THE REAL CASE FOR JUDICIAL REVIEW: A PLEA FOR NON-INSTRUMENTALIST JUSTIFICATION IN CONSTITUTIONAL THEORY

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Judicial review is a present instrument of government. It represents a choice that men have made, and ultimately we must justify it as a choice in our own time.¹

ABSTRACT

This paper defends judicial review on the ground that judicial review is necessary for protecting “a right to a hearing.” Judicial review is praised by its advocates on the basis of instrumentalist reasons; i.e., because of its desirable contingent consequences such as protecting rights, promoting democracy, maintaining stability, etc. We argue that instrumentalist justifications for judicial review are bound to fail and that an adequate defense of judicial review requires justifying it on non-instrumentalist grounds. A non-instrumentalist justification grounds judicial review in essential attributes of the judicial process.

In searching for a non-instrumental justification, we establish that judicial review is designed to protect the right to a hearing. The right to a hearing consists of three components: the opportunity to voice a grievance, the opportunity to be provided with a justification for a decision that impinges (or may have impinged) on one’s rights, and the duty to reconsider the initial decision giving rise to the grievance. The right to a hearing is valued independently of the merits of the decisions generated by the judicial process. We also argue that the recent proposals to reinforce popular or democratic participation in interpreting the Constitution are misguided because they are detrimental to the right to a hearing.

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I INTRODUCTION

Judicial review is a central feature of American constitutional law. Yet constitutional theory has been obsessed for many years with an attempt to provide an adequate justification for it, and in particular the attempt to reconcile judicial review with democracy. Some constitutional theorists maintain that judicial review cannot be defended on normative grounds and that it ought to, at best, be regarded as a historical or conventional choice made in the early stages of American constitutional history.\(^2\) However, Alexander Bickel rightly urged us not to be content with historical or conventional justifications for judicial review. Instead, he advised us to justify judicial review “as a choice in our own time.”\(^3\) In his view, such a central feature of constitutional law cannot merely be grounded in traditions or conventions without a continual, relentless (and successful) effort to make these traditions or conventions suitable for us.

Much of the work inspired by Bickel’s proclamation in the past decade or so has been critical of judicial review. Larry Kramer, Mark Tushnet, Jeremy Waldron, and Keith Whittington, to name but a few, have offered thoughtful and provocative criticisms of the role of the Supreme Court in American constitutional law. Others, such as Larry Alexander, Fredrick Schauer, and Richard Fallon have provided equally forceful arguments favoring judicial review and judicial supremacy.

This paper joins the search for a rationale for judicial review. It also wishes to defend judicial review against the recent numerous rising voices that either wish to abolish judicial review altogether or to limit or minimize its scope.\(^4\) Its main task is to expose a critical flaw shared by both

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\(^{3}\) Bickel, supra note 1.

\(^{4}\) The most influential recent contributions include: JEREMY WALDRON, LAW AND DISAGREEMENT (1999); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURT (2000); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND
advocates and opponents of judicial review and to propose a framework for addressing this difficulty.

The critical flaw of the debate concerning judicial review is the conviction that judicial review must be instrumentally justified; i.e., that it be grounded in contingent desirable features of the judicial process (for example, the superior quality of decisions rendered by judges, the special deliberative powers of judges, and so on). Once the critical flaw of traditional theories is understood, this paper turns to develop a new proposal to defend judicial review that overcomes the difficulties faced by instrumentalist justifications. Under this proposal, judicial review is designed to provide individuals with a right to a hearing or a right to raise a grievance. More particularly, we argue that judicial review is indispensable because it grants individuals opportunities to challenge decisions that impinge (or may have impinged) on their rights, to engage in reasoned deliberation concerning these decisions, and to benefit from a reconsideration of these decisions in light of this deliberation. The significance of such a right does not depend on the assumption that courts render better decisions than other institutions or that they are more protective of constitutional (or other) values. Under this view, judicial review is intrinsically rather than instrumentally desirable; its value is grounded in procedural features that are essential characteristics of judicial institutions per se.

Constitutional theorists justify judicial review on instrumentalist grounds; that is, on the basis of its desirable contingent consequences.\(^5\) For example, they contend that judicial review is justified because it contributes to the efficacious protection of rights,\(^6\) to the operation of representative institutions,\(^7\) to the stability of legal decisions and settlement of disputes,\(^8\)

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\(^5\) See, e.g., Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 5 (2006) (“My premises are thus firmly consequentialist. Indeed they are rule-consequentialist: judges should interpret legal texts in accordance with rules whose observance produces the best consequences overall”); Ronald Dworkin, Freedom’s Law: The Moral Reading of the American Constitution 34 (1996) (“I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding them. The best institutional structure is the one best calculated to produce the best answers to the essentially moral questions of what the democratic conditions actually are, and to secure stable compliance with those conditions.”).

\(^6\) See infra Section IIB.

\(^7\) See infra Section IIC.

\(^8\) See infra Section IID.
to the realization of decisions made during constitutional moments,\(^9\) or to the maintenance of other valuable aspects of liberal democracy.\(^{10}\) Hence, to evaluate the desirability of judicial review and its optimal scope, one ought to examine the long-term practical effects of judicial review.\(^{11}\) The most influential contemporary advocates of instrumentalism are constitutional institutionalists who use sophisticated methods to compare the performance of courts with that of other institutions and take into account a wide variety of consequentialist considerations.\(^{12}\) One of the principal advocates of this perspective – Adrian Vermeule – argues:

“In principle, these consequentialist premises exclude a domain of (wholly or partially) nonconsequentialist approaches to interpretation. It turns out, however, that this is not a very large loss of generality, because few people hold views of that sort. Interpretative consequentialism is an extremely broad rubric.”\(^{13}\)

This paper challenges the instrumentalist paradigm and joins the camp of the “few people” (who are so insignificant that they are not even named by Vermeule). It does so in two stages. First, it argues that instrumentalist theories fail to provide a solid justification for judicial review. Second, it develops an alternative non-instrumentalist justification for judicial review. Let us briefly survey each of these claims.

Instrumentalist theories depend on factual conjectures concerning the institutional dispositions of courts and legislatures. Courts, it is argued, are more likely to render rights-protecting decisions, to protect democratic institutions, or to promote other values. Yet, as institutional theorists have pointed out, these conjectures are often based on esoteric historical precedents or armchair sociological generalizations.\(^{14}\) Examining the

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\(^9\) See infra Section IIE.

\(^{10}\) See infra Section IIF.

\(^{11}\) Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 714 (1975). (“How one views this question [the question of judicial review] depends largely on how one evaluates the practical results, over the long run, of the exercise of this power”).


\(^{13}\) Vermeule, *infra* note 5 at 6.

\(^{14}\) See e.g. Stephen M. Griffin, *Review Essay: Legal Liberalism at Yale* 14 CONST. COMMENTARY 535, 553 (1997) (“In general... law professors have not been willing to engage with relevant research from political scientists and historians. ... Without such engagement, analysis by law professors of the place of the court in American government will remain a matter of armchair generalizations and folk wisdom.”).

Adrian Vermeule has pointed out that: “For every rights-protective Supreme Court decision, there is a decision that undermines rights. The question is not whether, say, the
institutional features of courts and legislatures suggests that none of the simple factual conjectures shared by constitutional theorists designed to defend judicial review can be established. Furthermore, opponents of judicial review have often argued that even if the decisions rendered by courts are superior to those of legislatures, this fact is not sufficient to justify judicial review since judicial review violates the right of citizens to “equal participation.” Finally, instrumentalists fail to capture the nature of the political controversy between advocates and foes of judicial review. This controversy, we argue, is not about the expertise or competence of judges versus legislatures; it is about the political morality of constitutional decision-making, and the legitimacy of the coercive powers of the state.

If judicial review cannot be grounded in instrumentalist explanations concerning its desirable effects, how can it be justified? This paper proposes that judicial review is grounded in features intrinsic to the adjudicative process itself. Judicial review can be successfully justified if it can be shown that individuals have a right to the judicial review of legislative decisions independent of the “correctness” of judicial decisions or other long-term contingent effects of judicial decision-making. We maintain that judicial review is designed to protect the “right to a hearing” or the “right to raise a grievance.” Judicial review provides an opportunity for individuals who believe (rightly or wrongly) that their rights have been violated to raise their grievance against the (actual or presumed) violation. The right to a hearing as understood in this paper is a procedural one. It is distinct from the right to secure a different outcome, an outcome that respects one’s rights; it is a right grounded in the fundamental duty of the

Court’s decision in Brown v. Board of Education is ‘good’ or ‘bad’ in isolation. Ambitious judicial review is an institutional rule that necessarily produces a package of outcomes, both good and bad. If the package includes Brown, it also includes horrors such as Chief Justice Taney’s proclamation in Dred Scott v. Sandford that there is constitutional right to own slaves.” See Vermeule, supra note 5 at 231; Elhauge, supra note 12, 101 (“After all we have no guarantee that judges empowered to review laws will only strike down…undesirable political outcomes; their review may also produce … undesirable political outcomes and strike down desirable political outcomes.”); Christopher Wolfe, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY (2nd ed. 1997) 84 (“[W]hat grounds are there to believe that the court will enforce the right principles at the right time? If some courts have correctly perceived the wave of the future and ridden the crest of the wave…, others have not had notable success in similar attempts. Ultimately, the defense of judicial activism on the basis of its good results flounders on the strikingly different results that judicial activism has had over time.”).

15 Waldron, supra note 4 at 243-249.
17 Id. at 997-99.
state to consult its citizens on matters of rights, and in particular to consult those whose rights may be affected.

Section II of the Article explores five popular arguments favoring judicial review. It establishes that these arguments are instrumental and that they fail precisely for that reason. Section III argues that individuals have a right to raise their grievances in front of judicial (or quasi-judicial) bodies, and that these bodies also ought to have the power to make authoritative judgments. This “right to a hearing” or “right to raise a grievance” ought to be respected independently of the instrumental contributions that judicial review makes (or may make) to other values of democratic or liberal societies. Section IV examines and criticizes the recent proposals to substitute judicial review with various types of “democratic constitutionalism.” The primary targets of Section IV include Kramer’s popular constitutionalism and Tushnet’s “weak form” constitutionalism. This section challenges the widespread conviction that judicial review is illegitimate because it is antidemocratic, elitist, or aristocratic. In fact we argue that the antidemocratic features of judicial review are necessary to protect the right to a hearing and, consequently, are necessary for constitutional legitimacy.

II THE INSTRUMENTALIST JUSTIFICATIONS FOR JUDICIAL REVIEW

A. Introduction

This section explores the instrumentalist justifications for judicial review and points out their weaknesses. Before we present the instrumentalist justifications, let us first describe what we mean by judicial review and the general structure of instrumentalist justifications for judicial review.

Judicial review, as understood here, consists of the following two components: 1) Courts have the power to make binding decisions concerning the constitutional validity of statutes that apply to individual cases brought before them and these decisions ought to be respected by all other branches of government. 2) No branch of government has the power to immunize its operation from judicial scrutiny. Our analysis implies that courts are not “equal partners” in the enterprise of constitutional
Our primary task in this section is to establish that the prominent theories purporting to justify judicial review are instrumentalist and that these theories fail for this reason. Under these theories, judicial review is justified to the extent that it is likely to bring about contingent desirable consequences. While there are important differences between the five theories examined in this section, they all share important structural similarities. Under each one of these theories, the constitutional theorist differentiates sharply between two stages of analysis. At the first stage, the theorist addresses the question of what the point of the Constitution is and, consequently, how it should be interpreted. Once the “point” of the Constitution is settled, the theorist turns to identify the institutions best capable of realizing the “point” of the Constitution. Instrumentalist theories of judicial review perceive this second step, namely identifying the institutions in charge of interpreting the Constitution, as subservient to the findings in the first stage. The institution in charge of interpreting the Constitution is simply the institution most likely to interpret the Constitution “rightly” or “correctly,” or whose decisions are the most conducive to the constitutional goals or values as defined at the first stage of analysis. Interpreting the Constitution can therefore be described as a task in search of an agent capable of performing it, the agent being an instrument whose suitability depends solely on the quality and the costs of its performance.

This section starts by examining five theories purporting to determine the legitimate scope of judicial review of statutes. The general structure of these theories is shared by other theories. The critical discussion of these theories enables us to expose some general limitations of instrumentalist theories.

B. Judicial Review and the Protection of Rights

Our claim, however, does not directly justify judicial supremacy. Judicial supremacy as opposed to judicial review includes a third component, namely the claim that courts do not merely resolve particular disputes involving the litigants directly before it. They also authoritatively interpret constitutional meaning. Judicial supremacy requires deference by other government officials to the constitutional dictates of the courts not only with respect to the particular case but also with respect to the validity of the legal norms. For a definition of judicial supremacy, see Whittington, *Political Foundations*, supra note 2 at 7. At the same time, we provide some arguments why the conclusions of this paper in conjunction with some additional common sense empirical conjectures can also support judicial supremacy.

See, e.g., Vermeule, *supra* note 5 at 233.
It is indisputable that individuals have rights and that the legal system ought to protect these rights.\textsuperscript{20} Identifying the scope of these rights, assigning them the proper weight, and allocating their protection to various institutions is often difficult and controversial. Many believe that judges are superior to other officials in their ability to identify the scope of rights and assign them the proper weight. Some theorists believe that the superiority of judges is attributable to their expertise; judges, under this view, form a class of experts on rights.\textsuperscript{21} Others believe that judicial review can be justified not on the basis of judicial expertise but on the basis of the nature of the judicial process, and the relative detachment and independence of judges from political constraints.\textsuperscript{22} At the core of these views is the belief that some or all decisions concerning rights require a certain professional/institutional framework, and that majoritarian decision-making is often not sufficiently informed or deliberative and therefore cannot guarantee that the rights will be protected adequately. Judges have a better opportunity to successfully identify either the scope of rights or their weight vis-à-vis other considerations by virtue of their special expertise, the


\textsuperscript{21} See, e.g., Charles Black, \textit{A New Birth of Freedom: Human Rights, Named & Unnamed} 125 (1997) (“Human rights claims are made \textit{in the name of the law}, as the outcome of reasoning from commitment; judges are practiced in this kind of reasoning, and some of them are expert at it . . .”).

