58. However, at least historically, there have been many fewer electoral removals in those jurisdictions where judges are elected than there are controversial rulings. Between 1964 and 1994, of 3,912 retention elections in ten states, only fifty judges were removed. Larry Aspin, William Hall, Jean Bax & Celeste Montoya, *Thirty Years of Judicial Retention Elections: an Update*, 37 SOC. SCI. J. 1, 2-3 (2000). However, some scholars suggest that things have changed in recent years, particularly with the development of organized opposition to judges. See Brandice Canes-Wrone, Tom Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J. L. ECON. & ORG. 211, 214-16 (2012).

The most recent data suggest that 2010 was a particularly bad year for judges—six judges were removed in 482 elections (then again, three of them were from one political controversy over gay marriage in Iowa). Larry Aspin, *The 2010 Judicial Retention Elections in Perspective: Continuity and Change from 1964 to 2010*, 94 JUDICATURE 218, 224 (2011). This level of removal might be the start of a new trend. Or it might be an aberration: from 1998 to 2008, only 1.2 judges were removed on average per year. *Id.* And six judges in 482 elections are still less than 2 percent—hardly a staggering blow to judicial independence.

IV. IS "JUDICIAL SUPREMACY" A MEANINGLESS CONCEPT?

If the account of judicial review above is correct, there may be no functional difference between strong judicial review systems, like the U.S. system, and weak judicial review systems, like the U.K. system, under the Human Rights Act declaration of incompatibility regime. In the latter, judges can declare Parliamentary action illegal but have no formal enforcement power—this is the style of judicial review that Gardbaum has called "the new commonwealth model."⁷⁹

On the theory noted in the previous section, the fundamental mechanics of strong and weak judicial review systems are the same. The courts in either can enforce their will over other organs of government only when backed by enough popular support for their role—even if not for any individual decision—that other officials need to fear punishment for disobedience. If the U.S. courts strike down an act of Congress, Congress and the President will do what they are told, notwithstanding their own political preferences to the contrary, only if they think the people might make them do so. Similarly, if the British courts say that an act of Parliament is incompatible with the Human Rights Act, Parliament will repeal it, contrary to the political preferences of the government, again, only if they think the people might make them. On this model, the fact that we say that the United States subscribes to "judicial supremacy" in constitutional interpretation, while the U.K. does not, plays no role. It is just an empty formality. If the people think that the courts accurately declare the law in each system, and are equally committed in each system to holding their elected officials to legal obedience, then the courts in each should be equally effective at carrying out their wills.

If this is true, it also has normative implications for the literature on the countermajoritarian problem. If weak judicial review and strong judicial review work the same way, then the latter cannot override the will of the people to a greater extent than the former. It follows that if weak judicial review is permissible, so is strong, absent an argument to the effect that formally binding judicial review is impermissible regardless of whether that formal property has any effect on the world.

That, at least, is the theory. Reality, however, may be uncooperative. Stephen Gardbaum has reviewed the performance of judicial review in the new commonwealth systems, and has found mixed results. The legislatures of some countries, particularly Canada, have treated judicial review as effectively conclusive, while those of others, particularly New Zealand and Australia, have been willing to disregard their constitutional courts.⁸⁰ This

⁷⁹ See generally Gardbaum, *supra* note 6. However, not all weak judicial review systems need be new commonwealth systems in Gardbaum's sense: the new commonwealth systems are also characterized by pre-enactment constitutional review. See STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* 14 (2013).

⁸⁰ GARDBAUM, *supra* note 79 at 227–29.

gives rise to a theoretical puzzle: if in each system it is the people who ultimately determine a court's power, what explains the different extent to which the legislatures in each defer to their constitutional courts' rulings?⁸¹

One possibility is that the public does not interpret the rulings of the courts in weak and strong judicial review systems the same way. The public might interpret the rulings of the U.S. Supreme Court as the final word on what the law is, while the public in weak judicial review systems may interpret their judicial rulings as merely advisory, and suitable for further public debate.⁸² This possibility should be explored further by empirical political scientists. I am intuitively skeptical of it, because it seems to me that many Supreme Court constitutional decisions are quite controversial, from *Roe v. Wade* to *NFIB v. Sebelius*. But my intuitive skepticism is quite unreliable: to a professor of constitutional law, controversy about Supreme Court cases is likely to be far more salient than its absence. We must go to the data.

