Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review

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Abstract

This Article explores and evaluates theories that we label “theories of constrained judicial review.” These theories, which include popular constitutionalism, departmentalism, and weak judicial review, challenge both the constitutional supremacy of courts and adopt an intermediate position that grants courts a privileged but not supreme role in interpreting the Constitution.

To evaluate such theories, this Article develops both a negative and a positive argument. It criticizes the existing justifications of constrained judicial review and provides a new justification for such theories. More specifically, we argue that the ultimate justification for constrained judicial review cannot be grounded in instrumentalist or consequentialist concerns, namely in the allegedly superior decisions rendered by courts within systems of constrained judicial review. Moreover, these theories cannot be defended by appealing to extant non-instrumental legitimacy-based justifications. Instead, the justification for constrained judicial review must be grounded in what we call a “the right to a hearing.” We distinguish between a strong (or robust) right to hearing (which requires judicial supremacy) and a weak right to a hearing (which requires constrained judicial review). Thus, the debate between advocates of judicial supremacy and advocates of constrained theories of judicial review should be construed as a debate concerning the nature and scope of the right to a hearing. Furthermore, systems of constrained judicial review, if they are to guarantee the right to a hearing, must be designed such that non-adjudicative bodies reconsider individual grievances. By doing so in a way that is sensitive to the individual grievance and its particularities, these bodies undertake adjudicative functions.

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This paper explores and evaluates the recent theories that challenge the constitutional supremacy of courts and adopt an intermediate position which grants courts a privileged, but not a supreme, role in shaping the Constitution. We call these theories “theories of constrained judicial review.”

Constrained judicial review differs both from legislative supremacy and from judicial supremacy. On the one hand, theories of constrained judicial review reject legislative supremacy, as these theories affirm that courts have a privileged status in interpreting the Constitution. However, these theories also reject judicial supremacy, as they maintain that judicial constitutional privileges should be constrained and greater constitutional responsibilities ought to be given to non-adjudicative institutions, e.g., the legislature or even the executive. This Article develops both a negative and a positive argument. It criticizes the existing justifications of constrained judicial review and provides a new justification for such theories. More specifically we argue that the ultimate justification for constrained judicial review cannot be grounded in instrumentalist or consequentialist concerns, namely in the (allegedly) superior decisions made by systems of constrained judicial review. Instead, the justification for constrained judicial review must be grounded in what we label the right to a hearing.¹ We distinguish then between a strong (or robust) right to hearing (which requires judicial supremacy) and a weak right to a hearing (which requires constrained judicial review). The debate between advocates of judicial supremacy and advocates of constrained theories of judicial review should be construed as a debate concerning the nature and scope of the right to a hearing. While we ultimately leave this debate open, we provide criteria to determine under what conditions constrained judicial review may be sufficiently protective of the right to a hearing.

Constrained judicial review has gained prominence in recent years. Many influential constitutional theorists reject judicial supremacy and favor one form or

¹ The right to a hearing justification was developed by one of us in earlier articles that defend judicial supremacy. See Yuval Eylon and Alon Harel, The Right to Judicial Review, 92 VA. L. REV. 991 (2006); Alon Harel and Tsvi Kahana, The Easy Core Case for Judicial Review, 2 J. LEGAL ANALYSIS 227 (2010). After developing this new category we label "constrained judicial review," we examine the applicability of this justification to schemes of constrained judicial review.
another of constrained judicial review;\(^2\) these theorists maintain that the true understanding of American constitutional law and its historical origins reveal that courts ought not to have the final say on the meaning of the Constitution. Other branches of government or “the people” ought to participate in constitutional interpretation as well. Furthermore, several important foreign jurisdictions including the UK, Canada, New Zealand, and several states and territories of Australia have adopted schemes that can be characterized as forms of constrained judicial review.

The advocates of constrained judicial review rest the case for constrained judicial review either on the view that constrained judicial review is instrumentally superior to either judicial supremacy or legislative supremacy or on the grounds that although judges may be better in identifying constitutional meaning, legitimacy-based considerations dictate weakening the supreme constitutional privileges of the courts and granting them a privileged but not a supreme role in interpreting the Constitution.

We reject both the instrumental and the legitimacy-based arguments. The instrumental considerations raised by advocates of constrained judicial review are simply too speculative and contested. It is impossible to determine whether courts, legislatures, or other entities are more or less capable of interpreting the Constitution and promoting constitutional values. Most likely, the answer to this question depends on contingencies that change from time to time and place to place. The legitimacy-based arguments also cannot support constrained judicial review. To the extent that legitimacy-based considerations challenge the constitutional supremacy of the Court, such considerations ought also to challenge constrained judicial review. Under both judicial supremacy and constrained judicial review, judges' constitutional interpretations are privileged and, to the extent that legitimacy-based considerations are sound, they preclude judicial privileges in both cases. We conclude therefore that the traditional justifications for constrained judicial review fail to establish a satisfactory case.

We maintain that the only compelling justification for either strong judicial review (judicial supremacy) or constrained judicial review is the right of the petitioners that their grievance be heard – “a right to a hearing.” It is ultimately the petitioners' concerns for a hearing that justify judicial review and not the special virtues of the courts in identifying constitutional meaning. The real privileges underlying the powers of the courts are not the privileges of courts but the privileges of petitioners. Courts, as we show below, are simply the only entities that can (as a conceptual matter) provide petitioners with a right to a hearing and protecting this right is the ultimate justification for judicial review. Courts, then, are the institutional conduit for a right to a hearing. This is true both with respect to strong as well as constrained judicial review. Yet while both constrained and strong judicial review

honor the right to a hearing, strong judicial review endorses a demanding interpretation of this right. Strong judicial review is both less compromising and more demanding in insisting on the primary significance of the grievance and the hearing based upon that grievance. Thus, strong judicial review entails a more robust form of a right to a hearing than constrained judicial review.

Strong and constrained judicial review differ in the weight they give to individual grievances. Strong judicial review gives a prominent role to the individual grievance. The individual grievance and the attempts to address the grievance are the focal center of the adjudicative process. In contrast, constrained judicial review takes into account the grievance but need not necessarily assign it a central status. Such schemes of judicial review dilute the weight of the grievance and its prominence. This observation has important normative implications as it suggests how to evaluate systems of constrained judicial review. Systems of constrained judicial review need to be designed such that grievances trigger a genuine reconsideration of the decisions giving rise to the grievance. A person who has a grievance ought to be able to challenge legislation and trigger a process in which his grievance is taken seriously by the polity in a manner that is attentive to the grievance and its particularities. This need not imply a fully fledged adjudicative process (which characterizes judicial supremacy) but it must resemble such a process.

This Article examines the nature, validity, and soundness of constrained judicial review. More specifically, it establishes that in contrast to the dominant view, the case for both strong and constrained judicial review is grounded not in the virtues of the courts or judges and their alleged greater competence in identifying constitutional meaning or promoting constitutional values but in the fact that courts, by guaranteeing a right to a hearing, facilitate the voicing of the grievances of those who believe (justifiably or unjustifiably) that their rights are violated.

II. CONSTRAINED JUDICIAL REVIEW

Constitutional regimes must attend to a basic tension underscoring their operation. Constitutionalism presupposes that a constitution can override majoritarian decision-making, whereas the basic idea of democracy (though not the only one, of course) is that a duly constituted legislature has the right to make decisions for the polity. This tension between constitutionalism and democracy has spawned a voluminous literature that seeks to explain, justify, renounce, or reconcile the two principles. An important aspect of the constitutionalism-democracy tension is the institution of judicial review. Judicial review, it is claimed, seeks to enforce a polity's constitutional commitments even at the expense of majoritarian preferences. The study of judicial review, therefore, has also been a study of the constitutionalism-democracy debate. Put another way, the concept of a constitutional democracy entails a conflict between the ideal of legislative supremacy and the ideal

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of judicial supremacy, where the latter is understood as an institution that is in charge of enforcing constitutionalism.