\textsuperscript{22} Owen Fiss, \textit{Two Models of Adjudication}, in \textit{How Does the Constitution Secure Rights?} 36, 43 (Robert A. Goldwin & William A. Schambra, eds., 1985). (“The capacity of judges to give meaning to public values turns not on some personal moral expertise, of which they have none, but on the process. . . .One feature of that process is the dialogue judges must conduct. . . .Another is independence: the judge must remain independent of the desires or preferences both of the body politic and of the particular contestants before the bench”); Owen Fiss, \textit{Forward: The Forms of Justice}, 93 \textit{Harv. L. Rev.} 1, 12-13 (1979) (“Their [the judges’] capacity to make a special contribution to our social life derives not from any personal traits or knowledge, but from the definition of the office in which they find themselves and through which they exercise power”); see also Michael J. Perry, \textit{The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policy Making by the Judiciary} 102 (1982) (“As a matter of comparative institutional competence, the politically insulated federal judiciary is more likely, when the human rights issue is a deeply controversial one, to move us in the direction of a right answer (assuming there is such a thing) than is the political process left to its own devices, which tends to resolve such issues by reflexive, mechanical reference to established moral conventions”); Lawrence G. Sager, \textit{Justice in Plainclothes: A Theory of American Constitutional Practice} 199 (2004) (pointing out “structural features of a constitutional judiciary that make it a promising environment for the contestation of rights”).
in institutional circumstances in which they operate, or both. This view is well entrenched in American legal thought. A rights-based justification for judicial review appeals to “moral rights which individuals possess against the majority.” The legislature represents the will of the majority, and the majority is inclined to make decisions that unjustifiably infringe the rights of minorities. Judicial

23 It has most famously been argued by Alexander Hamilton who says:

This independence of the Judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the People themselves, and which … have a tendency … to occasion dangerous innovations in the Government and serious oppressions of the minor party in the community.... But it is not with a view to the infractions of the Constitution only, that the independence of the Judges may be an essential safeguard against the effects of ill humors in the society. These sometimes extend no farther than to the injury of private rights of particular classes of citizens, but unjust and partial laws.

See The Federalist No. 78 at 544-45 (Alexander Hamilton) (Henry B. Dawson ed., 1891). In this paragraph Hamilton raises two distinct concerns. The first concern (the concern that the legislature has “a tendency … to occasion dangerous innovations in the Government”) is an epistemic concern pointing out the deficiencies of the decision-making of the legislature. Legislatures, under this argument, are incompetent (too adventurous) and therefore too prone to “dangerous innovations.” The second concern (the concern that the legislature has a tendency to generate decisions which constitute “serious oppressions of the minor party in the community.”) is a motivational concern, namely the concern that legislatures may have evil dispositions leading them to legislate “unjust and partial laws.”

Vermeule rightly points out that the distinction between incompetence and motivational concerns (self-interest) is fuzzy since “cognitive mechanisms such as motivated reasoning and self serving bias may transmute self-interest into ‘sincere’ error.” See id at 258.

24 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1977). See also Cooper v. Aaron, 358 U.S. 1, 18 (1958) (It is an “indispensable feature of our constitutional system” that the interpretation of the Court is binding on the states since “the principles announced [in Brown] and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us”).

25 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 896 (3rd ed., Foundation Press 2000) (“Subject to all of the perils of antimajoritarian judgment, courts and all who take seriously their constitutional oaths – must ultimately define and defend rights against government in terms independent of consensus or majority will”); Jesse Choper & John Yoo, Wartime Process: A Dialogue on Congressional Power to Remove Issues From the Federal Courts, 95 CAL. L. REV. 1243, 1246-7 (2007): “[T]he paramount justification for vesting the federal courts with the awesome power of judicial review is to guard against governmental infringements of individual liberties secured by the Constitution”).
review is justified to the extent that it is likely to contribute to the protection of rights – either directly, by correcting legislative decisions that violate individual rights, or indirectly, by inhibiting the legislature from making decisions that would violate individual rights.\textsuperscript{26}

The view that constitutional constraints are designed to guarantee the efficacious protection of rights against the legislature has dominated much of the debate concerning judicial review. Jeremy Waldron believes that:

The concern most commonly expressed about legislation is that legislative procedures may give expression to the tyranny of the majority and that legislative majorities are constantly – and in the United Kingdom, for example, endemically and constitutionally – in danger of encroaching upon the rights of the individual or minorities. So widespread is this fear, so familiar an element is it in our political culture, that the need for constitutional constraints on legislative decisions has become more or less axiomatic.\textsuperscript{27}

The first premise of the argument, namely, that majorities may be inclined to violate the rights of minorities, is well documented and seems self-evident.\textsuperscript{28} Yet, to justify judicial review, it is not sufficient to point out that legislatures fail to protect rights effectively. Two additional premises are necessary. First, it is necessary to establish that judges are more inclined to protect these rights than legislatures. Second, it is necessary to establish that judicial mistakes resulting from judicial overzealousness in protecting rights, i.e. mistakes encroaching on the legitimate powers of the government, are not too costly to outweigh the benefits resulting from the better and more efficacious protection of rights.\textsuperscript{29}

The alleged greater inclination of judges to protect rights is often defended by appealing to the structural features of the judicial branch that make the judiciary particularly appreciative of the significance of rights. Proponents of judicial review argue that judges’ insularity to public and populist pressures and the deliberative nature of judicial reasoning make

\textsuperscript{27} See Waldron, supra note 4 at 11.
\textsuperscript{28} See, e.g., Hamilton supra note 23.
\textsuperscript{29} See Harel, supra note 20 at 251-52.
them particularly attentive to the significance of rights and less prone to populist hysteria.\textsuperscript{30} At the same time, the relative weakness of the judicial branch and its vulnerability guarantee that judges will not be too overzealous in the protection of rights.\textsuperscript{31}

Opponents of judicial review remain unconvinced that courts are more effective in protecting rights than other institutions.\textsuperscript{32} For one, historical evidence does not support the claim that courts are always or even typically better in protecting rights than legislatures.\textsuperscript{33} The notorious case of \textit{Dred Scott} is a live example that courts are often not good at identifying what the rights protected by the Constitution are or ought to be.\textsuperscript{34} \textit{Lochner}, on the other hand, is an example establishing that courts may be overzealous in protecting what they wrongly perceive as rights and intrude into zones which ought to be governed by legislatures.\textsuperscript{35} These

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  \item \textsuperscript{30} See, e.g., sources in \textit{supra} note 22. See also \textsc{ronald dworkin, the forum of principle in ronald dworkin, a matter of principle} 33, 71 (1985) (maintaining that the judiciary alone serves as “forum of principle” which is free from the din of “the battleground of power politics”).
  \item \textsuperscript{31} See, e.g., Bickel, \textit{supra} note 1 at 252 (“In an enforcement crisis of any real proportions, the judiciary is wholly dependent upon the Executive…They respond naturally to demands for compromise”); Joseph P. Lash, \textsc{from the diaries of felix frankfurter} 86 (1975) (“Justice Jackson, as close to Frankfurter as anyone on the Court, put the matter of the Court’s consciousness of its own vulnerability with considerable candor: the Court ‘is subject to being stripped of jurisdiction or smothered with additional justices any time such a disposition exists and is supported strongly enough by public opinion. I think the Court can never quite escape consciousness of its own infirmities, a psychology which may explain its apparent yielding to expediency, especially during war time’”).
  \item \textsuperscript{32} See Komesar, \textit{supra} note 12 at 256-261 (arguing against “the fundamental rights approach to constitutional law” on the grounds that judges are not necessarily the best protectors of rights); Vermeule, \textit{supra} note 5 at 243 (“Courts may not understand what justice requires or may not be good at producing justice even when they understand it”).
  \item \textsuperscript{33} \textsc{david m. rabbani, free speech in its forgotten years} 131 (1997) (“The historical record poses a substantial challenge to current constitutional theorists who identify an independent judiciary as the best protection for individual rights in a democracy”); Waldron, \textit{supra} note 4 at 288: “[T]he record on judicial review is far from perfect …”; Wojciech Sadurski, \textsc{judicial review and the protection of constitutional rights} 22 \textsc{oxford journal of legal studies} 275, 278 (2002) (pointing out that there are many cases “implicating important issues of rights in which the legislature was more rights-protective than the Supreme Court …”); Vermeule, \textit{supra} note 5 at 231 (“For every rights-protective Supreme Court decision, there is a decision that undermines rights”).
  \item \textsuperscript{34} \textit{Lochner v. New York}, 198 U.S. 45 (1905). See, e.g., \textsc{christopher wolfe, that eminent tribunal: judicial supremacy and the constitution} 154 (2004) (explaining that the court erred in \textit{Lochner} by overextending rights protection beyond the provisions of the constitution); William M. Wiecek, \textsc{liberty under the law: the supreme court in american life}, 123-125 (1988) (“Lochner has become in modern times a sort of negative
cases may suggest that the success of courts in effectively protecting rights without intruding on other important values of public life depends upon particular social and political contingencies. Hence, the claim that courts are better at protecting rights cannot provide a solid basis for justifying judicial review. As Vermeule argues: “Courts may not understand what justice requires, or may not be good at producing justice even when they understand it.”

Even under ideal conditions, namely, under the assumption that courts are indeed better than legislatures in identifying and protecting rights, it is still unclear whether the quality of courts’ decision-making can justify judicial review. The overall success of the courts in protecting rights depends not only on the courts’ success rate in correctly deciding cases but touchstone. Along with *Dred Scott*, it is our foremost reference case for describing the Court’s malfunctioning … we speak of ‘lochnerizing’ when we wish to imply that judges substitute their policy preferences for those of the legislature”).

36 Using historical experience is dubious for another reason. Historical arguments fail to capture the complex inter-dependencies between different institutions. Thus, even if one can establish that courts have systematically been worse than legislatures in protecting rights, it does not follow that eliminating judicial review is conducive to the protection of rights since judicial review may have contributed to the quality of the legislature’s decision-making. See, e.g., Abraham, *supra* note 26 at 371 (arguing that judicial review disciplines legislatures and deters them from infringing individual rights). Similarly, even if one can establish that courts have systematically been better than legislatures, it does not follow that judicial review is conducive to the protection of rights because it is possible that a legislature operating in a world without judicial review is more reflective and deliberative than a legislature in a world with judicial review. See, e.g., Thayer, *supra* note 2 at 155-56 (maintaining that the availability of judicial review diminishes legislature’s willingness to deliberate about questions involving rights). These possibilities only serve to illustrate the complexity of the considerations required for establishing rights-based arguments for or against judicial review.

37 Vermeule, *supra* note 5 at 242 (maintaining that: “Before accepting [the authority of the court]… it is necessary to ask about judicial competence to evaluate moral arguments of this sort, and also to ask about facts and incentives. Perhaps the Court is not especially well equipped to evaluate those arguments; and if consequences matter, the moral arguments might not be decisive…”). See also Komesar, *supra* note 12 at 256-61 (disputing the view that judges are “preferred searchers for moral principles and fundamental values”); Sadurski, *supra* note 33 at 299 (arguing that “it might be rational to support judicial review of the institutional particularities of judicial institutions compared with those of the political branches, render courts more sensitive to rights considerations in general. But this judgment will be contingent on specific institutional comparisons and cannot be made in abstraction from the particular circumstances in a particular country”); Mark Tushnet, Red, White and Blue: A Critical Analysis of Constitutional Law 120 (1988) (“Those who write about constitutional law tend to ignore or discount the moral rhetoric that pervades politicians’ discourse, but there seems to be little reason to be any more skeptical about politicians’ sincerity in using that language than about judges”).

38 Vermeule, *supra* note 5 at 243.
also on the composition of the cases brought to the court. If the courts make a correct decision in 70% of the cases while the legislature decides correctly in 50%, courts may still do worse than the legislature if 80% of the petitions brought to the court are flawed or frivolous.\(^{39}\)

Recently, Richard Fallon suggested a new defense of the rights-based justification for judicial review.\(^{40}\) Fallon argued that even if courts are no better than legislatures in protecting rights, establishing multiple safeguards or veto powers to different institutions is desirable given that “errors of underprotection – that is, infringements of rights – are more morally serious than errors of overprotection.”\(^{41}\) It is better therefore to err on the side of too much rather than too little protection of rights. Judicial review “may provide a distinctively valuable hedge against errors of underenforcement.”\(^{42}\)

Fallon’s argument is problematic on several counts. First, as Fallon acknowledges, his argument applies only to cases of conflicts between a right and interest- or policy-based considerations.\(^{43}\) Yet, very often the relevant controversy is a controversy between conflicting rights claims.\(^{44}\)

More fundamentally, even if these assumptions are granted, it is difficult to see how Fallon’s argument could justify a system of judicial review as opposed to any other system that imposed burdens on legislation. If the only purpose of courts is to serve as an additional safeguard, why not use a third house of Congress, a senate of jurists with veto powers over legislation based on rights claims, or a requirement of consultation with eminent legal theorists? There is no attempt on the part of Fallon to establish that the judicial “hedge against error of underenforcement” is a superior alternative to other institutional mechanisms designed to minimize the risks of under-enforcement. Perhaps, therefore, Fallon succeeded in

\(^{39}\) We thank Dick Markovitz for raising this point.
\(^{40}\) Richard H. Fallon, An Uneasy Case for Judicial Review 121 HARV. L. REV. 1693, 1699 (2008). As Fallon himself indicates, the argument appeared earlier in the literature. See, e.g., Frank B. Cross, Institutions and Enforcement of the Bill of Rights, 85 CORNELL L. REV. 1529, 1576 (2000) (arguing that judicial review may be justified even if a judiciary lacks “any intrinsic advantage in constitutional interpretation and enforcement” because “adding an additional check on government action will enhance the liberty the Bill of Rights offers”).
\(^{41}\) Fallon, supra note 40 at 1699.
\(^{42}\) Id. at 1709.
\(^{43}\) Id. at 1710.
\(^{44}\) Jeremy Waldron, Freeman’s Defense of Judicial Review 13 LAW & PHIL. 27, 36 (1994) (arguing that “usually the circumstances we face is that a number of citizens think a given piece of legislation respects and even advances fundamental rights and a number of citizens believe that it unjustifiably encroaches on rights”).
establishing that it is desirable to have some institution empowered to monitor the legislature, but he said nothing as to why this institution is or ought to be a court, or why it ought to operate in a judicial manner.\textsuperscript{45}

To sum up, there are grave doubts concerning the empirical assumptions underlying the claims of rights-based advocates of judicial review. The arguments in this section establish not merely the weakness and vulnerability of the rights-based justification for judicial review, but a broader claim, namely that the effectiveness of any rights-protecting institutional mechanism is too dependent on factual contingencies to support general assertions concerning the optimal rights-protecting institutional design. Both advocates and opponents of rights-based arguments concerning judicial review ought to be more attuned to specific historical contingencies affecting the optimal division of powers between courts and legislatures. Grand assertions purporting to justify (or oppose) judicial review on the basis of rights-based arguments are grounded more in faith than in facts.