Another possible theoretical explanation for the difference is that in strong-form judicial review systems, the status quo may shift after the constitutional court invalidates some policy, such that it is assumed by legislators, by executive officials, and by the public at large that an invalidated policy will not be implemented. By contrast, in some weak-form systems, the status quo may not shift: it may be assumed that the policy will continue to be implemented absent some deliberate act of acquiescence by other officials.⁸³ The British Parliament, for example, must take some affirmative action to repeal a statute that has been the subject of a declaration of incompatibility under the Human Rights Act, although the statute provides for a "fast-track" method to do so.⁸⁴ By contrast, it is generally understood in the United States that if an act of Congress is struck down, it does not take an affirmative act by Congress to repeal it; indeed, it would take an affirmative act by Congress to reenact it, or some open defiance by the executive to enforce it notwithstanding the court's ruling.

⁸¹ The easy answer, of course, is just that the people support the courts in Canada and in the United States, but not in New Zealand or Australia. This might be true, but it would be theoretically uninteresting. It is also a task for empirical social scientists, who ought to go to survey data to sort it out.

⁸² This is a point made by KRAMER, *supra* note 45, at 229–31.

⁸³ States with weak-form judicial review might either allow or not allow courts to shift the status quo, while still leaving the ultimate decision to non-judicial branches of government. See Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2784–85 (2003) (comparing Canadian Charter section 33, which permits legislature to affirmatively act to reenact unconstitutional legislation, and New Zealand Bill of Rights, which requires courts to enforce unconstitutional legislation.)

⁸⁴ See generally Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 355–56 (2002) (explaining the procedure after a court declares an Act of Parliament incompatible under the Human Rights Act.).

Because of this status quo effect, and because some legislatures have built-in biases against action,⁸⁵ it may be that in existing strong-form judicial review states, all the inertia is on the side of obedience. But in at least some existing weak-form states, it is on the side of disobedience. In support of this proposition, note that Canada, which Gardbaum found to have the strongest judiciary in practice, also allows the judiciary to shift the status quo: under its constitution, the legislature must explicitly declare that a given law is immune from judicial review, either before review or afterward.⁸⁶ Absent such a declaration, the Canadian judiciary has the final power to strike down a law. By contrast, in New Zealand, where judicial review is empirically the least effective, the judiciary may not shift the status quo: other statutes (even those enacted earlier) are given priority over the Bill of Rights, and if the courts cannot find an interpretation of a statute that makes it consistent with the Bill of Rights, they must enforce it anyway.⁸⁷

This question also needs more attention from empirical researchers. However, if the data support the noted hypothesis, we may be able to find institutional design possibilities that further allow us to get something of what we want from judicial review while avoiding various versions of the countermajoritarian problem. For example, against the argument that formal bindingness is objectionable, we might implement a weak judicial review system that will not be formally binding, but in which the judicial invalidation of some act shifts the status quo and requires affirmative legislative or executive action to reinstate the act—getting all of the constraining-officials steak, but none of the formal “judicial supremacy” sizzle. By contrast, against the argument that it is not formal bindingness but imposing institutional barriers to the realization of the will of the people’s elected representatives that is objectionable, we might institute a formally binding system of judicial review that does not shift the status quo. The choice is not merely between strong judicial review, weak judicial review, and no judicial review at all.

V. CONCLUSION: THE MANY WAYS OF DOING JUDICIAL REVIEW

That last point can extend quite far. Based on the discussion in this essay, the question of the permissibility of judicial review is really no fewer

⁸⁵ See, e.g., Kenneth A. Shepsle, *Dysfunctional Congress?* 89 B.U. L. REV. 371, 380–83 (2009) (discussing strategic role of impediments to legislative action in U.S. Congress); see generally George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. OF POL. SCI. 289 (1995) (offering general theory of impediments to action in various legislative systems). If the hypothesis given in the text is right, the effect on legislative compliance of giving a constitutional court the power to shift the status quo should vary with the number of veto players in a state’s system. This is, in principle, empirically testable.

⁸⁶ Canadian Charter of Rights and Freedoms, sec. 33.