For many years there has basically been one idea undergirding the practice of judicial review – American style judicial review, also known (now) as strong judicial review. Under that view, the judiciary is the “ultimate expositor” of constitutional meaning, having the final say over constitutional interpretation. This view has been closely associated with the rise of judicial supremacy at the expense of the political branches. Over the years, the institution of judicial review has come under attack by many scholars who claim that, on the one hand, it entrenches specific choices made by an unelected and unrepresentative judiciary, which are then difficult to overturn, and on the other, it may have a debilitating effect on the political branches by stripping them of their authority to act for and on behalf of their constituents.

Alongside defenders of strong judicial review – or judicial supremacy – we identify three strands in current constitutional theory scholarship which advocate different forms of judicial constitutional privileges that are less robust than judicial supremacy. Each originates from a different historical understanding, and each proposes different prescriptions. However, the three different strands also share one major commonality. Namely, they all seek to de-privilege the court of its role as the sole and supreme expositor of the constitutional text. For various reasons all three approaches are dissatisfied with strong judicial review and thus want to either eliminate the power courts have today to strike down legislation, or would like to see that power curtailed, for example by having courts share their interpretive power with other institutions or by letting the legislature respond to court decisions and even override them.

The overarching objective of these theories is to elevate the political branches above the current dominance enjoyed by the judiciary when it comes to

8 The concern about distortion and debilitation has been present since the beginning of scholarly writing on judicial review. See, e.g., James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129 (1893); Mark Tushnet, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, 94 MICH. L. REV. 245 (1995).
9 See, e.g., Larry Alexander & Fredrick Schauer, On Extrajudicial Constitutional Interpretation 110 HARV. L. REV. 1359 (1997); Larry Alexander & Fredrick Schauer, Defending Judicial Supremacy: A Reply 17 CONST. COMMENTARY 455 (2000); RONALD DWORKIN, 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); Owen Fiss, Between Supremacy and Exclusivity, in THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard Bauman & Tsvi Kahana eds., 2006) 452, 460 (opposing any “version of legislative constitutionalism that… disputes not only judicial exclusivity but judicial supremacy as well”).
Collectively, these theories view with alarm the rise to power of courts over the other branches. Their objections to the role of courts as having the exclusive power to invalidate legislation ranges from instrumental concerns – other branches are just as capable of constitutional interpretation – to concerns rooted in democratic legitimacy and political theory. Namely, these theories often refer to the counter-majoritarian difficulty and to the loss of autonomy, political participation and, consequently, also legitimacy entailed in having courts and unelected judges – rather than the people – decide constitutional cases. At the same time, in contrast to traditional opponents of judicial review, these positions also acknowledge the significance and potential contribution that courts may have in identifying the constitutional meaning and in promoting constitutional values and thus they wish to grant courts a privileged (although not supreme or exclusive) role in interpreting the Constitution. In the sections that follow we describe three contenders that seek to displace the dominant conception of strong judicial review: Popular Constitutionalism, Departmentalism, and Weak Judicial Review. For our purposes, what is important about these theories is their desire not to eliminate judicial review, but to grant a greater role to the political branches than is currently practiced.

A. Popular Constitutionalism

Popular constitutionalism has perhaps been the most prominent scholarly movement in constitutional theory in the past decade. It is not always clear, however, what is meant by the term, and there is no single authoritative definition. It is not our intention to describe every version of the theory. Instead, we discuss its two most influential versions, those offered by Mark Tushnet and Larry Kramer. While the two works share a similar political agenda – de-privileging the Court – they differ in their methodology and prescriptions.

Tushnet's 1999 book, Taking the Constitution Away from the Court, launched the opening salvo of modern popular constitutionalism by calling for the elimination of judicial review altogether. Tushnet criticizes judicial review mainly on the grounds that, empirically speaking, the legislature is just as capable of identifying and promoting constitutional values when it engages in constitutional interpretation as are the courts. Moreover, Tushnet highlights the harmful effects of judicial review by calling attention to some less than stellar Supreme Court opinions that retarded progressive causes. The overall constitutional structure, Tushnet claims, is a sufficient safeguard for protection of individual rights, making judicial review unnecessary. On average, judicial decisions do not deviate considerably from the

12 MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURT (1999); KRAMER, supra note 6. Tushnet understands his work as developing an argument for populist constitutional law (TUSHNET, at 9) and Kramer's title is self-explanatory.
dominant political opinions, making judicial review a lot of “noise around zero.” Moreover, when the Court engages in judicial review it displaces Congress's authority to do so, in that members of Congress are likely to pay less attention to constitutional values if they know the Court will do that for them. With the elimination of the Court's power to strike down legislation, space would be opened up for the development of populist constitutional law, currently constrained by the place occupied by the Court. Here, and in other places, Tushnet is suggesting that we disengage from legalism and turn to politics and political engagement, which is where popular constitutionalism thrives. It is only in the political sphere, not the judicial sphere, where participation by all of the people is possible. Without the overhang of judicial review, the people will be free to develop their own constitutional law in a way that is progressive and attentive to problems of the day.

Coming on the heels of Mark Tushnet's call to “Take the Constitution Away from the Court,” Larry Kramer offers a different version of popular constitutionalism. One of the differences between Kramer's version and Tushnet's is that Kramer does not seek to eliminate judicial review altogether, although he too wants to discard judicial supremacy. In subsequent discussions of popular constitutionalism, we shall focus on Kramer's version, as it represents one variant of what we label theories of constrained judicial review.

Kramer is less concerned with doctrinal and comparative institutional analysis. His method is decidedly historical. According to Kramer, “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.” The fundamental conviction of popular constitutionalists is that “final interpretative authority rested with the ‘people themselves,’ and courts no less than elected representatives were subordinate to their judgments.” To the extent that judicial review is perceived as legitimate, it is only when 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.”

In Kramer’s view, modern constitutional theory, which embraces judicial supremacy, is founded on a fundamental misunderstanding of American

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13 Tushnet, supra note 12, at 153.
14 Id.
15 Id., at 171, 174, 181-185.
17 Tushnet, supra note 12 at 57-60, 169 (discussing the problem of judicial overhang and arguing that more robust statutory rights can develop under populist constitutional law).
18 In this aspect, Tushnet is joined by Jeremy Waldron who also wants to eliminate judicial review. Waldron, supra note 7.
20 Kramer, supra note 6 at 58.
21 Id. at 8.
22 Id. at 39.
constitutional history. The original conception of judicial review was one where each of the three branches has an equal role to play in constitutional interpretation on the people’s behalf.  

He argues that the drafters of the 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. The recent development of judicial supremacy has, in Kramer’s view, weakened democracy and placed a dangerous emphasis on judicial appointments and constitutional amendments. Judicial (or for that matter any other institutional) supremacy is seen by him as a product of America’s political and legal elites struggling to gain monopoly over the interpretation of the Constitution. Kramer’s popular constitutionalism is thus founded on the premise that ultimate constitutional power belongs to the people, and it is their interpretation, not the Court's, that should govern.

Popular constitutionalism, however, remains murky when it comes to the operative details of its implementation. Kramer writes that in a system characterized by popular constitutionalism, the people assume “active and ongoing control over the interpretation and enforcement of constitutional law.” But what, exactly, are the institutional arrangements through which the “people” can assume this kind of control? Kramer endorses the use of existing constitutional tools that have fallen into disrepute. Thus, he argues that we should be willing to make more use of judicial impeachments, slashing the Court's budget, presidential ignorance of Court mandates, congressional jurisdiction stripping, court packing, and revising court procedures. These instruments, he argues, can be used in instances where the people believe the Court exceeded its authority. Having these “weapons” in the people's toolkit will thus equip them for the task of curbing the Court. The Court, knowing that the people are willing to make good on these instruments, will naturally adopt positions that comport with popular constitutional understandings.

This is what justifies labelling this theory as one of constrained judicial review – a theory that privileges the courts and yet rejects judicial supremacy. Specifically, it insists that the last word be had not by courts, but by “the people.”

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25 Id. at 1009.