C. Does Judicial Review Improve the Democratic Process?

In his important contribution to constitutional theory, John Ely has argued that the Constitution is designed to protect the representative nature of government. In Ely’s view, the “pursuit of participational goals of broadened access to the processes and bounty of representative government” ought to replace “the more traditional and academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental...”\textsuperscript{46} The Constitution, in Ely’s view, is essentially a procedural document and the goals of the Constitution and those of the institutional structures designed to protect the Constitution should favor “participation-oriented representation reinforcing approach to judicial review.”\textsuperscript{47} In his attempt to unearth the underlying principles guiding the Warren Court, Ely identifies as central the “desire to ensure that the political process – which is where such values [substantive values] are properly identified, weighted, and accommodated – was open to those of all view-points on something approaching an equal basis.”\textsuperscript{48} It follows

\textsuperscript{45} For additional critiques of Fallon’s position, see Allan Hutchinson, A Hard Core Case against Judicial Review 121 HARVARD L. REV. F. 57 (2008).
\textsuperscript{46} See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980)
\textsuperscript{47} Id. at 87.
\textsuperscript{48} Id. at 74.
that judicial review must protect rights that engender participation in the political process. Courts have a central role in protecting these rights.

According to Ely, there are two types of concerns that are central to participation: concerns aimed at “clearing the channels of political change” and concerns aimed at “facilitating the representation of minorities.” The first type of concerns gives rise to the right to free speech, the right to vote, maintaining a visible legislative process, and so on. Ely believes that, “Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so; ins have a way of wanting to make sure that the outs stay out.” Constitutional entrenchment of the right to vote is equally important to protect this type of concerns. Ely puts great emphasis on the Court’s role in preventing majoritarian tyranny and protecting distributive concerns.

The second type of concerns gives rise to constitutional rights that are designed to facilitate the representation of minorities. Ely points out that minorities are often excluded from political power and that there is an inherent risk of inequalities among competing groups in American politics. Pervasive prejudices prevent genuine participation. Hence, there is a need for designing mechanisms that will facilitate genuine minority participation in the political process, and the courts are effective mechanisms to protect these participational values.

Despite major differences, it is easy to detect the structural similarity between traditional rights theorists and Ely’s participational theory. Under both theories, courts are assigned review powers because of the alleged superior quality of their decisions with respect to a certain sphere. While rights theorists believe that judicial review is justified because courts are better than legislatures at protecting rights, Ely believes that it is justified because courts are better than legislatures at protecting democratic representation.

This similarity, however, is the source of the weakness of Ely’s theory. The claim that courts are better able and more willing to “police the

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49 Id. chap. 5.
50 Id. chap. 6.
51 Id. at 106.
52 Id. at 81, 135. This argument was extended by Ely to include the protection of “the right to be different.” John Hart Ely, Democracy and the Right to be Different 56 N.Y.U.L.REV. 397 (1981).
53 Indeed, this similarity was noted by Ronald Dworkin, who believes that Ely was wrong only “in limiting this account to constitutional rights that can be understood as enhancements of constitutional procedure rather than as more substantive rights.” See Dworkin, supra note 5 at 349.
process of representation” is dubious for reasons similar to those explored in the last section. The most effective critic of Ely’s theory is Neil Komesar, who challenged Ely’s conviction that courts are indeed necessary both to “clearing the channels for political change” and to “facilitate the representation of minorities.” With respect to the first goal, Komesar has argued that:

Even within the traditional arenas of judicial activism that Ely means to describe with his theory, the political process is not completely unable to police itself. Is it obvious that attempts to “choke off the channels of political change” in order to retain the power for the “ins” would not or could not be deterred or controlled in the absence of judicial intervention? Our political process has many public officials and political actors with a great diversity of desires. This diversity of individuals and desires impedes the formation of a stable majority capable of choking off change. For most of American constitutional history, the courts were inactive about process, voting, and speech. During this period legislatures, not courts, produced reforms, the franchise was extended, and the press functioned.\(^5^4\)

With respect to Ely’s second goal, Komesar argued that:

Nor have the political branches shown themselves completely unable to combat legislative prejudices and stereotypes – the second type of malfunction that Ely identifies. Remedies for gender discrimination have come as often from the political process as from the judiciary. The political process, for example, eventually provided suffrage for women through the Nineteenth Amendment.\(^5^5\)

Ely’s analysis fails because it does not engage in *comparative* institutional analysis; it fails to compare the quality of decision-making of different institutional alternatives.\(^5^6\) While Ely detects the imperfections of the legislature in making procedural decisions, he is mistaken to infer from

\(^{54}\) Komesar, *supra* note 12 at 203.  
^{55} Id. at 203.  
^{56} Id. at 199.
these imperfections that courts should be assigned powers to make these
decisions. Such a conclusion requires comparing the virtues and vices of
courts and legislatures, while taking into account the complex
interdependencies between these institutions and, as Komesar establishes,
such a comparison does not necessarily favor courts over legislatures.57

D. The Settlement Function of Judicial Review

In recent contributions to constitutional theory, Larry Alexander and
Frederick Schauer defend not only judicial review but judicial supremacy
on the grounds that judicial supremacy is conducive to settlement,
coordination, and stability.58 The previous two theories examined in
Sections B and C maintain that the superiority of the courts rests on the fact
that the quality of the decisions rendered by courts is superior to the quality
of decisions rendered by other institutions. Alexander & Schauer provide a
justification for judicial supremacy that is independent of the quality of
judicial decisions. Instead, they suggest that authoritative settlement of
disagreements is sometimes desirable, even when the settlement is sub-
optimal. In their view:

[O]ne of the chief functions of law in general, and
constitutional law in particular, is to provide a degree of
coordinated settlement for settlement’s sake of what is to
be done. In a world of moral and political disagreement
law can often provide a settlement of these disagreements,
a settlement neither final nor conclusive, but nevertheless
authoritative and thus providing for those in first-order

57 Id. at 199
58 Larry Alexander & Fredrick Schauer, On Extrajudicial Constitutional Interpretation 110
Interpretation]; Larry Alexander & Fredrick Schauer, Defending Judicial Supremacy: A
Reply 17 CONSTITUTIONAL COMMENTARY 455 (2000) [hereinafter Alexander & Schauer,
Defending Judicial Supremacy]. This argument was first made by Daniel Webster, who
maintained that: “Could anything be more preposterous than to make a government for the
whole union, and yet leave its powers subject, not to one interpretation, but to thirteen or
twenty four, interpretations? Instead of one tribunal, established by and responsible for all,
with power to decide for all, shall constitutional questions be left to four and twenty popular
bodies, each at liberty to decide for itself, and none bound to respect the decisions of the
others?” See Daniel Webster 6 Cong. Deb. 78 (1830). More recently, the argument has been
raised and rejected by Bickel, who believes that: “The ends of uniformity and of vindication
of federal authority” can be served “without recourse to any power in the federal judiciary to
lay down the meaning of the Constitution.” See Bickel, supra note 1 at 12.
disagreement a second-order resolution of that
disagreement that will make it possible for decision to be
made, actions to be coordinated, and life to go on.\textsuperscript{59}

Stability and coherence are highly important in facilitating the
coordinative function of law. It is necessary to establish institutions that
will be capable of promoting these goals. Alexander & Schauer believe that
courts in general and the Supreme Court in particular are better capable of
maintaining stability and achieving settlement than other institutions. In
purporting to establish the Supreme Court’s special virtues in realizing
these goals, Alexander & Schauer rely on the relative insulation of the
Court from political winds, on the “established and constraining procedures
through which constitutional issues are brought before the court,” on the
small number of members of the Supreme Court, the life term they serve,
and the fact that the Court cannot pick its own agenda.\textsuperscript{60}

Several legal theorists have raised objections to Alexander &
Schauer’s conjectures. Some theorists have disputed the importance of
stability and settlement.\textsuperscript{61} They argued that in fact, the constant anarchic
dynamism and shifting interpretations generated by competing
constitutional interpretations of different institutions may be more desirable
than the rigidity generated by a single authoritative judicial interpretation.\textsuperscript{62}
Even if one concedes that maintaining stability with respect to some
constitutional questions is important, it seems that the value of reaching the
right, correct, or desirable interpretation overshadows the value of
maintaining stability, at least with respect to many substantive
disagreements. As Whittington argues: “It is sometimes better to have no
rule than a substantively bad rule. Moreover, a substantively good but fluid
rule may be better than a substantively bad but fixed rule.”\textsuperscript{63}

\textsuperscript{59} See Alexander & Schauer, \textit{Defending Judicial Supremacy}, id. at 467.
\textsuperscript{60} Id. at 477.
\textsuperscript{61} See Keith E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses 80 N.C.L.REv. 773, 788 (2002) (noting that: “The settlement function of the law is valuable one, but it is not the only value that the Constitution serves.”).
\textsuperscript{62} Id. at 790.
\textsuperscript{63} Id. One example of persistent constitutional disputes provided by Alexander & Schauer can highlight this concern. Alexander & Schauer mention among others the constitutional disputes concerning prayers in public schools, the maintenance of single-sex colleges and universities, and capital punishment. See Alexander & Schauer, \textit{Defending Judicial Supremacy} 470-01. Take the case of capital punishment. Assume now that an official believes that the Court wrongly decided that capital punishment does not violate the Eighth Amendment. In the official’s view executing a person is a violation of that person’s constitutional right. It seems that the value of protecting the constitutional right is much
Indeed, other theorists have questioned whether courts in general, and the Supreme Court in particular, are the institutions most capable of maintaining stability and reaching settlement. One of the critics of Alexander & Schauer asks: “Would legislative supremacy produce more or less stability than judicial supremacy? Inertia or structural status quo bias is built into legislative institutions by voting rules, bicameralism, and other features. Is this stronger or weaker than the status quo built into judicial institutions?” Another critic even asserts that “Court opinions can unsettle as well as settle the legal and constitutional environment.” To sum up, Alexander & Schauer fail to establish that coherence and stability are central values for constitutional issues, and that courts are better than other institutions in maintaining stability and reaching settlement.

E. The Dualist Democracy

The “dualist democracy” position advocated by Bruce Ackerman distinguishes between two different types of decisions that can be reached in the American democracy. The first type is a decision made by the American people, and the second type is a decision made by their governments. The American Constitution is designed to protect the first type of decisions – decisions of “We the People” from being eroded by the second type – decisions of “We the Politicians”.

Decisions by the people are only rarely made and only under special conditions. In order to gain the authority to make supreme law in the name of the people, political partisans must operate in the public sphere and gain support for their position. Supreme law must be the byproduct of lengthy public deliberation under circumstances that are ripe for active greater than the value of facilitating settlement with respect to the true meaning of the Eighth Amendment. Executing a person against the dictates of the Eighth Amendment simply in order to facilitate authoritative (but flawed) settlement concerning the meaning of this Amendment is clearly wrong.

64 See Whittington, supra note 61 at 797 (“The capacity of the judiciary to settle constitutional disputes can be overstated … Critics of extrajudicial constitutional interpretation assert and assume that the Court can do so, but there are reasons to doubt their assumption in this regard”). See, also Kramer supra note 4 at 234-6 (providing numerous reasons why there is no reason to believe that courts’ decisions are more stable than political ones).

65 See Vermeule, supra note 5 at 249.

66 See Whittington, supra note 61 at 800.


68 Ibid.
deliberation and a genuine disposition for public-spiritedness. In contrast, in periods of “normal politics” decisions made by the government occur daily, are made primarily by politicians, and are undeserving of the status of higher law. They are the product of deliberation conducted by “public citizens”: elected politicians, staffers, bureaucrats, government officials, party leaders, lobbyists and the like, who are subject to the normal constraints of interests, ideologies, and powers. During periods of normal politics, most citizens – “private citizens,” as Ackerman puts it – are relatively disengaged from politics and are distanced from having a real impact or interest in public deliberation. Ackerman believes that the Constitution is designed to protect the first type of decisions – decisions made during periods of constitutional politics – from gradual erosion during periods of “normal politics.”

After identifying the values the Constitution is designed to protect, Ackerman investigates the role of courts in preserving the dual structure:

[D]ualists cannot dismiss a good faith effort by the Court to interpret the Constitution as “antidemocratic” simply because it leads to the invalidation of normal statutes; this ongoing judicial effort to look backward and interpret the meaning of the great achievements of the past is an indispensable part of the larger project of distinguishing the will of the We the People from the acts of We the Politicians.