⁸⁷ GARDBAUM, *supra* note 79, at 128–30.

than six questions. Is there to be judicial review by some branch of government independent of the legislature at all? Is it to be carried out by popular or by elite institutions? Are the members of those institutions to be subject to election? Are the constitutions that they enforce to be entrenched or not? Is judicial review to be formally binding? And, finally, is judicial review to shift the status quo or not?

The answers to these questions are independent of one another. The following chart captures just some of the diversity of institutional choices available to framers of judicial review systems:

| | Judicial Review | Popular or Elite | Elective reviewers | Entrenched constitution | Formally binding | Shifts status quo |
|---------------------------------|-----------------|------------------|--------------------|-------------------------|------------------|-----------------------|
| U.S. | Yes | Elite | No | Yes | Yes | Yes |
| U.K. | Yes | Elite | No | No | No | No |
| California | Yes | Elite | Yes | No | Yes | Yes |
| 5 th -century Athens | Yes | Popular | No | No | Yes | unclear ⁸⁸ |
| 4 th -century Athens | Yes | Popular | No | Yes | Yes | unclear |

As that chart also reveals, many heretofore hypothetical options are available. A state might, for example, adopt something like the U.S. system, but with elective (but elite) courts, or with popular constitutional juries. Doing so might take much of the wind out of the sails of the democratic objection to judicial review. However, it might—or might not—do so at the cost of sacrificing some of legislators’ and executives’ legal accountability, and with it, a measure of the rule of law.

Nor are the dimensions reflected on the chart the only ones with which institutional designers might tinker. One obvious omission is the question of whether a state has a formal written constitution or merely a collection of constitutional conventions, either of which might be compatible with any combination of institutional choices along the other dimensions. Also omitted is the extent to which legislatures may modify the power of courts (except insofar as this is a function of constitutional entrenchment in general). For example, in the U.K., parliament has the power to repeal the whole Human Rights Act regime, and conservatives have threatened to do so,⁸⁹ while, in the U.S., Congress possesses, and has repeatedly come close to using, the ability to modify the Supreme Court’s power by measures such as court-packing and jurisdiction-stripping.⁹⁰ Moreover, the chart above does not capture the extent to which legislatures or some other institution must explicitly review the constitutionality of an enactment prior to enactment, a feature unfamiliar to the United States but present not only in the new constitutionalism,⁹¹ but

⁸⁸ Historians are not clear on what happened in Athens to the illegal proposal after a *graphe paranomon*—a suit against decrees contrary to the law—was decided in favor of the plaintiff, and this may have changed over time. See Adriaan Lanni & Adrian Vermeule, *Precautionary Constitutionalism in Ancient Athens*, 34 CARDOZO L. REV. 893, 902 n. 48 (2013) (discussing difference of opinion on the matter).

⁸⁹ GARDBAUM, *supra* note 79, at 9–10.

⁹⁰ See generally Neal Devins, *Should the Court Fear Congress?*, 90 MINN. L. REV. 1337, 1342–45 (2006) (recounting history of Congressional attacks on Supreme Court).

⁹¹ GARDBAUM, *supra* note 79, at 14.

also, on some readings, in a different form in 4th Century Athens.⁹² Similarly, it does not capture the question of whether courts themselves engage in pre-enactment or post-enactment review: on one interesting recent argument, the U.S. practice of post-enactment review distorts legislative preferences relative to pre-enactment review.⁹³

Ultimately, the goal is to design institutions that make officials accountable to the will of the sovereign *demos* expressed both in its election outcomes and its laws.⁹⁴ To do so, we need to get past a simple one-dimensional debate about “judicial supremacy.” We can have both the rule of law and democracy. Judicial review, structured the right way, can help.

⁹² On some readings of the source material, in 4th Century Athens, there was a trial-like procedure meant to test new additions to the *nomos*, the higher law to which day-to-day decrees must conform. See P.J. Rhodes, *Sessions of Nomothetai in Fourth-Century Athens*, 53 CLASSICAL Q. 124, 126 (2003).

⁹³ Brianne J. Gorod, *The Collateral Consequences of Ex Post Judicial Review*, WASH. L. REV. (forthcoming) (manuscript at 7–8), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2265455.

⁹⁴ See *The People’s Will and the People’s Laws*, *supra* note 17 for a discussion of how the laws are the will of the people.