26 Id. at 247. For a similar view in the comparative context, see HIRSCHL, supra note 6.

27 Kramer, Constitutionalism, Circa 2004, supra note 24 at 959.

28 Id. at 249.

29 Id. at 253.

30 Id. at 249, 253.
B. Departmentalism

Popular constitutionalism vests ultimate and final constitutional authority and enforcement with “the people” who can resist the constitutional decisions made by the courts by voting, petitioning, and even mobbing, alongside the tools available to the other branches discussed above. As a corollary, the people should not retreat from measures that seek to discipline judges. Popular constitutionalism has been linked with departmentalism, but the two are not the same. Departmentalism places authority over constitutional interpretation not with “the people” directly, but with the different governmental departments. Thus, it is possible that departmentalism is preferable to judicial supremacy because it involves determinations by other branches, assumingly enhancing its democratic pedigree.

According to the most influential version of departmentalism, advanced by President Lincoln in response to the Dred Scott decision and later by Attorney General Edwin Meese, each branch of the government has “final interpretive authority over all constitutional questions decided within the branch, irrespective of which branch those constitutional questions concern.” Thus, each issue that comes before Congress, the President, or the Court requires their independent determination of its constitutionality, regardless of what the other branch has said. So, for example, the President can decide not to execute a statute that he deems unconstitutional, even if that statute was enacted by the requisite majority to survive his veto. Similarly, Congress can re-enact a statute determined by the Court to be unconstitutional, and so on. In the context of Lincoln's and Meese's proposals, the branches might respect the Court's decision as it applies to the parties, but they are under no duty to respect the Court's decision as a general rule in similar cases. The rationale underlying this conception of departmentalism is that each branch is co-equal to the others and all are equally subordinate to the Constitution. As such, each branch is bound by the Constitution (or its own vision of the Constitution) but not by another branch's interpretation of the Constitution.

31 Id. at 106-111, 114, 124; Robert Post & Reva Siegel, Popular Constitutionalism, Departmentalism, and Judicial Supremacy 92 CAL. L. REV. 1027 (2004).
32 See Larry Alexander and Lawrence B. Solum, Popular Constitutionalism?, 118 HARV. L. REV. 1594, 1609, fn. 37 (2005) (claiming that Kramer's sympathetic treatment of departmentalism is at odds with popular constitutionalism and that Kramer acknowledges the difference between the two theories); Saikrishna Prakash and John Yoo, Against Interpretive Supremacy, 103 MICH. L. REV. 1544 (2005) (Departmentalism has no necessary relationship with popular constitutionalism).
33 For other versions, see, Alexander and Solum, supra note 32 at 1610 (divided departmentalism); Johnsen, supra note 23 (functional departmentalism).
37 Alexander and Solum, supra note 32, at 1613 (italics omitted).
38 The equality is in terms of both legitimacy (all branches are equally legitimate) and instrumentally in the sense of providing valuable interpretations (all branches of government are equal in their ability to identify constitutional meaning and promote constitutional values). For the legitimacy claim, see Meese, supra note 36. For instrumentalist values in departmentalism, see Johnsen, supra note 23 (stressing functional considerations in the allocation of interpretive authority).
Critics of departmentalism have pointed out its chaotic and diffuse nature. Namely, if each branch can ignore the other's constitutional determinations, and if there is no authority that definitively resolves constitutional disputes, we run the risk of having permanent constitutional unsettlement and interpretive anarchy. Thus, every time a public official's constitutional understanding deviates from that of the Court's she will do as she pleases, and different officials will behave differently from one another, based on their interpretation of the Constitution. Rather than have overlapping regimes of interpretive authority, the branches might seek to frustrate each other's doing, in effect blocking new policy initiatives. Of course, departmentalists agree that in particular cases, the Court can resolve the particular dispute definitively for those parties. But in that case, it is not clear what departmentalism offers, since different parties can just go to court based on a court's earlier decision and seek to enforce it in their case. And, since the other branches are committed to conforming to particular decisions made by the Court for the litigants (as opposed to general pronouncements), it is not clear how departmentalism changes things, except for the inconvenience of having to re-litigate similar cases.

Of course, it is possible that in the face of continued resistance on the part of other branches of government, the Court might change its precedent, but that is equally true for systems of judicial supremacy as even under such systems courts can overrule precedents based on resistance on the part of other branches and changed constitutional understandings.

C. Weak Judicial Review

Popular constitutionalism calls for eliminating judicial supremacy by devolving constitutional interpretation to “the people” who will interpret and enforce constitutional law through their political actions. Departmentalism rejects judicial supremacy in favor of vesting interpretive authority in all three branches of government, with the attendant implication that one branch may, in certain circumstances, ignore the constitutional determinations of another branch. However, in a system committed to strong judicial review, like the U.S., such proposals have failed to carry the day. They hearken back to a past that is no longer present. This

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39 To be sure, not everyone thinks this is a bad thing. See, e.g., LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF JUDICIAL REVIEW (2001) (arguing that judicial review keeps things unsettled but that this is a good thing because it preserves the overall legitimacy of the entire system because people are committed to the Constitution’s general pronouncements but differ on particular conceptions); 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”).

40 See, e.g., Jennifer Mason McAward, Congress's Power to Block Federal Court Orders, 93 IOWA L. REV. 1319 (2008) (showing how Congress uses appropriation riders that prohibit the use of federal funds for the enforcement orders).

41 See Meese, supra note 36, at 986-988.

42 See Alexander and Solum, supra note 32, at 1615.

does not mean, however, that alternative forms of judicial review have not had more resonance in other systems. In this section, we examine such systems, referred to as systems of weak judicial review, a term coined by Mark Tushnet.\footnote{See, e.g., Mark Tushnet, New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries, 38 WAKE FOREST L. REV. 813, 814 (2003); Mark Tushnet, Alternative Forms of Judicial Review, 101 MICH. L. REV. 2781 (2003). Tushnet refers to them as a "weak-form judicial review." We use weak judicial review.}

Like popular constitutionalism and departmentalism, weak judicial review also de-privileges the court by resisting judicial supremacy and strong judicial review.\footnote{This is accurate from the American standpoint as the U.S. constitutional order is based on judicial supremacy and constrained judicial review detracts from the existing judicial privileges. In contrast, relative to the status quo in other systems characterized by legislative supremacy, constrained judicial review grants courts greater rather than lesser privileges.} Unlike the former, however, systems of weak judicial review offer actual institutional arrangements that attempt to accomplish this goal.\footnote{See Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, 49 AM. J. COMP. L. 707 (2001).} Weak judicial review can therefore be regarded as a doctrinal manifestation, or an elaboration, of the values that undergird either departmentalism or popular constitutionalism. Under weak judicial review, the courts’ interpretations merit great respect and have great weight, but they can at times be overridden or rejected by legislatures. Thus, weak judicial review seeks what can be regarded as a middle path between judicial supremacy and legislative supremacy.\footnote{See, e.g., Stephen Gardbaum, Reassessing the New Model of Commonwealth Constitutionalism, 8 INT’L J. CONST. L. 167, 171 (2010).}

Weak judicial review is a label for diverse systems that have developed alongside, and in contradistinction to, American style judicial review. It stands for the idea that constitutional limitations can be enforced without according a final, and sometimes exclusive, role to the judiciary. In New Zealand and several states and territories in Australia, it is a legislative mandate that the court interpret any enactment so that it complies with enumerated individual rights – an interpretation the legislature can reject by a subsequent enactment.\footnote{See New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109; Australian Capital Territory’s Human Rights Act of 2004 (ACT HRA) and the Victorian Charter of Human Rights and Responsibilities of 2006 (VCHRR).} In the United Kingdom, alongside the interpretive mandate mechanism, the Human Rights Act 1998 (HRA)\footnote{Human Rights Act, 1998, c. 42 (Eng.).} has instituted “incompatibility declarations” – a process by which a court declares an enactment to be incompatible with constitutional commitments, leaving it to the legislature to amend, repeal, or leave the statute unchanged. A similar position, which combines the interpretive mandate with incompatibility declarations, has been adopted in the Australian Capital Territory’s Human Rights Act of 2004 (ACT HRA) and the Victorian Charter of Human Rights and Responsibilities of 2006 (VCHRR).\footnote{See Gardbaum, Reassessing, supra note 47 at 170-171.} In Canada, section 33 of the Canadian Charter of Rights and
 Freedoms\textsuperscript{51} allows the legislature, with regard to certain (not all) Charter rights, to actively override a judicial decision, in what is known as the “Notwithstanding Clause.” Finally, weak judicial review can take the form of weak remedies. These are remedies that relegate the court to a monitoring role, while leaving the particulars to other branches. Such remedies have been noted with respect to socio-economic rights in the South African Constitution.\textsuperscript{52}