The Court therefore furthers the cause of democracy by preserving and protecting constitutional politics against erosion by political elites who are engaged in “normal politics.” The Court is valued in Ackerman’s scheme to the extent to which it serves the purpose of reaching decisions that express more faithfully the values cherished by the mobilized citizenry. Surprisingly, however, Ackerman says very little as to why judges are especially qualified to fulfill the function assigned to them within his scheme. In response to the central question of this article (namely, “Why judges?”), Ackerman notes the following:

69 Ibid.
70 Ibid.
71 Id. at 10.
Sometimes the Justices will make serious mistakes, but these blunders should be placed into a larger perspective. Political life is full of pathologies… Within this human-all-too-human tragicomedy, the Court adds something valuable to the mix. Quite simply, the Justices are the only ones around with the training and the inclination to look back to past moments of popular sovereignty and to check the pretensions of our elected politicians when they endanger the great achievements of the past.  

Ackerman’s sole justification for the conjecture that granting powers to courts is conducive to preserving the achievements reached during periods of constitutional politics is “quite simply” that “justices are the only ones around” who can do the job. However, he provides no structural or institutional reasons why this should be the case. As we have shown throughout this section, far from being “simple” the question whether judges are indeed better for the job is the central question for instrumentalist constitutional theory.

F. The Rise of Institutionalist Instrumentalism

One response to the failure of instrumentalism is the attempt on the part of constitutional theorists to develop a more sophisticated version of instrumentalism, institutional instrumentalism. Institutional instrumentalism is based on the premise that by using sophisticated social science methods, legal theorists can provide sound institutional arguments favoring or opposing judicial review based on scientific predictions concerning the relative competence and suitability of these institutions.

Institutionalists share many of the reservations made by us against the four instrumentalist theories described above. Yet institutionalists such as Einer Elhauge, Neil Kommisar, and Adrian Vermeule share with instrumentalists the belief that constitutional design is ultimately an instrument used to achieve desirable social goals. To remedy the defects of traditional instrumentalists, institutionalists believe constitutional design is

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73 *Id.* at 1806. Yet Ackerman is fully aware that the historical evidence is at best mixed. Thus he asserts that: “[F]rom a moral point of view, Dred Scott is the single darkest stain upon the court’s checkered history … For the overwhelming majority of today’s Americans, Lochner’s constitutional denunciation of a maximum-hours law … is an alien voice.” See Ackerman, *supra* note 67 at 63-64.
74 See *supra* note 14.
an enterprise in “comparative institutional analysis.”  

More specifically, what ought to determine the scope of judicial powers to review legislation is an institutional choice based on “the relative strengths and weaknesses of the reviewer (the adjudicative process) and of the reviewed (the political process).”

Adrian Vermeule describes institutionalism as a form of rule consequentialism. In his view “judges should interpret legal texts in accordance with rules whose observance produces the best consequences overall.” Rule consequentialism requires the theorist to look not at any particular decision that courts or legislatures are likely to generate but at the broader and more foundational institutional characteristics of courts and legislatures. After criticizing traditional instrumentalisists on the ground that they fail to grasp the consequences of their own favorite institutional design, Vermeule turns to investigate the institutional competence of courts and legislatures. In his view, the relevant variables for determining the powers of judicial institutions are highly complex, and include “the agency costs and the costs of uncertainty, systemic effects (especially a form of moral hazard), the optimal rate of constitutional updating, and the transition costs of switching from one regime to another.” Institutionalism thus aspires to provide a more systematic and less anecdotal instrumentalist theory concerning judicial review.

These attempts are admirable, yet we believe that the institutionalist accounts are misguided for four reasons. First, we are skeptical as to whether institutionalists (as well as other advocates of instrumentalist theories) can in fact make reliable assertions concerning the likely performance of courts versus legislatures or other institutions. Second, even if institutionalist advocates of judicial review establish that courts are better in protecting constitutional rights or other constitutional values, it hardly follows that courts ought to be granted review powers. Participatory concerns are very likely to override or even annul the relevance of the concerns for better decision-making process. Third, we believe that instrumentalist arguments in general and institutionalist arguments in particular misconstrue the debate concerning judicial review; they conceptualize it as a technocratic debate about the likely quality of decision-making or other consequences of different forms of institutional

75 Komesar, supra note 12 at 3.
76 Ibid. at 254.
77 Vermeule, supra note 5 at 5.
78 Id. at 256.
79 Ibid.
design. But the real debate is a debate about political and moral institutional legitimacy. It is not about whether judicial review is efficient, stable, or effective in protecting substantive rights, but about what justifications citizens are entitled to when their rights are at stake. Fourth, institutionalists often fail to acknowledge the very possibility that non-instrumentalist arguments can play a primary role in justifying judicial review. Let us elaborate each one of the four arguments.

Historical work indicates that predictions concerning the performance of courts versus legislatures are often flawed. A recent historical work by Tushnet supports this skepticism. Tushnet establishes that many of the institutional debates concerning courts and legislatures were politically motivated. He shows convincingly that the sectarian support or opposition to courts (on the grounds that courts are likely to be more liberal or more conservative than legislatures) is misguided because legislatures’ and courts’ inclinations cannot be reliably predicted.

Arguably these difficulties in predicting the performance of institutions ought not to deter one from attempting to design the institutional mechanisms which will render the best possible decisions. Yet, if this instrumentalist vision was the only purpose of constitutional theorists, it seems to follow that the institutional design cannot be said to be true universally. Reliable predictions concerning the performance of the courts can be made only with respect to certain historical or social circumstances. The optimal institutional design depends therefore on the particular contingencies of the relevant society. The mere ambition of institutionalists to design foundational institutional mechanisms independently of these contingencies indicates that non-instrumentalist considerations are at stake.

But even if, contrary to our conjecture, institutionalists develop accounts that can reliably predict the performance of courts versus legislatures and allocate constitutional powers among these institutions accordingly, it does not follow that courts ought to exercise review powers. Jeremy Waldron distinguishes between outcome-related reasons and process-related reasons. The alleged superior performance of courts is an “outcome-related reason” supporting judicial review. Yet, in addition to disputing the premises underlying this outcome-related argument, Waldron also maintains that courts are inferior to legislatures for process-related reasons.

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80 See Mark Tushnet, *The Rights Revolution in the Twentieth Century* (unpublished manuscript; on file with the authors).
reasons since while “legislators are regularly accountable to their constituents and they behave as though their electoral credentials were important…[n]one of this is true of Justices.”82 The mere fact that moral philosophers may perhaps be even better than both legislators and Justices in protecting rights does not justify granting moral philosophers review powers over legislation. It is difficult to see why the alleged superiority of Justices justify granting them these very same powers.

Furthermore, instrumentalist accounts misconstrue the essence of the debate concerning judicial review. This controversy, we believe, is not about the expertise of judges versus legislatures or the quality of the performance of these institutions; it is to a large extent a debate about the political morality of constitutional decision-making. Instrumentalist theories rely heavily on empirical generalizations concerning the institutional dispositions of courts and legislatures.83 The institution in charge of making constitutional decisions is the institution that is more likely to get it right.84 Thus, the debate between advocates and foes of judicial review is perceived as a technocratic debate about the quality of the performance of the different institutions.

Yet, it is difficult to believe that this grand and perennial debate about the constitutional powers of the Court is a technocratic debate resembling perhaps the debates concerning the institutional powers of agencies. The judicial review debate is conducted by political philosophers, constitutional lawyers, and citizens. While some of the arguments raised by the participants are instrumentalist, the spirit of the debate and the range of participants indicate that the debate concerning judicial review and its optimal scope cannot reasonably be construed as a technocratic debate concerning the likely consequences of different systems of constitutional design. The debate is not about institutional competence but about political morality and institutional legitimacy. The flaw in institutionalism is simply its failure to comprehend the foundations of the controversy and its insistence on instrumentalizing a question that ought not to be instrumentalized.85

82 Id. at 1391.
83 See supra note 12.
84 See Vermule, supra note 5 at 5.
85 Institutionalists could argue that their analysis also explains the relevance of political morality. After all, as institutionalists concede that to establish the superiority of one institution over another, one must first identify the goals that the institution is designed to achieve. See Vermeule, supra note 5 at 83-85 (arguing that value theory may be necessary for institutionalist analysis). Yet, even under this concession, there is a substantial component of the controversy that is technocratic.
Finally, it seems that institutionalists are blind to the possibility of a non-instrumentalist justification for judicial review. In conveying such blindness, Adrian Vermeule asserted, “In principle, these consequentialist premises exclude a domain of (wholly or partially) nonconsequentialist approaches to interpretation. It turns out, however, that this is not a very large loss of generality, because few people hold views of that sort. Interpretative consequentialism is an extremely broad rubric.” Vermeule’s assertion acknowledges that perhaps other non-consequentialist voices may be relevant to constitutional theory but he fails to identify who these voices are and what their arguments could be. This article will now attempt to give voice to these few people who reject interpretative consequentialism.

III NON-INSTRUMENTALIST JUSTIFICATION FOR JUDICIAL REVIEW: THE RIGHT TO A HEARING

A. Introduction

Section II demonstrated the inadequacy of instrumentalist justifications for judicial review. Our main aim in this section is to establish a non-instrumentalist justification for judicial review. What is distinctive about courts is not the special wisdom of judicial decisions or other special desirable contingent consequences that follow from judicial decisions, but the procedures and the mode of deliberation that characterize courts. These procedures are designed, we argue, to provide a right to a hearing.

Our argument proceeds in two parts. Section B discusses the right to a hearing and establishes its importance. It argues that protecting rights presupposes the protection of the opportunity to challenge what is considered to be their violation. Section C establishes that the right to a hearing is embedded in the procedures of the legal process, and that judicial review or quasi-judicial review is the only manner in which the right to a hearing can (as a conceptual matter) be protected. This latter claim is based on a careful examination of the nature of the judicial process and the modes of deliberation characterizing it.

B. The Right to a Hearing

Our proposal rests upon the view that judicial review is designed to facilitate the voicing of grievances by protecting a right to a hearing. The

\[86\text{Ibid at 6.}\]
right to a hearing consists of three components: the opportunity to voice a grievance, the opportunity to be provided with a justification for a decision that impinges (or may impinge) on one’s rights, and the duty to reconsider the initial decision giving rise to the grievance. The right to a hearing is valued independently of the merit of the decision likely to be generated at the end of this process.

When and why do individuals have a right to a hearing? The right to a hearing, we argue, depends on the rightholder’s claim concerning the existence of an all-things-considered right that is subject to a challenge. The right to a hearing therefore presupposes a moral controversy concerning the existence of a prior right. There are two types of controversies that give rise to a right to a hearing. The first is a controversy concerning the justifiability of an infringement of a right. In such a case, the rightholder challenges the justifiability of the infringement on the basis of the shared assumption that there was an infringement. Here, the right to a hearing is designed to provide the rightholder with an opportunity to establish that the infringement was unjustified. The second type of controversy occurs when there is a genuine and reasonable dispute concerning the very existence of a prior right. The rightholder challenges the claim that no right is being infringed. Here, the right to a hearing is designed to provide the rightholder with an opportunity to establish the existence of such a right. In both cases, we argue, the right to a hearing does not hinge on the soundness of the grievance of the rightholder. Even if the rightholder is wrong in her grievance, she is entitled to a hearing. Let us investigate and examine each one of these cases.

The first type of controversy occurs when the rightholder challenges the justifiability of an infringement of a right. A right is justifiably infringed when it is overridden by conflicting interests or rights. If, in the course of walking to a lunch appointment, I have to stop to save a child and I consequently miss my appointment, the right of the person who expects to meet me is being (justifiably) infringed.

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87 Eylon & Harel, supra note 16 at 1002.
Infringements of rights can give rise to two distinct complaints on the part of the rightholder.\(^89\) One complaint is based simply on the claim that the infringement is an unjustified infringement rather than justified infringement; i.e., that it is a violation. The second complaint, however, is procedural in nature. When one infringes another’s rights, one typically encounters a complaint based not on the conviction that the infringement is unjustified, but on the grounds that an infringement, even when justified, must be done only when the rightholder is provided with an opportunity to raise a grievance. The complaints elicited by a disappointed promisee may illustrate the force of such a grievance. The disappointed promisee may protest that “you have no right to break your promise without consulting me first.” This rhetorical use of “right” invokes the commonplace intuition that when someone’s rights are at stake, that person is entitled to voice her grievance, demand an explanation, or challenge the infringement. Such a right cannot be accounted for by the conviction that honoring it guarantees the efficacious protection of the promisee’s rights. Even under circumstances in which the promisee’s rights would be better protected if no such hearing was to take place, the promisee should be provided with an opportunity to challenge the promisor’s decision.

Infringements of rights trigger a duty to provide a hearing. In fact, some theorists of rights have argued that the right to a hearing provides a litmus test to differentiate cases involving infringements from cases in which no prima facie right exists in the first place. In pointing this out, Phillip Montague has argued that:

If Jones has a right to do A and is prevented from acting, then he is owed an apology at least. But if Jones has only a prima facie right to do A, so that preventing him from acting is permissible, then whoever prevented him from acting has no obligation to apologize. \textit{He almost certainly owes Jones an explanation, however.} And this obligation to explain strikes me as sufficient to distinguish situations in which prima facie rights are infringed from situations in which no rights – not even prima facie rights – are at stake.\(^90\) (emphasis added)

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\(^89\) See Eylon & Harel, supra note 16 at 1002-03.
The right to a hearing in cases of a dispute concerning the justifiability of an infringement hinges on the existence of a prior right that is being infringed (either justifiably or unjustifiably). There is thus an important link between individual rights and the derivative right, the right to a hearing. The existence of a prior independent right gives the rightholder a stake in that right, even when the right is justifiably overridden. The rightholder retains some power over the execution of the right even when the right is justifiably infringed. The right to a hearing is grounded in the fact that people occupy a special position with respect to their rights. Rights demarcate a boundary that has to be respected, a region in which the rightholder is a master. One’s special relation to the right, i.e. one’s dominion, does not vanish when the right is justifiably overridden. When the infringement of the right is at stake, the question of whether it might be justifiable to infringe that right is not tantamount to the question of whether one should have dominion over the matter. A determination that the right has been justifiably infringed does not nullify the privileged position of the rightholder. Instead, his privileged position is made concrete by granting the rightholder a right to a hearing. Thus, infringing the right unilaterally is wrong even when the infringement itself is justified because the rightholder is not treated as someone who has a say in the matter.

What does the right to a hearing triggered by an infringement of a prior right consist of? In a previous work, one of us identified three components of the right to a hearing: an opportunity for the victim of infringement to voice her grievance (to be heard), the provision of an explanation to the victim of infringement that addresses her grievance, and a principled willingness to respect the right if it transpires that the infringement is unjustified.\(^91\)

To establish the importance of these components, consider the following example. Assume that A promises to meet B for lunch, but unexpected circumstances, e.g. a memorial, disrupt A’s plans. The promisor believes that these circumstances override the obligation to go to the lunch. It seems that the promisee under these circumstances deserves a “hearing” (to the extent that it is practically possible), consisting of three components. First, the promisor must provide the promisee with an opportunity to challenge her decision to breach. Second, she must be willing to engage in meaningful moral deliberation, addressing the grievance in light of the particular circumstances. Finally, the promisor must be willing to reconsider the decision to breach.

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\(^{91}\) Eylon & Harel, supra note 16 at 1002-06.
The first component, namely the duty of the promisor to provide the promisee with an opportunity to challenge her decision, is self-explanatory. The second and the third components require further clarification. To understand the significance of the willingness to engage in meaningful moral deliberation, imagine the following: the promisor informs the promisee that some time in the past, after thorough deliberation, she adopted a rule that in cases of conflicts between lunches and memorials, she always ought to attend the memorials. When challenged by the promisee, the promisor recites the arguments used in past deliberations without demonstrating that those arguments justify infringing this promise in the specific circumstances at hand, and without taking the present promisee into consideration in any way. Such behavior violates the promisor’s duty to engage in meaningful moral deliberation. The duty requires deliberation concerning the justifiability of the decision in light of the specific circumstances. This is not because the original deliberation leading to forming the rule was necessarily flawed. Perhaps the early deliberation leading to forming the rule was flawless, and perhaps such an abstract detached rule-like deliberation is even more likely to generate sound decisions than deliberation addressed to evaluating the present circumstances. The obligation to provide a hearing is not an instrumental obligation designed to improve the quality of decision-making and, consequently, its force does not depend on whether honoring this obligation is more likely to generate a better decision. The obligation to engage in moral deliberation is owed to the rightholder as a matter of justice. The promisee is entitled to question and challenge the decision because it is her rights that are being infringed.

Last, note the significance of the third component; namely, the willingness to reconsider the initial decision based on the conviction that the right can be justifiably infringed. To note its significance, imagine a promisor who is willing to engage in a moral deliberation but announces (or, even worse, decides without announcing) that her decision is final. It is evident that such a promisor breaches the duty to provide a hearing even if she is willing to provide an opportunity for the promisee to raise his grievance and even if she is providing an explanation. A genuine hearing requires an “open heart,” i.e., a principled willingness to reconsider one’s decision in light of the moral deliberation. This is not because the willingness to reconsider the decision necessarily generates a better decision on the part of the promisor. Reconsideration is required even when it does not increase the likelihood that the “right” decision is rendered.

92 The example is taken from Eylon & Harel supra note 16 at 1002-03.
So far we have examined the right to a hearing in the first type of controversy about rights, namely controversies on whether a given infringement of a right is justified. Let us turn our attention to examining a second type of controversy; namely, the case in which there is a genuine dispute concerning the existence of a right in the first place. To establish the existence of a right to a hearing in such a case, let us first establish the intuitive force of the claim by providing an example. We will later explore what principled justifications one can provide for the existence of a right to a hearing under such circumstances.

Consider the following case. John promises to his friend Susan that in the absence of special reasons making it especially inconvenient for him, he will take her to the airport. The next day, a few hours before the agreed-on time, John has a mild sore throat and informs Susan that he cannot take her. Given the conditional nature of his promise, John argues that Susan has no right (not even a prima facie right) to be taken to the airport.

Unlike in the previous case, the dispute between Susan and John is not over whether the promise can be justifiably overridden by unexpected circumstances but whether the conditions giving rise to the right were fulfilled to start with. John maintains that a mild sore throat is “a special reason making it particularly inconvenient for him” to bring Susan to the airport and, consequently, he believes that Susan has no right whatsoever to be brought to the airport. Susan disagrees. She believes that a mild sore throat is not “a special reason making it particularly inconvenient” for John to bring her to the airport and, consequently, that she has a right to be brought to the airport. It seems that irrespective of whether John or Susan is right, John ought to engage in moral deliberation concerning the existence or non-existence of such a right. Failure to do so is a moral failure on the part of John irrespective of whether John is justified in his belief that the conditions of the promise were not satisfied in this case. Furthermore, John’s duty to provide a “hearing” does not seem to depend on whether a hearing is indeed conducive to the “right” or “correct” decision. The duty to provide a hearing does not hinge therefore on instrumental considerations.

The right to a hearing in such a case has a similar structure to the right to a hearing triggered by a case where the dispute is about the justifiability of the infringement. It consists of the same three components. First, John must provide Susan with an opportunity to challenge his decision to stay at home; i.e., to establish that she has a right that he take her to the airport. Second, John must be willing to engage in meaningful moral deliberation, addressing Susan’s grievance in light of the particular circumstances. It would thus be wrong on the part of John to use a general rule, e.g. a rule that states that “any physical inconvenience is a special reason to infringe such a promise,” without examining the soundness of the
rule in light of the particular circumstances. Finally, John must be willing to reconsider the decision in light of the arguments provided in the course of the moral deliberation and act accordingly. Principled and genuine willingness on the part of John to act in accordance with the deliberation is necessary for honoring the right to a hearing.

This example may have provided some intuitive force to the claim that the right to a hearing applies not only in cases of a potential infringement of an existing right but also in cases in which there is a genuine and reasonable dispute concerning the very existence of a right. Yet, arguably, it is more difficult to account for the normative foundation of a right to air a grievance when the very right under the grievance might not exist. How can such a right to a hearing be vindicated when, unlike the case of infringement, it cannot rest on the uncontroversial existence of a prior prima facie right?

If there is a right to a hearing in such a case, it must be grounded in the special status of rightholders. Arguably, rightholders ought to have the opportunity of establishing their conviction that they are indeed owed a particular right. Depriving them of such an opportunity (even in cases in which they wrongly maintain they have a prior right) is unfair because such a deprivation fails to respect them as potential rightholders. Under this argument, precisely as a prima facie right that is justifiably infringed leaves its fingerprint (or moral residue) in the form of a right to a hearing, so too a dispute concerning the existence of a right leaves a fingerprint in the form of a right to hearing even when, after further inquiry, one can conclude that the “right” giving rise to the dispute never existed in the first place.

It might be argued that both cases discussed above (the lunch example and the airport example) are irrelevant to the case at hand. Unlike a promisor, the state is in a position of authority legitimized by the democratic process. It might be claimed that locutions such as “you have no right” belong to the interpersonal realm and the intuitiveness of the right to a hearing is confined to such contexts, and that therefore the supposed right to a hearing does not extend to authoritative relationships. This view would hold that just as an army commander is not required to reconsider her commands in light of every grievance, neither is the state. The state cannot be required to provide a hearing, and a lack of a hearing does not compromise the state’s legitimate authority.

This is not the way political theorists view the relations between the state and its citizens. Legal and political theorists share the view that the state has a broad duty similar to what we have labeled as the right to a hearing. As Laurence Tribe says:

Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a
different outcome; these rights to interchange expresses the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one. 93

The contours of our position favoring judicial review can now be discerned more clearly. There are two types of cases that, under our view, justify judicial review of legislation. First, when a person has a right and that right is (justifiably or unjustifiably) infringed by the legislature, that person is owed a right to a hearing. Second, when there is a dispute over whether a person has a right and the legislature passes a statute that, arguably, violates the disputed right, the individual is owed a right to a hearing. 94 In both cases, the right to a hearing consists of a duty on the part of the state to provide the rightholder an opportunity to challenge the infringement, a willingness on the part of the state to engage in moral deliberation and provide an explanation, and a willingness to reconsider the presumed violation in light of the deliberation. Furthermore, the moral deliberation required of the state cannot consist of an abstract or general deliberation – the kind of deliberation that characterizes the legislative process. It must consist of a particularized or individualized deliberation that accounts for the particular grievance in light of the particular circumstances.

The right to a hearing is not designed to improve decision-making. We are not even committed to the view that granting a right to a hearing is more likely to generate superior decisions. The soundness of the right-to-a-hearing conception of judicial review does not depend on establishing that judicial review is more congenial to the protection of the rights than alternative systems, or that granting the right to a hearing better protects

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94 The distinction between these two types of cases is of course familiar to foreign constitutional lawyers. Both Canadian and South African constitutional law distinguishes sharply between two stages of constitutional scrutiny analogous to the ones discussed here. For the Canadian discussion of this issue see, e.g., Peter W. Hogg, Constitutional Law of Canada 808 (1985) (“Because of s. 1, judicial review of legislation under the Charter of rights is a two-stage process. The first stage of judicial review is to determine whether the challenged law derogates from a Charter right … the second stage is to determine whether the law is justified under s. 1 as a reasonable limit prescribed by law that can be demonstrably justified in a free and a democratic society”). For the South African discussion see M.H. Cheadle et al., South African Constitutional Law: The Bill of Rights 696 (2002) (“A limitation clause necessarily gives rise to two stages of analytical enquiry. The first stage is to determine whether the right in question is infringed. The second is to determine whether that infringement can be justified as a reasonable limitation of the right”).
democracy, stability, the dual-democracy structure or any other substantive value. This is precisely what makes this position immune to the objections raised against instrumentalist views. The only virtue of judicial review is the fact that it constitutes the hearing owed to citizens as a matter of right.

Before turning to examine the role of courts in facilitating a hearing, let us investigate further this last statement. As stated above, the soundness of the right-to-a-hearing conception of judicial review does not depend on establishing that a hearing is more congenial to the protection of any substantive value than alternative systems. But the right-to-a-hearing conception of judicial review is not entirely insensitive to the quality of judicial decision-making. The right-to-a-hearing conception of judicial review presupposes that individual grievances are seriously considered and evaluated, and that the institutions designed to investigate these grievances are engaged in good faith and serious moral deliberation. While the right-to-a-hearing conception of judicial review rejects the instrumentalist view that judicial review is justified only if and to the extent it “maximizes” the likelihood of rendering “right” or “correct” decisions, this conception still maintains that courts ought to engage in serious good-faith deliberation in order to respect that right. It is inconceivable that such serious good-faith deliberation fails to protect rights in an adequate manner.

C. The Right to a Hearing and the Judicial Process

So far we have established that individuals have a right to a hearing. Such a right comes into play when (other) rights are infringed (justifiably or unjustifiably) or when the very existence of (other) rights is disputed. It is time to explore the exact relationship between a right to a hearing and judicial review. In what ways, if any, can a right to a hearing provide a justification for judicial review? Can we not entrench procedures of “legislative review” or non-judicial review that will be superior or, at least, adequate in protecting the right to a hearing? This possibility can be regarded as a challenge to the fundamental distinction drawn earlier in this paper between instrumentalist and non-instrumentalist justifications for judicial review. Under this objection, the attempt to replace instrumentalist justifications for judicial review founded on extrinsic goals (such as protecting rights or participation, or maintaining stability and coherence) with non-instrumentalist justifications (based on the right to a hearing) fails because there is nothing intrinsically judicial in the procedures designed to protect a right to a hearing. Put differently, under this objection the institutional scheme designed to protect the right to a hearing could itself be conceptualized as instrumentalist. Such an instrumentalist approach to the right to a hearing would maintain that the institution which ought to be assigned with the task of reviewing statutes should be an institution that
maximizes respect for the right to a hearing. Arguably, even if such an institution happens in our system to be a court, it does not necessarily have to be a court. Thus, judicial review is always subject to the instrumentalist challenge that it is not the best institutional mechanism to facilitate a hearing. According to this objection, there is no fundamental difference between the instrumentalist justifications described and criticized in Section II and the right-to-a-hearing justification for judicial review.

To establish our claim that the right to a hearing provides a non-instrumentalist justification for judicial review, we need to establish that judicial procedures are not merely a means to providing a hearing – that in fact, these procedures constitute a hearing. There is therefore a special affinity between courts and the right to a hearing such that establishing judicial procedures is tantamount to protecting the right to a hearing. To defend this claim, we shall show that a) courts are specially designed to facilitate a hearing, and b) to the extent that other institutions facilitate a hearing, it is because they operate in a judicial manner.

The first task, i.e. establishing that courts are specially suited to facilitate a hearing, requires looking at the procedures that characterize courts. It seems uncontroversial (to the extent that anything can be uncontroversial) that courts are designed to investigate individual grievances. This is not a feature that is unique to constitutional litigation. It characterizes both criminal and civil litigation, and it is widely regarded as a characteristic feature of the judicial process as such. The judicial way of assessing individual grievances comprises three components. First, the judicial process provides an opportunity for an individual to form a grievance and challenge a decision. Second, it imposes a duty on the part of the State to provide this opportunity. Finally, the State is required to provide a hearing that is adequate to the purpose of resolving the dispute.

95 See Bickel, supra note 1, 173 (asserting that: “[C]ourts of general jurisdiction … sit as primary agencies for the peaceful settlement of disputes …”); Donald Horowitz, The Judiciary: Umpire or Empire 6 LAW AND HUMAN BEHAVIOR 129, 131 (1982) (“For, at bottom, the adjudicative mode – particularly, the resolution according to law of controversies between individual litigants – lies at the core of what courts do and are expected to do”); Richard H. Fallon, Jr., Reflections on the Hart and Wechsler Paradigm, 47 VAND. L. REV. 953, 958 (1994) (citing Henry Hart and Herbert Wechsler maintaining that “courts were good at, and indeed essential for, resolving concrete, narrowly focused disputes”).