Another way to think of weak judicial review is through the lens of temporality.\textsuperscript{53} Strong judicial review allows for quite a limited legislative response to court decisions invalidating statutes. Dissatisfied with a judicial ruling, there is very little the legislature can do. In some cases, it can propose a constitutional amendment or initiate amendment procedures (depending on the jurisdiction). But this will often be exceedingly difficult and, at times, impossible. In the U.S., for example, constitutional amendments must comply with the daunting procedural requirements in Article V, making constitutional amendment unlikely.\textsuperscript{54} In contrast, weak judicial review allows for real-time legislative response to the judicial decision. The legislature, depending on the system, must act either to incorporate the judicial decision (in cases of “incompatibility”) or overrule it (Canada's “notwithstanding clause” or New Zealand's option to enact a new statute overruling a court's interpretation). Furthermore, not only can the legislature respond fairly quickly to the judicial decision, it can do so in ways that are considerably less cumbersome and demanding than the constitutional amendment process. In the UK, parliament does not even have to respond. A declaration of incompatibility does not affect the validity of the law, thus preserving the principle of parliamentary sovereignty. In Canada, section 33 requires a positive intentional legislative act in order to override the judicial decision. However, the legislative act does not require any special majority, although it is limited to a period of five years, which may be extended.\textsuperscript{55} In New Zealand, the legislature must enact a new statute through the regular process. Thus, weak judicial review has institutionalized the process of legislative responses

\textsuperscript{53} See, e.g., Mark Tushnet, Forms of Judicial Review as Expressions of Constitutional Patriotism, 22 LAW AND PHILOSOPHY 353, 361 (2003) (discussing the period of time over which weak-form review takes place compared to strong-form review).
\textsuperscript{54} This is why, in the U.S., constitutional changes mostly come about also by way of changed understandings, judicial interpretations, and precedents and the appointment of new judges. For such an argument see David A. Strauss, The Irrelevance of Constitutional Amendments, 114 HARV. L. REV. 1457 (2001).
\textsuperscript{55} Israel has a similar provision in section 8A of its Basic Law: Freedom of Occupation, allowing the Knesset to enact a law which violates the rights guaranteed in that law, if the law was passed with the majority of M.K.s and it specifically states that it is enacted with the purpose of overriding the rights protected in the Basic Law. An overriding law will be valid for four years. The motive behind this provision was to overcome unfavorable court decisions that changed the religious status quo, mostly with regards to the importation of non-kosher meat into Israel.
to judicial decisions, something which is generally lacking in systems characterized by judicial supremacy.56

Numerous justifications have been offered for weak judicial review. Here we describe the three main ones: promoting inter-branch dialogue, overcoming the counter-majoritarian difficulty, and improving policy outcomes and the legislative process.

Promoting inter-branch dialogue. Depending on the institutional format, weak judicial review allows judicial decisions to be avoided, reversed, or modified. According to some scholars, the dialogue that will take place between the court and the legislature triggers or reinforces a public debate where constitutional values play a more prominent role than they would have without a judicial decision.57 Christine Bateup, for example, argues that the unique judicial contribution is in its ability to foster “society-wide constitutional discussion that ultimately leads to a settled equilibrium about constitutional meaning.”58 Under this view, the court is not just another voice in the conversation, but mediates the views of different participants, giving them an explicit constitutional form. The court's decisions either facilitate debate or trigger action by other institutions.59 Moreover, the dialogic justification rests on a real-time interaction between courts and legislatures.60 According to Hogg and Bushell, in the Canadian system, legislative responses to judicial decisions have been prompt.61 This strengthens the dialogic metaphor, which compares the interaction to a conversation that elaborates the meaning of constitutional values.

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57 Peter W. Hogg and Allison A. Bushell, The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights isn't Such a Bad Thing After All), 35 OSGOODe HALL L. J. 75, 79 (1997). But see JEREMY WALDRON, LAW AND DISAGREEMENT 291 (1999) (arguing that this view is a travesty. "Civic republicans and participatory democrats are interested in practical political deliberation, which is not just any old debating exercise, but a form of discussion among those who are about to participate in a binding collective decision... The exercise of power by a few black-robed celebrities can certainly be expected to fascinate an articulate population. But that is hardly the essence of active citizenship. Perhaps such impotent debating is nevertheless morally improving . . . . But independent ethical benefits of this kind are . . . not the primary point of civic participation in republican political theory.”), cited in Jeff Goldsworthy, Judicial Review, Legislative Override, and Democracy, 38 WAKE FOREST L. REV. 451, 455 (2003).
59 Id. at 1159.
60 This view contrasts with dialogic conceptions of strong judicial review that argue that there is already a dialogue in place insofar as courts are ultimately responsive to public opinion, but that dialogue occurs over a long period of time. Further, unlike weak judicial review, these dialogic conceptions do not provide a structured institutional mechanism that channels constitutional dialogue, except for noting its occurrence as a matter of fact. For this version of strong-form dialogue see Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577 (1993); Barry Friedman, The Importance of Being Positive: The Nature and Function of Judicial Review, 72 U. CHI. L. REV. 1257 (2004). For a recent statement that dialogue is a feature of all systems of judicial review, strong and weak, see Christine Bateup, Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights, 32 HASTINGS INT’L & COMP. L. REV. 529 (2009).
61 Hogg and Bushell, supra note 57, at 99.
Dialogic theorists make two types of arguments about dialogue. One is that dialogue is intrinsically valuable. Since rights are subject to reasonable disagreement, it is a good idea to have multiple institutional positions when interpreting rights. It is a cooperative view rather than a monopolistic view. The second type of argument views dialogue as instrumentally valuable because it is more likely to generate the right decision. This view is less concerned with the legitimacy implications of having a court as a sole decider, but rather seeks to point to instrumental virtues of having both types of voices (judicial and legislative) available in constitutional deliberation.

Overcoming the counter-majoritarian difficulty. By far the most serious and lasting objection to judicial review has been the democratic objection. Termed by Alexander Bickel as the “counter-majoritarian difficulty,” the argument is that judicial review is incompatible with democracy because it gives unelected judges the option to thwart the will of duly constituted majorities. Weak judicial review seeks to mitigate this concern by instituting mechanisms that attenuate the democratic tensions, by giving both the judiciary and the legislature a role in constitutional interpretation, which is thought to be more legitimate from a democratic theory standpoint that values participatory rights. Weak judicial review claims to protect the democratic pedigree by giving the legislature the final word on constitutional meaning. That is, courts express a position on the constitutional validity of a statute, but, depending on the particular form of weak review, the legislature has the final say on the statute’s fate.

Improving policy outcomes and the legislative process. Most defenders of weak judicial review note its instrumental value in bringing about good policy outcomes

64 See, e.g., Mark Tushnet, Weak Form Judicial Review and "Core" Civil Liberties, 41 HARV. CIV. RTS.-CIV. LIB. L. REV. 1, 2 (2006) ("Drafters of constitutions have recently embraced weak-form judicial review because it appears to go a long way toward overcoming the well-known “countermajoritarian difficulty” of strong-form judicial review).
65 Under this view, strong judicial review undermines democratic self-government. See Waldron supra note 7; David Bonner, Helen Fenwick, and Sonia Harris-Short, Judicial Approaches to the Human Rights Act, 52 INT’L & COMP. L. QTLY. 549, 550 (2003) ("The HRA [Human Rights Act] combines positive legal protection and enforcement of human rights with the preservation of parliamentary sovereignty."); Tushnet, supra note 44 at 814 ("Weak-form systems hold out the promise of protecting liberal rights in a form that reduces the risk of wrongful interference with democratic self-governance.").
66 To be sure, this does not mean that the legislature will exercise the option. As has been noted by many scholars, for the most part, legislatures comply with the judicial decision and either repeal or modify the statute rather than override it. See, e.g., Peter W. Hogg, Allison A. Bushell Thornton, Wade K. Wright, Charter Dialogue Revisited – or "Much Ado About Metaphors", 45 OSGOODE HALL L. J. 1, 51-52 (2007). In addition, Tushnet has persuasively argued that weak-form review tends to degenerate into strong-form review because the political branches come to accept the court’s status as the final expositor of constitutional meaning. See, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE PERSPECTIVE (2008).
and improving the legislative process more generally. These scholars point to the contributions judges can make to policy-making by illuminating and addressing deficits in the legislative process. Rosalind Dixon, for example, argues that the legislative process suffers from blind spots and burdens of inertia, which arise because the legislature “may fail to recognize that a law could be applied in a way that infringes rights.” This can be the result of time pressure or other limitations inherent in the legislative process. Legislators might fail to anticipate the perspectives of rights claimants who will be harmed by the law. And, “legislators who are focused on a particular legislative objective, and who have limited legal experience, may be ill-equipped to perceive ways in which a rights-based claim might more fully be accommodated, without undue cost to the relevant legislative objective.”