96 This is of course implied by the Due Process Clause. See Mullane v. Hanover Central Bank & Trust Co. 339 U.S. 306, 313 (1950) (maintaining that: “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case”); Boddie v. Connecticut 401 U.S. 371, 377 (1971) (“[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons
of the state (or other entities) to provide a reasoned justification for the decision giving rise to the challenge.\textsuperscript{97} Last, the judicial process involves, ideally at least, a genuine reconsideration of the decision giving rise to a challenge, which may ultimately lead to an overriding of the initial decision giving rise to the grievance.\textsuperscript{98} If the judicial review of legislation can be shown to be normatively grounded in these procedural features, it follows that courts are particularly appropriate in performing such a review.

To establish this claim, consider the nature of a failure on the part of courts to protect the right to a hearing. Such a failure is different from a failure on the part of the court to render a right or a just decision. The latter failure indicates that courts are fallible, but it does not challenge their status as courts. In contrast, the former failure, namely a failure to protect the right to hearing, is a failure on the part of courts to do what courts are specially designed to do; it is a failure to act judicially. It seems evident therefore that courts are specially suited to protect the right to a hearing.

The second task, i.e. establishing that other institutions facilitate a hearing only to the extent that they operate in a judicial manner, is perhaps the more challenging task.

The right-to-a-hearing justification for judicial review requires merely a guarantee that grievances be examined \textit{in certain ways} and \textit{by using certain procedures} and \textit{modes of reasoning}, but it tells us nothing of the identity of the institutions in charge of performing this task. Thus, in principle, the right to a hearing can be protected by any institution including perhaps the legislature.

Yet whatever institution performs this task, such an institution will use processes which are indistinguishable from those used by courts. We

\textsuperscript{97} The duty to provide a reasoned response is an essential part of the judicial process. See, e.g., Daniel L. Shapiro, \textit{In Defense of Judicial Candor} 100 H.A.R.V. L. R.E.V. 731, 737 (1987) ("[R]easoned response to a reasoned argument is an essential aspect of that [judicial] process. A requirement that judges give reasons for their decisions – grounds of decision that can be debated, attacked and defended – serves a vital function …"); Scott C. Idelman, \textit{Judicial Candor} 73 TEX.A.S. L. R.E.V. 1307, 1309 (1995) ("[T]he basic rule that judges ought to be candid in their opinions that they should neither omit their reasoning nor conceal their motives seems steadfastly to have held its ground"); Fallon, \textit{supra} note 95 at 966.

\textsuperscript{98} Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law} 73 H.A.R.V. L. R.E.V. 1, 19 (1959) ("The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in light of constitutional provisions, even though the action involves value choices, as invariably action does"); \textsc{Steven J. Burton}, \textit{Judging in Good Faith} 36-37 (1992) ("The good faith thesis maintains, in brief that the judicial duty to uphold the law requires judges \textit{to act} on the reasons provided by the law." (emphasis added)).
have argued earlier in this section that courts are designed to investigate individual grievances and that such an investigation is crucial for protecting the right to a hearing. This suitability of courts however is not accidental; it is a natural characteristic of the judicial process. Courts provide individuals an opportunity to challenge what individuals perceive as a violation of their rights; courts are also designed to engage in moral deliberation, to provide an explanation for the violation, and to reconsider the presumed violation in light of the deliberation. Institutions that develop similar modes of operation – modes that are suitable for protecting the right to a hearing – thereby inevitably become institutions that operate in a judicial manner. The more effective institutions are in facilitating a hearing, the more these institutions resemble courts. The right to a hearing justification for judicial review accounts not only for the need of establishing some institution designed to honor this right but also establishes the claim that the institution capable of honoring such a right operates in a court-like manner and that the procedures, modes of reasoning, and modes of operation of such an institution must resemble those of courts.

So far we have established that the right to a hearing justifies judicial review. However, this view may also support judicial supremacy. Judicial supremacy, as opposed to judicial review, maintains that courts do not merely resolve particular disputes involving the litigants directly before it, but also authoritatively interpret constitutional meaning. Judicial supremacy therefore requires deference by other government officials to the constitutional dictates of the courts not only with respect to the particular case but also with respect to the validity of legal norms.

Arguably, it seems that the right-to-a-hearing justification for judicial review cannot justify judicial supremacy. At most, it can justify courts (or any other institutions designed to protect the right to a hearing) in making particular and concrete decisions that apply to the case at hand. The right to a hearing merely dictates that the persons whose rights may be at stake will have an opportunity to raise their grievances, that they will be provided with an explanation that addresses their grievances, and that the decision in their cases will be reconsidered in light of the hearing. But why should such a decision carry further normative force? Why should it set a precedent for other cases or carry any normative weight?

Strictly speaking, the right to a hearing can only justify courts in reconsidering concerns raised by a person whose rights may have been infringed and who wishes to challenge the alleged infringement. We can label a system that satisfies these conditions a system of “case specific

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99 See supra note 18.
review.’ The ancient Roman system is an example of such a system. Under the Roman system, the tribunes had the power to veto – that is, to forbid the act of any magistrate that bore unjustly upon any citizen – but not to invalidate the law on the basis of which the act was performed.100 However, it is easy to see the deficiencies of such a system. There are compelling reasons why decisions rendered in courts should have normative ramifications that extend beyond the case at hand. Glancing at the huge amount of literature concerning precedents provides us with a variety of such arguments. Considerations of certainty, predictability, coordination, etc., provide independent reasons for granting courts’ decisions a broader and more extensive normative application.101 Compelling considerations support the conjecture that judicial decisions have normative repercussions that extend beyond the particular grievances considered by courts. The normative forces that such decisions carry may be controversial. But, it is evident that particular judicial decisions ought to have some normative force that extends beyond the particular cases at hand.

To sum up, we have argued that the right to a hearing can justify judicial review. The right to a hearing requires the establishment of institutions that are capable of following certain procedures and conducting certain forms of reasoning designed to protect the right to a hearing. The institutions that are designed to protect the right to a hearing are only courts or court-like institutions – institutions that operate in a judicial manner. Our view justifies granting courts (or any other institutions designed to protect the right to a hearing) the powers to examine and reconsider grievances


To some extent, this system is the one prevailing in the US. Most constitutional challenges in the US are “as applied” challenges. See Gonzales v. Carhart 550 U.S. 1, 38 (2007). When a court issues an as-applied remedy, it rules that a given statute cannot be applied in a given set of circumstances. This ruling is only binding on the parties before the court. In contrast, when a court issues a “facial” remedy, it declares that the statute itself (or part thereof) is unconstitutional with respect to all litigants. The practical difference between the two remedies is clear from the perspective of future litigants. If a law is struck down as-applied to a given set of circumstances, a future litigant will always have to argue that they too are under the same or similar circumstances, and a court will have to accept this argument and declare the law unconstitutional with respect to the new litigant. If, on the other hand, a law is struck down facially, this will be unnecessary, and all political and legal actors, particularly litigants, may ignore the unconstitutional law or part thereof.

101 See, e.g., Gerald J. Postema, Some Roots of Our Notion of Precedent in Precedent in Law 9, 15 (ed. Laurence Goldstein) (describing the rationales underlying the following of precedents in terms of “certainty and predictability of decisions … and in terms of utilitarian benefits of coordination of social interaction and respect for established expectations”).
brought to them by individuals whose rights may have been affected. It does not directly explain the precedential force of these decisions. Yet given that courts have (or should have) the powers necessary to protect the right to a hearing, their decisions ought to have ramifications that extend beyond the particular cases considered by them. This extension of our view is necessary for justifying the conventional understanding of judicial supremacy.

IV THE ILLEGITIMACY OF DEMOCRATIC CONSTITUTIONALISM

A. Introduction

In recent years constitutional theorists have tried hard to reconcile constitutionalism with democratic and participatory values. In contrast with other voices calling for such reconciliation, constitutional theorists believe that such reconciliation requires developing a new institutional paradigm. More particularly, constitutional theorists advocate the weakening of the constitutional powers exercised by courts and granting greater constitutional powers to non-judicial institutions, particularly legislatures. These revisionist institutional proposals, embodying what Frank Michelman refers to as “judicial leadership without judicial

102 See, e.g., Owen Fiss, Between Supremacy and Exclusivity in The Role of Legislatures in the Constitutional State (Richard Bauman & Tsvi Kahana eds., 2006) 452 at 462 (arguing that “although the judiciary may not be directly responsive to the people, as the legislature is, it is sufficiently embedded within a larger system of democratic governance to meet the objection that judicial review is undemocratic”).

draw inspiration from foreign legal systems such as the British and Canadian legal systems. This section investigates which, if any, of the proposals endorsing what we label “democratic constitutionalism” can be reconciled with the right to a hearing. We establish that while democratic constitutionalists believe that their proposals strengthen the legitimacy of the constitutional order by making it more democratic, they actually undermine the legitimacy of the Constitution by depriving individuals of their right to a hearing.

The discussion of democratic constitutionalism seems especially timely, since in the past decade or so even mainstream American constitutional theory has turned against judicial supremacy. More and more American constitutional scholars have become democratic constitutionalists. That is, they do not oppose judicial review altogether;

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104 Michelman, id at 145.

105 The rise of democratic constitutionalism might be connected to one judicial development and two intellectual developments in American legal academia. The judicial development is the conservative inclination of the Rehnquist Court. The opposition to this Court from liberal legal academia may explain the recent attempt to weaken judicial power. See Robert Post & Reva Segal, Roe Rage: Democratic Constitutionalism and Backlash 42 HARV. C.R.-C.L. REV. 373, 374-75 (2007) (“One of the many reasons for this shift [in the inclination of liberals to support judicial review] is that progressives have become fearful that an assertive judiciary can spark ‘a political and cultural backlash that may … hurt, more than help, progressive values’”). The two intellectual developments are the rise of comparative constitutionalism and the inter-disciplinarization of legal scholarship. The rise of comparative constitutionalism has made American academics more familiar with foreign legal systems. These foreign systems often limit the review powers of courts. Fiss, supra note 102 at 458 (arguing that the “worldwide move toward constitutional governments maybe help explain the growth of legislative constitutionalism”). Another indication of the connection between democratic constitutionalism and comparative constitutionalism is that even though in the United States the Executive has as strong a claim to represent the people as the legislative branch, there has been little discussion of “executive constitutionalism”. This might be due to the fact that the countries most studied in the context of democratic constitutionalism – Canada, the UK, and New Zealand – have a parliamentary system where the executive is not accountable directly to the people.

In addition to the conservative inclination of the Rehnquist Court and the rise of comparative constitutionalism, we believe that the inter-disciplinarization of legal scholarship might be an additional factor contributing to the rise of democratic constitutionalism. This inter-disciplinarization has led to the replacement of the all-or-nothing approach to judicial review towards a more nuanced socio-historical examination of American constitutional traditions and practices. This nuanced approach allowed scholars to be skeptical about judicial supremacy and to propose alternatives to this mechanism. See e.g. David P. Currie The Constitution in Congress: The Federalist Period, 1789-1801 x (1997) (demonstrating that “before 1800 nearly all of our constitutional law was made by Congress or the President” and “a number of constitutional issues of the first importance
rather, they oppose judicial supremacy or judicial finality. They say that while the Court should have a say in constitutional issues, it should not have the final or the exclusive say.\textsuperscript{106}

have never been resolved by judges” and that “what we know of their solution we owe to the legislative and executive branches, whose interpretations have established traditions almost as hallowed in some cases as the Constitution itself”); \textsc{David P. Currie} \textit{The Constitution in Congress: The Jeffersonians, 1801-29} at 344 (2001) (demonstrating that many “constitutional issues, great and small [were] ventilated in the pitiless glare of political debate” in Congress and the executive branch, during the studied period”); Kramer, \textit{supra} note 4 at 8 (offering an interdisciplinary study of American constitutional history and suggesting that for most of it, “[F]inal interpretive authority rested with ‘the people themselves,’ and the courts no less than elected representatives were subordinate to their judgments”); Whittington, \textit{Political Foundations}, \textit{supra} note 2 at 15 (demonstrating that “over the course of American history, there has been no single, stable, allocation of interpretive authority. Rather, various political actors have struggled for the authority to interpret the Constitution”).

\textsuperscript{106} See Michelman, \textit{supra} note 103 at 145-46 (suggesting that while “legal-interpretative work benefits strongly from [qualifications found] in a special concentration among occupants of a judicial office … ordinary citizens and their electorally accountable representatives are intellectually or motivationally [capable] of arguing competently or judging honestly among contestant constitutional-legal interpretations”); Gardbaum, \textit{supra} note 103 at 747 (asserting that the “dialogue, competition, and joint responsibility between courts and legislatures … add new dimension and perspective to the task of constitutional interpretation”); Manfredi, \textit{supra} note 103 at 193, 188 (asserting that “liberal constitutionalism does not establish a judicial monopoly” over constitutional interpretation and that “the legislative and executive branches of government possess equal responsibility and authority to inject meaning into the indeterminate words and phrases of the Charter.”); Whittington, \textit{supra} note 61 at 847 (arguing that “[t]he judiciary has a useful role to play in the constitutional system, but so do other political institutions”); Post & Siegel, \textit{supra} note 103, 1947 (proposing a constitutional model that “attributes equal interpretive authority to Congress and to the Court”); Kramer, \textit{supra} note 4 at 7-8 (opposing judicial supremacy and arguing that throughout American constitutional history “final interpretive authority rested with “the people themselves,” and courts no less than elected representatives were subordinate to their judgments” and that “the idea of turning [final constitutional interpretation] over to judges was simply unthinkable”); Post, \textit{supra} note 103 at 44 (asserting that one reason for the Supreme Court to respect the constitutional interpretation of Congress is “that interpretation of the Constitution ought to be responsive to democratic will, and Congress is more democratically accountable than the Court”); Hiebert, \textit{supra} note 103 at 1985 (asserting that rights can “be adequately protected without presuming that courts have the only valid role in resolving conflicts between legislation and individual rights and the only valid interpretation of those rights”); Levinson, \textit{supra} note 103 at 378 (arguing that “the legislature – although it is obviously a nonjudicial institution – can legitimately play a meaningful role in interpreting its particular national constitution”); \textsc{Tushnet, Weak Courts}, \textit{supra} note 4 at 157 (arguing that “the performance of legislators and executive officials in interpreting the constitution is not … dramatically different from the performance of judges”).
Advocates of democratic constitutionalism provide a variety of arguments. Some of these arguments are instrumental and are based on the conviction that true partnership between courts and legislatures generates better public discourse and ultimately better decisions. Democratic constitutionalists maintain that Congress is just as qualified to interpret the Constitution as the Supreme Court, and that, despite what advocates of judicial supremacy argue, interpretation by legislatures is not anarchic, irrational, or tyrannical. To the extent that legislative decisions are irrational, judicial interpretation also suffers from the same flaw, and in any case, the difference between the two institutions is insignificant. Others influential writers have relied on what they believe to be the true historical understanding of the principle of checks and balances between the branches.