To sum up, the arguments favoring constrained judicial review are divided into two types: instrumental and legitimacy-based arguments. The former maintain that constrained judicial review is superior in terms of the quality of the constitutional decisions to either judicial supremacy or to legislative supremacy. The latter maintain that while the decisions resulting from constrained judicial review are not necessarily superior to those rendered under schemes characterized by judicial supremacy, judicial supremacy is not sufficiently attentive to democratic values: i.e., it is too elitist and therefore illegitimate. The next section examines these arguments.

III. THEORIES OF CONSTRAINED JUDICIAL REVIEW EXAMINED

Theories of popular constitutionalism, departmentalism, and weak judicial review offer general arguments about the undesirability of strong judicial review, and they propose solutions that seek to mitigate these problems. Although they differ in their proposals, they share a similar political and normative agenda that aims to de-privilege the courts and erode its powers of judicial review. At the same time they do not wish to eliminate judicial privileges altogether but merely to weaken them and open the possibility of greater input from non-adjudicative institutions. Most importantly, theories of constrained judicial review emphasize that courts should not have the last word in constitutional interpretation. The final input, according to these theories, should (at least sometimes) be reserved to the political branches or the people writ large. Thus, even if a court strikes down a statute, the final consideration whether that statute is, in fact, unconstitutional, cannot be left to the courts. Consequently, all advocates of constrained judicial review stress the importance of

67 See, e.g., Bateup, supra note 58, at 1134 (noting that "most dialogue theorists… favor a dialogic understanding of judicial review due to the potential it creates for reaching better answers to constitutional questions.", thus arriving at a deep and broad consensus about constitutional meaning). See also Tushnet, Core Liberties, supra note 64, at 3 ("weak-form review should be understood as a method of working out the best understanding of what the Constitution properly protects through a process of exchange between the courts and legislatures over time. Eventually, the interactions should produce a settled and correct understanding").


69 Id. at 402.
institutional interactions between courts, legislatures, the executive, and public opinion. The importance that they assign to judicial review, therefore, is derived from an analysis of this inter-institutional discourse. Specifically, theorists of constrained judicial review make two kinds of arguments when discussing why strong judicial review is inadequate: an instrumentalist argument and a non-instrumentalist legitimacy-based argument.\textsuperscript{70}

A. The Instrumentalist Argument\textsuperscript{71}

According to the instrumentalist argument against strong judicial review, courts are not necessarily (or even typically) better than legislatures when it comes to protecting individual rights and promoting constitutional values.\textsuperscript{72} Consequently, there is no reason that constitutional interpretation should rest exclusively with courts. Rather, we should assign the task of constitutional interpretation to the branch or branches that would be the best constitutional interpreters.\textsuperscript{73} Thus, popular constitutionalism would like to revive political debate by having the people interpret and enforce the Constitution. Departmentalists would like all the branches to engage in constitutional interpretation. And proponents of weak judicial review favor a dialogue between courts and legislatures. Each one of the proponents of these views believes that his preferred institutional mechanism is more likely to generate the correct interpretation or enrich constitutional discourse.

There are many reasons given by advocates of constrained judicial review in favor of the instrumental superiority of this scheme. Most typically, advocates point out that constitutional decisions are founded on different types of considerations that require different types of expertise and that, consequently, institutions with different perspectives and expertise ought to be involved in such decisions, guaranteeing that

\textsuperscript{70} We leave the historical argument made by Kramer to one side. We do this for two reasons. First, Kramer's historical narrative is contested and we lack the tools to evaluate that controversy. See, e.g., Robert J. Kaczorowski, \textit{Popular Constitutionalism Versus Justice in Plainclothes}, 73 \textit{Fordham L. Rev.} 1415 (2005) (arguing that Kramer's account is overstated); Wayne D. Moore, \textit{Review}, 48 \textit{Am. J. Legal Hist.} 100 (2006) (largely agreeing with the historical analysis but arguing that it is overstated). Second, and more importantly, we do not think that historical facts, in themselves, can give rise to a normative argument. To do that, Kramer must rely on a normative theory to support his claim. We think that he does, and we discuss below some of his normative arguments.

\textsuperscript{71} In a previous article one of us has extensively addressed (and criticized) several instrumentalist justifications of judicial review. See Alon Harel and Tsvi Kahana, \textit{The Easy Core Case for Judicial Review}, 2 \textit{J. Legal Analysis} 226 (2010). Thus, here we only concern ourselves with one aspect of instrumentalist arguments, namely the difference between courts and legislatures.

\textsuperscript{72} See, e.g., Waldron, \textit{supra} note 7; \textit{Tushnet, supra} note 12; Neil K. Komesar, \textit{Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy} 256-261 (1997) (arguing against “the fundamental rights approach to constitutional law” on the grounds that judges are not necessarily the best protectors of rights.); Adrian Vermeule, \textit{Judging Under Uncertainty: An Institutional Theory of Legal Interpretation} 243 (2006) (“Courts may not understand what justice requires or may not be good at producing justice even when they understand it.”).

\textsuperscript{73} Framed as such, this is an epistemic argument about the interpretive capacities of institutions. For an epistemic argument preferring legislative constitutional development and interpretation over judicial ones, see Adrian Vermeule, \textit{Law and the Limits of Reason} (2008). For a symposium devoted to this book see 2 \textit{Jrslm. Rev. Legal. Stud.} 5-47 (2010).
the constitutional output is based on a comprehensive evaluation of all these considerations. Courts, legislatures, and other agents have different expertise and a different outlook on constitutional questions. Thus, it is important that all the relevant agents be involved in addressing constitutional questions. In other words, there is value in having multiple institutions pronounce their considered positions on matters of constitutional law.\textsuperscript{74}

Scholars who focus on the difference between a court and a legislature usually point to courts’ special institutional competence in relation to matters of principle.\textsuperscript{75} Michael Perry, for example, identifies the Court’s political isolation, which he claims allows judges to detect emerging moral principles toward the construction of a moral order.\textsuperscript{76} Likewise, Kent Roach argues that in dialogic systems, courts are best at “[bringing] to the table the importance of fundamental values,” whereas legislatures are best at bringing “knowledge of regulatory objectives and obstacles that the court may otherwise have difficulty appreciating.”\textsuperscript{77} Janet Hiebert argues that judges and legislators have different focal points.\textsuperscript{78} Unlike the legislative process, the “court’s task is not to decide how best to reconcile conflicting values but instead to assess the constitutional validity of the specific legislation or state action that is subject to Charter challenge.”\textsuperscript{79} Thus, judges have the ability to focus on the rights dimension of policies, whereas legislatures take a more holistic perspective on the policy as a whole, rights being only one factor, and not necessarily the most important one.\textsuperscript{80} Legislatures will get to reflect on the reasoning given by the court, especially as it highlights concerns not addressed in the policy formation stage.\textsuperscript{81}

We find these positions important, but flawed. First, it is not clear why judges are particularly good at identifying matters of principle. The political branches can engage in constitutional interpretation as well, and have been known to do a fairly good job at it too.\textsuperscript{82} Second, the view that judges are uniquely positioned to pronounce on matters of principle due to their political isolation rests on “idealized assumptions about how judges decide cases,”\textsuperscript{83} since judges are, in fact, part of the political system and often act strategically vis-à-vis the political branches.\textsuperscript{84} Third, if indeed judges are better at identifying and explicating matters of principle, as Bickel,

\textsuperscript{74} We are putting to one side the symbolic effects that would undoubtedly arise if both institutions voiced the same opinion and reasoning, which would suggest a high level of societal consensus.
\textsuperscript{75} Bateup, \textit{supra} note 58 at, 1144, citing \textsc{Bickel}, \textit{supra} note 63, at 25-26, 261.
\textsuperscript{76} \textit{Id.} at 1145-1146 (describing Perry).
\textsuperscript{77} \textsc{Kent Roach}, \textsc{The Supreme Court on Trial: Judicial Activism or Democratic Dialogue} 286 (2001). For a similar view see \textsc{Vermeule}, \textit{supra} note 72.
\textsuperscript{78} \textsc{Janet L. Hiebert}, \textsc{Charter Conflicts: What is Parliament’s Role?} 51 (2002).
\textsuperscript{79} \textit{Id.} at 53.
\textsuperscript{80} \textit{Id.}, at 55.
\textsuperscript{81} \textit{Id.}, at 56.
\textsuperscript{83} Bateup, \textit{supra} note 58, at 1149.
\textsuperscript{84} There is enormous literature on these issues. For a summary, see Barry Friedman, \textit{The Politics of Judicial Review}, 84 TEX. L. REV. 257 (2005).
Roach, and Perry suggest, why would supporters of constrained judicial review want legislatures to take a crack at what is considered to be a superior judgment?

Advocates of constrained judicial review also claim that their institutional mechanisms will force legislators to consider the individual rights implications of their policies. But constrained judicial review often develops too rosy an image of the legislature. This picture is based on the assumption that if only the legislature's attention were drawn to the impact that its legislation has on individual rights, the legislature would deliberate again while taking these concerns seriously. Yet often the legislature does more than merely err or fail to notice that its legislation violates rights; in fact, it is its intention to violate rights in order to achieve popular support or in order to promote sectarian interests. In such cases the weak powers granted to the courts are simply too weak as no amount of deliberation is likely to change the legislative decision. Furthermore, it is these cases that are more likely to involve grave and egregious violations of rights as they are not based on lack of attention or a hasty mistake on the part of the legislature; they are based on a deliberate intention to violate rights.

Instrumentalist arguments, however, suffer from two additional and fatal flaws. First, it is unclear that courts are indeed better at making decisions that promote constitutional values. Second, it is dubious whether the epistemic superiority of courts or, for that matter, any institution, can justify granting powers to such an institution.

Courts are not necessarily better decision-makers than other institutions. Mark Tushnet argues that on average judicial decisions do not deviate considerably from the dominant political opinions and thus judicial review is a lot of “noise around zero.” Robert Dahl famously argued that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States,” and Barry Friedman has exhaustively detailed the ways in which the Court tracks popular opinion. Thus, if judicial review on average reflects popular opinion it is not clear how a system with judicial review would perform better than a system without judicial review.

Furthermore, it is unclear that epistemic superiority of courts is sufficient to justify granting them judicial review powers. Instrumentalist arguments hinge on

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85 This was the case, for example, with Quebec's sweeping use of the override. Shortly after the Charter went into effect, the Quebec legislature attached an override provision to every Quebec law in order to immunize its entire code.
86 See Alon Harel, The Vices of Epistemic Institutionalism, 2 JRSLM. REV. LEGAL STUD. 5, 11-12 (2010).
87 TUSHNET, supra note 12, at 153.
88 Robert A. Dahl, Decision-making in a Democracy: The Supreme Court as a National Policy-maker, 6 J. PUB. L. 279, 285 (1957) (basing his argument on the ways in which judges are appointed and confirmed).
90 According to Tushnet, however, the added harm in judicial review is the judicial overhang. But here too there is only anecdotal support for his proposition.
judges' alleged ability to get things “right,” whatever right may mean. Assume now that we believe that a group of moral philosophers or religious authorities are better at identifying what rights we have. Their education, commitment and integrity or, alternatively, the institutional features of the institutions in which they operate guarantee that they are better able to accurately identify what our rights are. It seems evident that this is not a sufficient justification for granting moral philosophers or religious authorities such a power. Expertise, or even institutional virtues on their own, would not be a sufficient reason for the transfer of decision-making authority.

Instrumentalist arguments ultimately hinge on empirical findings on which there is no consensus among scholars. Constitutional theorists are hard pressed to show that a world with judicial review yields better rights protections than a world without judicial review. And the converse is true as well. No one can show that a world without judicial review will be better than a world with judicial review. As Erwin Chemerinsky wrote, the question is ultimately one of faith. However, as Adrian Vermeule points out, if judicial review is indeed “a matter of faith,” then why incur the costs of adding judicial review to the system when its benefits are speculative or unclear? In instrumental terms, unless judicial review is affirmatively shown to make things better, there is no reason to have it given the clear positive decision costs or process costs resulting from the involvement of the courts. Finally, epistemic superiority cannot trigger legitimacy of the type necessary for constitutional decision-making. Mere epistemic superiority cannot provide a reason to shift power from legislatures to courts. Thus, since instrumentalist arguments cannot carry the day, theories of constrained judicial review must establish that strong judicial review is democratically illegitimate. To this we turn now.

### B. The Non-Instrumentalist Argument: The Concern for Legitimacy

Most supporters of theories of constrained judicial review also believe that there is something fundamentally undemocratic about judicial review. They worry over the loss of participatory rights and autonomy by having non-elected judges thwart the will of elected representatives. This worry exists independently of the Court's ability to reach the right result. Indeed, even if the Court were to get it right every single time, these objections would still be valid because even if the people make mistakes, they are entitled to make them and, furthermore, they cannot alienate the powers to make them.

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92 ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 141 (1987) (“I have no way of proving [that the long-term benefits of judicial review outweigh its costs]. It is difficult to know how to add up the benefits of all past “good” decisions and weigh them against the costs of all past “bad” decisions.”); See also Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002)
94 See, generally, VERMEULE, supra note 72.
95 See Harel, supra note 86.
96 See Waldron, supra note 7.
We cannot hope to canvas the enormous literature espousing or opposing judicial review on democratic, participatory, or, more generally, legitimacy-based grounds. We do find it telling, however, that insofar as judicial review is counter-majoritarian, it is hardly alone in being so. Indeed, American government has many hard-wired counter-majoritarian instruments in place. Consider, for example, that Article I mandates equal representation in the Senate, that Article II vests extraordinary power with the President with little accountability, and that Article V prevents popular majorities from instituting more democratically responsive institutions.97 Thus, the singling out of judicial review is, on its face, perplexing. Moreover, repeated accounts by political scientists and legal scholars have demonstrated how the political branches have deliberately made the choice to give courts more power and authority over more and more types of disputes.98 Of course, as Jeremy Waldron has argued, the mere fact of having something decided democratically does not make that thing democratic.99 Still, it is difficult to understand how, in a country with numerous counter-majoritarian institutions, where the political branches support judicial review, and where judicial review enjoys broad support among the citizens, judicial review is constantly singled out as the most problematic aspect of American government.

Of course, simply because other institutions share problematic aspects does not make judicial review unproblematic. But short of abolishing judicial review altogether (and restoring legislative supremacy) — a solution rejected by theories of constrained judicial review — the democratic tensions purported to be resolved still remain. Advocates of weak judicial review, for example, emphasize the fact that under the scheme they propose legislatures have the powers to override or disregard the judiciary’s decisions. But this is hardly sufficient to overcome the concern for legitimacy of judicial review. Under some versions of weak judicial review, courts can effectively postpone and often practically block the passing of legislation. For example, under the interpretive mandate version, the courts are actually putting in place their desired interpretation. While the legislature can overturn that interpretation, it is clear that merely by opining the court has raised the stakes for


99 Jeremy Waldron, A Rights-Based Critique of Constitutional Rights, 13 OXFORD J. LEG. STUD. 18, 47 (1993) “(If a majority of the British people thought a military dictatorship was democratic (because more in tune with the ‘true spirit of the people’ or whatever), that would not show that it was, nor would it provide grounds for saying that democratic arguments against the dictatorship were ‘self-defeating’.”)
political action, making a subsequent legislative move politically costly. Consequently, courts in that system (as well as other systems of constrained judicial review) enjoy a much greater impact on legislation than any other body. Weak judicial review can thus be compared with a system that grants some individuals (i.e., judges) greater participatory privileges than other, non-elected, individuals. Arguably while such a scheme is less unjust than one that grants courts supremacy, it is still not sufficient to overcome the concerns of those who believe in the right to equal participation. After all, it is essential for the legitimacy of the political system that individuals not only have a right to participation but also a right to equal participation and it seems that the privileges granted to courts operating within the frame of a system of weak judicial review violate the requirement of equality.