107 See Christine Bateup, *Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOKLYN L. REV 1109, 1139 (2006). (“The result of this interactive process in which no branch dominates and in which constitutional meaning is steadily formed is constitutional dialogue, as ‘all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional issues’”); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty* 94 MICH. L. REV. 245, 275 (1995) (arguing that “in transferring responsibility for articulating constitutional norms from the public and their representatives to the courts, more-than-minimal judicial review may … deprive the courts of information they should find useful”); Gardbaum, *supra* note 103 at 748 (arguing that democratic constitutionalism “might lessen the perception that courts are engaged in discretionary policymaking, which in turn may result in both better and more appropriate constitutional decision-making and greater legitimacy attaching to the court’s functions”).

108 See, e.g., Whittington, *supra* note 61 at 835-6, 839 (“Extrajudicial constitutional interpretation need not be as majoritarian, or as tyrannous, as this objection implies … Elected officials may be responsive and accountable to the public will, but they are not therefore purely majoritarian in their actions. The very insecurity of elective office discourages nonjudicial officials from ignoring minority interests. Politicians gain security in office by servicing broad, heterogeneous constituencies, not by relying on a homogeneous but narrow group of supporters.”); Tushnet, *Weak Courts, supra* note at 4 at 157 (maintaining that it is “important to avoid being romantic about judges while being realistic or cynical about legislatures and executive officials”).

109 Tushnet, *id.* at 79 (asserting that “the task is comparative, so that we must also ask whether constitutional courts are constitutionally responsible to any greater degree. My answer is that they probably are, but not dramatically so”); Kramer *supra* note 4 at 240 (maintaining that “like Congress, the Court now leaves most of its business to staff working behind closed doors”); Peter H. Russell *Standing Up For Notwithstanding* 29 ALBERTA L. REV. 293 at 301 (1991) (explaining that “in designing the institutional matrix for making decisions on rights issues it is a mistake to look for an error-proof solution. Both courts and legislatures are capable of being unreasonable and, in their different ways, self-interested”); Michelman, *supra* note 103 at 151 (arguing that, as a matter of principle, “independent judges surely can fail; an engaged people, as we for the moment supposing, can possibly succeed; neither I can do better than their best”).
of government – a principle that has been a building block of the American constitutional tradition. Yet others are motivated by a democratic, participatory, and anti-elitist political vision. They argue that it is simply unfair to grant judges so much power to interpret the Constitution rather than to grant this power to the people or to their representatives. Finally, some democratic constitutionalists have relied on structural arguments based on the view that the Constitution is not a legal document in the simple sense of the word. The Constitution is a political statement; a deliberate, rhetorical, deliberative, and discursive device around whose majestic generalizations the polity – individuals and institutions – should organize their arguments. However, it is not binding in the same sense that statutes are.

110 See Kramer, supra note 4 at 228 (arguing that “[n]either the Founding generation nor their children nor their children’s children, right on down to our grandparents’ generation, were so passive about their role as republican citizens …Something would have gone terribly wrong, they believed, if an unelected judiciary were being given that kind of importance and deference”); JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 79-95 (1984) (arguing that while judicial review was part of the vision of the American founding fathers, judicial finality was not, and that objections to judicial finality can be traced to the writings and views of Abraham Lincoln and James Madison.); Michelman, supra note 103 at 147 (suggesting that “it is embarrassing to Abraham Lincoln’s posterity” to fear “replacing the independent judiciary, as last-word constitutional interpreter, with the people’s tribune”).

111 See Gardbaum, supra note 103 at 740-41 (asserting that “the judicial veto of legislation … gives final decision making power on fundamental, usually hotly-contested matters of principle … to the branch of government that is least accountable and which, if it is representative at all, represents the sovereignty of the past over the present); Kramer, supra note 4 at 8 (“Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with ‘the people themselves,’ and the courts no less than elected representatives were subordinate to their judgments”); Tushnet, WEAK COURTS, supra note 4 at x (“Every variant of strong-form judicial review raises basic questions about democratic self-governance, because every variant allows the courts to displace the present-day judgments of contemporary majorities in the service of judgments the courts attribute to the constitution’s adopters”).

112 See Larry D. Kramer, Forward: We the court 115 HARV. L. REV. 4, 10 (2001). (“The founding generation did not see the Constitution this way [i.e., as a regular legal document] and, as a result, had very different views about the role of the judiciary. Their Constitution was not ordinary law, not peculiarly the stuff of courts and judges. It was…a special form of popular law, law made by the people to bind their governors, and so subject to rules and considerations that made it qualitatively different from (and not just superior to) statutory or common law”); Agresto, supra note 110 at 71 (contrasting the view that the Constitution is law with the view that the Constitution is a “framework for limited government” and favouring the latter view).
These arguments of course bear a great resemblance to the arguments made by opponents of judicial review. But democratic constitutionalists do not reject judicial review as such. Judicial scrutiny of constitutional provisions is still welcome. Democratic constitutionalism proposes a balanced division of power between the courts and legislatures. Advocates of democratic constitutionalism support a middle ground between two familiar, extreme positions. Supporters of legislative supremacy, such as Jeremy Waldron, oppose any form of judicial review. Advocates of judicial supremacy, such as Owen Fiss and Ronald Dworkin, oppose any institutional scheme that deprives courts of their power to interpret the Constitution. Advocates of democratic constitutionalism argue that constitutionalism without judicial exclusivity or finality does not compromise the fundamental values underlying constitutionalism. There is no need for the Supreme Court to be supreme, they say, only for it to be a court. As long as the Supreme Court can participate with the legislature in the dialogue, conversation, or national seminar about the meaning of the Constitution, and as long as individuals have the opportunity to go to court and present their arguments, the Court need not be supreme. Rather than viewing democratic constitutionalism as an uneasy, tolerable compromise between judicial supremacy and parliamentary sovereignty, supporters of this view see it as “the real thing.”

The question to be addressed in this section is whether this position can be justified. Perhaps democratic constitutionalists are correct that a more balanced partnership between courts, legislatures, and citizens is indeed desirable for various reasons. But can it be reconciled with the right

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113 See Section II.
114 See Waldron, supra note 81 at 1346.
115 See Fiss, supra note 102 at 460 (opposing any “version of legislative constitutionalism that … disputes not only judicial exclusivity but judicial supremacy as well”).
116 See RONALD DWORIN, LAW’S EMPIRE 356 (1986) (asserting that “the United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions”).
117 See, e.g., Jeffrey Goldsworthy, Homogenizing Constitutions 23 OXFORD J. L. STUD. 484, 485 (2003) (Forms of democratic constitutionalism “offer the possibility of a compromise that combines the best features of both the traditional models by conferring the courts the constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word”); Lorraine Weinrib, Learning to Live With the Override 35 McGill L. J. 541 at 564 (1990) (asserting that rather than merely “juxtaposing [the] contradictory elements” of legislative supremacy and judicial supremacy, the inclusion of a Notwithstanding Clause in the Canadian Charter “melds the best of the contending views into something new and better”).
to a hearing? In Section B, we present two types of democratic constitutionalism: popular constitutionalism, and legislative constitutionalism. In Section C, we establish why democratic constitutionalism fails to respect the right to a hearing.

B. Two Forms of Democratic Constitutionalism

I. Popular Constitutionalism

Many people oppose judicial supremacy or weaker forms of judicial review under which judges have a final say concerning the soundness of particular constitutional arguments. Popular constitutionalists oppose single-branch supremacy entirely. As Larry Kramer, the most eloquent advocate of this position, has asserted: “No one of the branches was meant to be superior to any other, unless it were the legislature, and when it came to constitutional law, all were meant to be subordinated to the people.” 118 Judicial review is perceived as legitimate only insofar as it is understood as “another instance of the right of every citizen to refuse to recognize the validity of unconstitutional laws – a ‘political-legal’ duty and responsibility rather than a strictly legal one.” 119

In Kramer’s view, modern constitutional theory is founded on a fundamental misunderstanding of American constitutional history. The original conception of judicial review was not one of judicial supremacy but one of departmentalism, where each of the three branches has an equal role to play in constitutional interpretation on the people’s behalf. 120 He argues that the drafters of the U.S. Constitution wanted questions of constitutional law to be interpreted by the people rather than the judiciary, and he attempts to show that this is the way judicial review has been more or less understood throughout history until the 1950s or 1960s. 121 Judicial (or any other institutional) supremacy is seen by him as a product of

118 Kramer, supra note 4 at 58.
119 Id at 39.
120 Larry D. Kramer, “The Interest of the Man”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy 41 VAL. U. L. REV. 697, 749 (2006) (“Madison sought to achieve [the people’s] control [over constitutional law] through a system of “departmentalism,” in which different departments of government were first made dependent on the people and interdependent on each other, and then given authority to pursue and act on their own best understanding of the Constitution”).
America’s political and legal elites struggling to gain a monopoly over the interpretation of the Constitution.\textsuperscript{122}

Kramer believes that Americans have given up their right to interpret the Constitution and have granted courts supremacy over constitutional interpretation.\textsuperscript{123} However, he thinks that the alienation of the people’s powers to interpret the Constitution to an elite class of lawyers, judges, and academics is troublesome. It is both anti-democratic and stands in opposition to the original understanding of the Constitution.\textsuperscript{124} The rationale underlying Kramer’s proposal was aptly described by Post and Siegel as the danger that the people “cease to maintain a vibrant and energetic engagement with the process of constitutional self-governance.”\textsuperscript{125}

Kramer’s popular constitutionalism is founded on the premise that ultimate constitutional power belongs to the people. The people however can speak through a variety of social and political institutions. Hence, the institutional implementation of popular constitutionalism is based on a diffuse system under which various branches of government are engaged in constitutional interpretation.\textsuperscript{126}

Popular constitutionalism is only one form of democratic constitutionalism. Other democratic constitutionalists, intimidated perhaps by the chaotic and diffuse nature of popular constitutionalism, believe in the institutional supremacy of the legislature.

2. Legislative Constitutionalism

Legislative constitutionalism gives legislatures (always or occasionally) the final word on constitutional issues. Like popular constitutionalism, it opposes judicial supremacy. However, unlike popular constitutionalism, it does not fear any form of institutional supremacy, and trusts the legislature with the final word on constitutional issues.\textsuperscript{127}

\textsuperscript{122} Kramer, \textit{supra} note 4, 247.

\textsuperscript{123} Kramer says: “Americans in the past always came to the same conclusion: that it was their right, and their responsibility, as republican citizens to say finally what the Constitution means. The question is, would Americans today do the same? Are we still prepared to insist on our prerogative to control the meaning of our Constitution? … To listen to contemporary debate, one has to think the answer must be no.” Kramer, \textit{supra} note 4 at 227.

\textsuperscript{124} See \textit{supra} note 120.


\textsuperscript{126} Kramer attributes this view to Madison. See Kramer, \textit{supra} note 120 at 749.

Legislative constitutionalism differs from what is often labeled legislative supremacy in that the latter, unlike the former, denies the desirability (and possibly the legitimacy) of a supreme constitution. Under legislative constitutionalism, the Constitution is indeed supreme and the legislature ought to comply with its dictates. However, legislatures can (or ought to) be trusted (always or occasionally) to interpret the Constitution and develop it. As Stephen Gardbaum put it, systems of legislative constitutionalism “decouple judicial review from judicial supremacy” by “granting courts the power to protect rights” yet “empowering legislatures to have the final word.” Popular constitutionalists can only envy the success of legislative constitutionalism, as the latter has gained great international popularity. Canada, the United Kingdom, and, to some extent, New Zealand have all experimented with systems that can be understood as forms of legislative constitutionalism.

Canada is perhaps the clearest and the most developed example of legislative constitutionalism. Section 33 of the Canadian *Charter of Rights and Freedoms* empowers governments to override most rights protected by the Charter for up to five years, with the possibility of renewal. To use elected representatives is, in the familiar phrase, like setting the fox to guard the chicken coop. And yet, weak-form judicial review does just that – or, at least, it relies on the fox to guard the chickens effectively most of the time”).

128 See, e.g., P.C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version* 18 U. MICH. J. OF LAW REF. 51, 68 (1984) (favoring “a regime limited by a number of constituent moral principles” that are spelled out “in a document designed to be enforced by the courts” but at the same time objecting to judicial supremacy and supporting a “partnership between court and legislature” (at 84)); Tushnet, *supra* note 107 at 279 (establishing that rather than a return to legislative supremacy, the Canadian model of judicial review with legislative override “reconciled the existence of entrenched rights with the tradition of parliamentary supremacy”); Goldsworthy, *supra* note 117 at 577 (2003) (noting that “[r]ecently, Canada and Britain have adopted ‘hybrid’ models, which allocate much greater responsibility for protecting rights to courts, without altogether abandoning the principle of parliamentary sovereignty”).