C. The Fundamental Flaw with Existing Theories of Constrained Judicial Review

It seems, then, that advocates of judicial review are at an impasse. On the one hand, instrumentalist arguments are contingent on empirical conjectures and therefore cannot provide the necessary support for judicial review. Thus, only a non-instrumentalist legitimacy-based argument can support any kind of judicial review. On the other hand, constrained judicial review cannot be justified on the grounds that it is more legitimate than strong judicial review as, like strong judicial review, it also privileges courts in ways which clash with democratic concerns. Can the theories that wish to preserve some judicial privileges and yet reject judicial supremacy be salvaged?

To do so we identify a fundamental flaw of theories of constrained judicial review. The major flaw of these theories is that they emphasize institutions (courts and legislatures) or the people writ large. There is however one player whom all of these theories overlook, namely the claimant or petitioner, the person aggrieved by the (alleged) constitutional violation. In justifying the privileged (although not supreme) role of the courts, advocates of constrained judicial review maintain that what we care about is the input of the courts or of the judges. In our view, courts indeed ought to be privileged, but not because courts (and judges) are good decision-makers, or faithful interpreters of the Constitution, or, at least, more faithful interpreters than other institutions; instead, we maintain that courts are privileged simply because they give voice to the grievances of individuals. The fundamental flaw of the existing justifications for constrained judicial review is the underlying premise that courts are privileged institutions whose opinions are entitled to greater (even if not exclusive) attention than that of other institutions because of some virtues possessed by judges or the courts. But the privileging of the court for such a reason is problematic for both instrumental and non-instrumental, legitimacy-based reasons. The instrumental justifications are, as stated above, founded on dubious and controversial empirical conjectures. The non-instrumental (legitimacy-based) justification conflicts with the fact that, to the extent that courts are superior.

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to other branches in any way, e.g., epistemically superior, such superiority does not justify granting the courts powers of decision-making.\textsuperscript{101} In other words, although theories of constrained judicial review are specifically designed to accommodate the concern for legitimacy, they are unable to do so as the problem of legitimacy arises not only under strong judicial review, but under any system that privileges the courts, including constrained judicial review.

But if it is not the superiority of courts or of the judges themselves and their (alleged) greater ability to identify constitutional meaning or to promote constitutional values that justifies judicial privileges, what else could it be? To provide a satisfactory explanation we need a theory that does not rely on the (alleged) superiority of the court. We therefore propose a theory that grounds judicial review on a right to a hearing. Such a theory avoids the objections to both sorts of concerns discussed above. As it is not instrumental, it does not depend on unsubstantiated empirical conjectures concerning the superiority of the courts. Furthermore, to the extent that it is not based on the (instrumental) superiority of the court as a decision-making body, it may overcome the legitimacy-based concerns as it steers clear of objections to judicial review that point to the weakness of mere instrumental superiority as a grounds for privileging the courts.

Our explanation is therefore as follows: Courts ought to be privileged not because of any features of judges or their superior epistemic powers, or the neutrality, objectivity, and independence of judges. Courts’ privileges are grounded in the fact that courts are the only institution that meets and hears the (justified or unjustified) concerns of victims of violations of rights. It is the right to be heard (a right that belongs to petitioners) that is at stake rather than the special virtues of the court. Under this view, which we develop below, courts are granted constitutional privileges not because they are better at identifying rights or engaging in principled decision-making but rather because courts are the institutions that can hear those individuals who claim (justifiably or unjustifiably) that their rights have been violated and that society is obliged to hear and react to the grievances of these individuals. Courts are the ones that are in charge of providing a fair hearing to these individuals such that the privileges that courts have are not fundamentally their own privileges but are explained in terms of the privileges of the rights claimants, the petitioners.

It is here that our proposal differs from that of existing justifications either for strong judicial review or for theories of constrained judicial review. Courts have a special role in constitutional interpretation, not because they are wiser, or because their privileged role contributes to the public good or to the realization of constitutional values, or even because they identify concrete rights violations better than other bodies do. Courts are privileged because they are voicing concerns of the (real or imaginary) victims of violation of rights. It is the courts that confront these victims, and the privileged role of courts is ultimately designed to voice the grievances of these individuals. Ultimately, therefore, the privileges granted to courts are not attributable to the courts per se but to those who voice their grievances.

\textsuperscript{101} See Waldron, supra note 98, at 40 (arguing that “there is a certain dignity in participation, and an element of insult and dishonour in exclusion, that transcends issues of outcome.”).
by petitioning the courts. To establish this conjecture we need to inquire as to why those who voice grievances – the petitioners – deserve such a privileged role. The next section is devoted to examining this question.

IV. Judicial Review and the Right to a Hearing: Courts as Voicing Claimants' Grievances

A. The Right to a Hearing

This section defends the view that judicial review is designed to protect the right to a hearing (or the right to raise a grievance). Furthermore, it argues that the debate between advocates of strong judicial review and advocates of constrained judicial review can be construed as a debate concerning the scope and the nature of the right to a hearing. Let us start by briefly presenting the justification for the right to a hearing conception of judicial review.

102 Assume that I believe a right of mine has been violated. Such a conviction on my part triggers resentment. I turn therefore to the person who I believe has violated his duty towards me and require that he reconsider the decision giving rise to my grievance. It is our contention that, under these circumstances, I have a right to a hearing that consists of three distinct components: one, the opportunity to raise a grievance against what is perceived by an individual as a violation of his right; two, the duty on the part of the entity that is perceived (by the rightholder) to be the duty-holder to provide an explanation; and, three, the duty on the part of that entity to reconsider the decision that gave rise to the grievance in the first place. This right can be triggered not only by a decision of an individual but also by a decision of a legislature that may, under certain circumstances, violate constitutional rights. In such cases the person who believes that her constitutional right has been violated is entitled to a hearing – a hearing that judicial review is designed to achieve. Last, we maintain that the right to a hearing does not depend on whether the decisions that emanate from the hearing are better or more protective of rights or democracy than decisions resulting from other mechanisms of decision-making. The justifiability of the right to a hearing is not grounded in the conviction that a hearing would generate a better or superior decision, but simply in the fact that the resentful claimant is entitled to it as a matter of right.

To establish the significance of these three components of the right to a hearing, think of the following example. Assume that Paul promises Jeremy to meet him for lunch. Prior to the meeting Paul asked Jeremy to cancel the meeting because of a memorial ceremony that will take place at the same time. Assume also that Jeremy is offended as he believes that memorial ceremonies do not justify the cancellations of lunch appointments. After all, he believes attending to the needs/interests of living people is more important than honoring the dead.

102 The discussion on the right to a hearing is based on previous papers of one of us. See supra note 1. Yet while previous papers focused their attention on the debate between judicial supremacy (strong judicial review) and legislative supremacy the focus here is on the debate between strong judicial review and constrained judicial review.
It seems that even if Jeremy is wrong and memorial ceremonies do justify the infringement of promises, Paul owes Jeremy “a right to a hearing.” His duty is not to apologize but a duty to patiently listen to Jeremy's grievances, to justify his decision to Jeremy and, finally, to reconsider his decision given the moral deliberation. Jeremy's right to a hearing is not derived from the fact that the hearing is more likely to bring about a better or a more just outcome. The real justification for the right to a hearing is that Jeremy has a right to participate in Paul's deliberations whether to infringe on Jeremy's alleged right that Paul keep the meeting even when Paul's decision to infringe the right is ultimately justified. Similar concerns apply in cases where Paul could not reach Jeremy in time and went to the memorial ceremony. In such a case Jeremy could challenge the decision ex post and require an apology or a compensation of an appropriate type. Jeremy is entitled in such cases to a right to a hearing to facilitate the determination of whether Paul's decision was correct or not. Now, if Jeremy has such a right in such a trivial case why should this right be denied to a citizen whose property is confiscated, or a gay partner who is deprived of the power to marry his lover, or a person who was convicted in court on the basis of evidence that he regards as dubious and unsatisfactory? Even if these decisions are ultimately justified, it seems preposterous to deprive the rightholder in such cases of the opportunity to raise his grievance.