129 Gardbaum, *supra* note 103 at 709.

130 S. 33 of the Canadian *Charter of Rights and Freedoms* reads:

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation
this power, the legislature must expressly declare that the legislation shall apply notwithstanding the relevant Charter provisions. It is perhaps worthwhile to add that despite the natural temptation this power offers, it has rarely been invoked by Canadian legislatures.131

The language of section 33 allows legislatures to use the “notwithstanding” mechanism in advance for any reason, including its own “majoritarian or representational values”132 and “utility maximization.” In other words, legislatures can use section 33 for purposes that are unconstitutional even according to their own reading of the Constitution.133 In this respect, it could be argued that section 33 entrenches legislative supremacy rather than legislative constitutionalism. However, most Canadian constitutional scholars agree that this would be a bad practice on the part of the legislature and that it is only appropriate for legislatures to invoke section 33 in order to interpret and enforce certain rights in cases of disagreement between the courts and the legislature about the constitutionality of legislation.134 This suggests that the Canadian system is a genuine system of legislative constitutionalism; it is based on the understanding that section 33 grants legislatures the power not to violate the Constitution but to interpret it in a way that is different from the courts’ interpretation.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

S. 33 can be applied to fundamental freedoms (s. 2), including freedom of religion and conscience, freedom of expression and assembly and freedom of association; legal rights (ss. 7-14), and equality rights (s. 15). In contrast, s. 33 cannot be invoked with respect to democratic rights (ss. 3-5), mobility rights (s. 6), rights regarding the official languages of Canada (ss. 16-22), minority language education rights, minority language education rights (s. 23), or gender equality rights (s. 28).

132 See Weinrib, supra note 117 at 568.
133 Id at 567.
134 See, e.g., Manfredi, supra note 103 at 191 (asserting that section 33 should not be used “to override rights per se, but to override the judicial interpretation of what constitutes a reasonable balance between rights” since “the value of section 33 … lies in the power it confers on legislatures to re-assert democratic judgment against judicial will”); Kent Roach, Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures 80 CAN. BAR. REV. 481 at 525 (2001) (arguing that use of section 33 signals “parliament’s disagreement with how the Court interpreted the relevant rights”).
To better understand legislative constitutionalism, it is valuable to look at the rationales provided by Canadian constitutional theorists for section 33. The most popular justification for section 33 speaks of a division of labor between courts and legislatures, using terms such as “partnership,” “dialogue,” “conversation,” and even “checks” or monitoring of judicial performance, but the idea referred to by all of these different terms is clear. Judicial review, it is said, does not entail judicial supremacy. The best way to protect rights and to enforce the Constitution is through facilitating a joint venture between courts and legislatures.

C. The Failure of Democratic Constitutionalism: The Argument from Democratic Illegitimacy

Democratic constitutionalism is hailed by its advocates on both instrumentalist grounds and, more importantly, on grounds of legitimacy. Democratic constitutionalists assert that democratic constitutionalism is superior on instrumentalist grounds since the interpretations of the courts are not necessarily superior in any way to those rendered by other institutions.

They also believe that democratic input is essential for legitimacy reasons.

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136 Weinrib supra note 117 at 564-65 (asserting that section 33 creates “a complex partnership through institutional dialogue”).
137 See Janet Hiebert, Why Must a Bill of Rights be a Contest of Political and Judicial Wills 10 Public L. Rev. 22, 31-34 (1999).
139 Paul Weiler articulated it as follows:

The premise of the Charter is that the optimal arrangement for Canada is a new partnership between court and legislature. Under this approach judges will be on the front lines; they will possess both the responsibility and the legal clout necessary to tackle “rights” issues as they regularly arise. At the same time, however, the Charter reserves for the legislature a final say to be used sparingly in the exceptional case where the judiciary has gone awry. See supra note 135.
140 See Tushnet, WEAK COURTS, supra note 4 at x (“[T]he courts’ determinations of what the constitution means are frequently simultaneously reasonable ones and ones with which other
Our arguments in Section II raise serious doubts concerning the persistent ambitions of constitutional theorists to develop instrumentalist justification for their institutions. The lessons drawn from that discussion are also applicable to democratic constitutionalists. However, our primary target here is not the instrumentalist arguments for democratic constitutionalism but the arguments of legitimacy. Democratic constitutionalists believe that popular or legislative input in interpreting the Constitution is necessary for, or at least conducive to, constitutional legitimacy. Judicial review deprives the people of powers to which they are entitled; namely, the power to interpret the Constitution, or at least to participate in its interpretation. Is not such participation essential to citizenship? Does the need for such participation not follow from genuine respect towards citizens’ power of reasoning?

Opponents of democratic constitutionalism have challenged this view on the grounds that democratic constitutionalism may deprive individuals of their rights and such a deprivation also bears on legitimacy. After all, as some opponents of democratic constitutionalism have pointed out, democratic constitutionalism seems particularly appealing when the people or the legislature makes the right decisions. It seems slightly less appealing when the democratic input is fundamentally misguided. On the other hand, democratic constitutionalists have been reasonable people could disagree. This is especially true when the courts interpret the relatively abstract statements of principle contained in bills of rights”).

141 Tushnet, WEAK COURTS, supra note 4 at xi (“Proponents of the new model of weak-form judicial review describe it as an attractive way to reconcile democratic self-governance with constitutionalism”).

142 See Waldron, supra note 81 at 1391-2 (asserting that “[l]egislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decision-making” and that “the Supreme Court Justices … do not represent anybody”).

143 See id at 1353 (“By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights”).

144 John D. Whyte, On Not Standing for Notwithstanding 28 ALTA. L. REV. 347 at 351 (1990) (“The commitment to the rule of law or legalism … does not fit well with the idea that the ultimate method of resolution of conflicting claims is through a purely political process”).

145 L. A. Powe, Jr., Book Review Essay: Are “The People” Missing in Action (and Should Anyone Care?) 83 TEX. L. REV. 855 (2005) (arguing that: “Omitting Reconstruction and the Trail of Tears, plus all of the modern examples, offers evidence that Kramer sees popular constitutionalism only when he approves of the cause. Or else it reinforces the view that popular constitutionalism in Kramer’s hands is so slippery that only he can successfully apply it”).
quick to point out the mixed record of the judiciary in protecting rights and those are regrettably as monumental as the failures of the people or of the legislatures.\footnote{146}

Rebuttal of democratic constitutionalism cannot rest therefore on the claim that courts are better protectors of rights. It can, however, rest on the right to a hearing. While courts may fail to protect rights, they cannot fail in protecting the right to a hearing.\footnote{147} People may be deprived of their rights because of wrongful judicial decisions, but to the extent that courts operate in a judicial manner, individuals’ right to a hearing is always respected by courts. Under a system of judicial review, individual grievances trigger a process of examination, deliberation, and reconsideration. In practice, this may often amount to little for those whose rights are ultimately violated, but it is a necessary feature of a rights-respecting society.

Perhaps democratic constitutionalists could argue that democratic constitutionalism does not deprive individuals of the right to a hearing, or at least does not deprive them of this right entirely. There are two possible arguments why democratic constitutionalism does not violate the right to a hearing. First, the democratic constitutionalist could argue that a hearing could be conducted by institutions other than the courts such as the legislature or the people. Second, democratic constitutionalists could point out that most versions of democratic constitutionalism grant courts an active part in constitutional interpretation. Even in matters where the legislatures prevail, legislatures would be exposed to judicial decisions, judicial discourse, and judicial influence. Should not this influence be sufficient to address the concerns that democratic constitutionalism violates the right to a hearing?

The first claim has been discussed in Section III where we argued that the right to a hearing must involve a particularized reconsideration of the initial decision giving rise to the grievance. We have stated there that moral deliberation must be conducted in a way that is sensitive to the particular claims and circumstances of the case giving rise to the grievance. We have also argued that such a particularized reconsideration is one that characterizes courts. To the extent that it is provided by other institutions, those institutions operate in a judicial manner.\footnote{148} But democratic constitutionalists do not want to turn the legislature or the people into a court. Instead, they wish to maintain their non-judicial character and yet

\footnote{146} \textit{Supra} note 33.  
\footnote{147} See Section IIIC.  
\footnote{148} \textit{Id}.  


grant them constitutional powers. It is precisely their popular non-judicial traits that make them particularly suitable, according to democratic constitutionalism, to engage in constitutional interpretation.\footnote{See, e.g., JANET HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT’S ROLE 53 (2002) (maintaining that it is precisely because court and the legislatures have “different vantage points,” that they both “have valid insights into how legislative objectives should reflect and respect the Charter’s normative values”).} It follows therefore that democratic or legislative input cannot count as adequate to satisfy the conditions of the right to a hearing.

Democratic constitutionalism’s second response may be to emphasize that democratic constitutionalism does not wish to exclude the judiciary from participating in constitutional decision-making. Kramer, for instance, believes that judges ought to take part in popular constitutionalism.\footnote{Kramer, supra note 4 at 252: “The potential usefulness of the judiciary in a separation-of-powers scheme is not difficult to comprehend, and politicians and ordinary citizens alike can and do appreciate that there are advantages in giving the Court some leeway to act as a check on politics”}. Tushnet also values judicial participation in constitutional interpretation.\footnote{See e.g. Hiebert, supra note 149 at 52 (emphasizing that “[t]he benefits of conceiving Charter judgment in relational terms arises from the responsibility each body incurs to respect Charter values, from the exposure to judgments made by those differently situated, and from the opportunity to reflect upon the merits of contrary opinion”).} Canadian legislative constitutionalists often maintain that courts must give their decision before the legislature can override it and that the courts’ opinions ought to be consulted seriously by the legislature.\footnote{See text accompanying note 91.} Could such judicial input count as a hearing?

The answer to this question is no, because democratic constitutionalism fails to respect the third condition of the right to a hearing, namely the duty to reconsider the initial decision giving rise to the grievance. Consider the promisor in our example above.\footnote{See Tushnet, WEAK COURTS, supra note 4 at 9 (“Judicial review still seems to be the best way to strike down a statute that is inconsistent with any reasonable interpretation of the Constitution’s specification of fundamental rights. We might try to direct the courts to invalidate legislation only when it is truly unreasonable”).} The promisor explains his decision to attend a memorial rather than to have lunch with the promisee. Assume that the promisor provide the promisee with an opportunity to challenge his decision and to engage in moral deliberation concerning his decision. But, at the end of the day, he delegates the final decision to a friend of his. He instructs the friend to take seriously the deliberation but he also instructs him not to take this deliberation as binding. It seems evident that such a promisor breaches the duty to provide a hearing. A genuine hearing requires a principled commitment to
reconsider one’s decision in light and only in light of the moral deliberation. This is not because the commitment to reconsider necessarily generates a better decision on the part of the promisor. We can assume that the reconsideration does not increase the likelihood that the “right” decision will be rendered. Delegating the final decision to a friend seems to violate the duty to reconsider the case even if that friend is a reliable moral observer.

Democratic constitutionalists endorse an analogous solution. They emphasize that under democratic constitutionalism, courts can actively participate in the making of constitutional decisions. Individuals have an opportunity to raise their grievances. Courts can deliberate and make conclusions with respect to the soundness of these grievances. But once courts – analogous to the promisor – conclude their deliberation, it is up to the legislature – analogous to the friend – to make a final decision. That being the case, the third component, namely the reconsideration of the initial decision giving rise to the grievance in light and only in light of the deliberation, is not adhered to by democratic constitutionalists. This failure on the part of democratic constitutionalism is not an accident; it rests upon a deeply held conviction that democratic participation in constitutional interpretation is necessary for constitutional legitimacy. However, we believe that, ironically, it is the democratic constitutionalist’s relentless search for constitutional legitimacy that undermines legitimacy. The democratic input (welcomed by democratic constitutionalists) threatens constitutional legitimacy by eroding the right to a hearing. Democratic constitutionalism therefore undermines what is most valuable in rights-respecting constitutionalism.

V CONCLUSION

The reader may perhaps question what the ramifications of this analysis are. What can we learn from this observation? Should constitutional lawyers or political activists care about the precise theoretical justification given to judicial review? Or is it merely a matter of theorists lusting for scholastic novelties?

Political theorists have pointed out that the institutional debate concerning judicial review hinges upon one’s political inclinations. When courts are conservative and legislatures progressive, liberals are inclined to condemn judicial activism while conservatives are inclined to support courts; when courts are liberal the inclinations change accordingly.154 Some

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154 See, e.g., Tushnet, supra note 80.
maintain that the disposition to condition one’s views concerning the allocation of powers between courts and legislatures on their performance is wrong while others maintain that this is the right way (and indeed the only way) to make institutional decisions. Under this view, institutional decisions concerning the division of labor between courts and the legislature ought to depend on the quality of the decisions rendered by these institutions.

This paper supports the advocates of the former position; namely, the view that institutional decisions concerning the division of labor between legislatures and courts are at least partially independent of the quality or the content of the decisions likely to be issued by the relevant institutions. This is because the institutional question is not a technocratic question concerning who is better in rendering certain decisions. Instead, it is a question of the very foundations of the political legitimacy of the state.

This paper provided a rights-based analysis of judicial review. Yet the rights that are at stake are not substantive rights — rights that may often be better protected by legislatures, citizens, or perhaps moral philosophers. Instead, we suggested that judicial review is designed to protect the right to a hearing. We have said very little about the question of how this constitutional vision fits into existing doctrines of constitutional law. Our silence concerning this issue should not however be interpreted as conceding that no doctrinal support for this view can be provided. For example, it is a basic principle of American constitutional law entrenched in Article III of the Constitution that in order to trigger judicial review of legislation, there must be an actual individual that is affected by the impugned legislation. Differentiating between the person who is affected and not affected is of course the subject of much constitutional doctrine. The Constitution limits the judicial power to “cases” and “controversies.”\(^\text{155}\) This paper can perhaps be regarded as an attempt to explore the rationale behind this famous requirement of Article III.

\(^{155}\) U.S. Const. art. III, § 2, cl. 1