Let us examine more closely the components of the right to a hearing in such a case.103 The first component – the opportunity to raise the grievance – is self-explanatory. A person who believes his rights are violated ought to have an opportunity of articulating why he believes so. The second and the third components of the right require some attention. To understand the nature of Paul's duty to provide an explanation (the second component) assume that Paul announces to Jeremy that in the past (after long deliberation) he came to the conclusion that he ought always to follow the rule that in a case of a conflict between a lunch and a memorial ceremony he ought to go to the memorial. When Jeremy requires an explanation he simply reiterates the arguments leading him to adopt such a rule in the first place without examining the relevance and the applicability of these arguments to the present case. Such behavior, we think, violates the right to a hearing and especially the second component of this right – Jeremy's right that Paul provide an explanation. This right requires a concrete examination of the reasons underlying the decision. This is not because the original decision to adopt the rule is necessarily wrong or unjustified. It is possible that the considerations that eventually led to the adoption of the rule are impeccable and it is also possible that the best way to make a decision under these circumstances is indeed to blindly follow the rule. The duty to provide a hearing is not an instrumental duty designed to guarantee the quality of the decision or to increase the probability that the decision is correct, just, or appropriate. It is a duty to enable the victim of the decision – Jeremy in our example – to participate in the moral deliberation.

Last, the third component – the willingness to reconsider the initial decision giving rise to the grievance. Assume that Paul is willing to allow Jeremy to raise his grievance and is also willing to explain his decision but he announces in advance (or,

103 See Eylon and Harel, supra note 1, at 1002; Harel and Kahana, supra note 1, at 238-239.
even worse, decides without announcing) that the decision is final and will not be changed. It is evident that this is a violation of the right to a hearing. A real hearing requires willingness to reconsider the decision; it requires willingness to change it if it transpires that the decision is wrong; in particular it requires a willingness to act on the basis of the deliberation. This is not because the hearing increases the chances of a good decision. It is even possible that the willingness to reconsider decreases the chances of a good or an appropriate decision. But a hearing without any willingness to reconsider the outcome obviates the purpose of a hearing in the first place. It is nothing more than a pro forma hearing, a sham gesture.

Under this view, the justification of judicial review does not require special presuppositions concerning the special quality of judicial decisions or any assumptions concerning the superior ability of judges or courts to make decisions. The justification for judicial review is simply to guarantee that individuals who claim (rightly or wrongly) that their rights were violated are provided with a forum in which they could raise their arguments and a guarantee that these arguments be investigated and trigger a reconsideration of the decision in light of the deliberation. This process does not guarantee (even as a probabilistic matter) better or more successful decisions than those that would have been accepted by the legislature. All that is guaranteed by this process is the right to be heard, which is valuable in itself—a value that is independent of the conjecture that courts are better or more successful than legislatures at protecting individual rights.

B. Courts and the Right to a Hearing

At this stage, one may question why a hearing ought to be conducted in courts and why judicial review is necessary for realizing the right to a hearing. It is here that we maintain that the justification for judicial review based on the right to a hearing is superior, as it is founded not on empirically controversial claims about the court, but on essential features of courts, or, more precisely, features of the adjudicative process. Courts, we maintain, are the institutional embodiment of the right to a hearing. In other words, they are institutions designed to provide a right to a hearing. Judicial review is in essence a mechanism for realizing this right. What seems to support this conjecture is that, as a matter of fact, courts are institutions whose mode of reasoning and operation tracks precisely the stages described above; in short, adjudication is nothing but a process of a hearing.

To see why, think of the procedures used in courts. It is uncontroversial that, generally, courts (in contrast to legislatures) examine individual grievances. Examining such grievances involves three components that are known to us from the discussion concerning the right to a hearing. First, the judicial process gives voice to

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104 BICKEL, supra note 63, at 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.”).
the citizens’ grievances. 105 Second, it imposes a duty on the state or other entities to provide a justification for the decision that eventually gave rise to the grievance. 106 Third, it also requires examination of the decision that may lead to its reconsideration. 107 These are precisely the three basic components of the right to a hearing.

It is true that courts are not necessary for protecting the right to a hearing; it is the adjudicative process itself rather than courts that is necessary. The right to a hearing requires the existence of an institution that facilitates a hearing. There is no reason to believe that the court is the only institution that can conduct a hearing. Theoretically, even the legislature can do it. There is nothing in principle that prevents the legislature (namely the body that is responsible for the decision giving rise to the constitutional grievance) to conduct a hearing and to allow a citizen to raise her particular grievance against the law, to listen to it attentively, to reason and to reconsider the decision giving rise to the grievance. 109 While there is nothing that

105 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) (“Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of rights and duty through the judicial process must be given a meaningful opportunity to be heard.”).
106 See, e.g., Daniel L. Shapiro, In Defense of Judicial Candor, 100 HARV L. REV. 731, 737 (1987) (“Reasoned 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, Judicial Candor, 73 TEX. L. REV. 1307, 1309 (1995) (“The 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, supra note 104, at 966.
107 See Herbert Wechsler, Toward Neutral Principles of Constitutional Law 73 HARV. L. REV. 1, 19 (“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.”); STEVEN J. BURTON, JUDGING IN GOOD FAITH 36-37 (1992) (“The good faith thesis maintains, in brief that the judicial duty to uphold the law requires judges to act on the reasons provided by the law.”).
108 A skeptic may ask at this point and ask whether it is not enough for the sake of realizing the right to a hearing to discuss the pros and cons of the decision in the legislative body. After all, our legislatures are asked again and again to justify their decisions. In addition to its legislative activity, Congress is also an exciting debating society and the debates conducted there provide an opportunity to voice grievances for individuals whose rights are violated as a result of the legislation. But even if Congress examined grievances in an effective way this would not be sufficient. The distinctive feature of courts is not merely the facilitation of hearing but the facilitation of particularized hearings – the right given to real as well as imaginary rightholders (those who believe unjustifiably that they have a right that was violated) to raise their particular grievances.
109 Needless to say, the body that will be established for the purpose of facilitating a hearing (be it is the legislature or another body that is neither the legislature nor the courts) must be able to honor the right to a hearing. There is no doubt that even if legislatures try hard to conduct a fair hearing the fact that they are involved in the process of legislation and in the decision giving rise to the grievance may distort their judgment. Furthermore there is an inherent conflict between the role of the legislature and the role of the judge. Legislatures are often representatives of interest groups and are influenced by lobbies. The role of a representative is incompatible with performing a hearing. Using the legislature
prevents the legislature from operating in this way, it seems that if the legislature operates in such a way it thereby becomes a court. The body that performs the hearing (irrespective of whether it is a legislature or a new body that is neither the court nor the legislature) ought to conduct procedures that are identical to those characterizing courts. In other words, such a body has to facilitate the raising of grievances on the part of individuals, addressing these grievances, and reconsidering the decision giving rise to the grievance. “Non-judicial bodies” such as executive administrative tribunals that provide for a hearing mimic therefore the procedures of courts. The more these bodies are effective in performing a hearing the more they resemble courts. They resemble courts so much that one can simply say that the right to a hearing requires the establishment of courts. After all a bird that looks like a duck, walks like a duck, and behaves like a duck is nothing but … a duck. An institution that is in charge of hearing grievances, providing a reasoned explanation, and reconsidering the decisions giving rise to the grievance is nothing but a court.

C. Constrained Judicial Review and the Right to a Hearing

Once we are clear on the purpose of judicial review, we can examine what form judicial review should take in order to honor the right to a hearing. In previous articles one of us has defended strong judicial review on the grounds that this is the only institutional scheme that can honor the right to a hearing. In contrast, here we examine to what extent constrained judicial review is sufficient to satisfy the requirements of a hearing. More specifically we argue that there are two interpretations of the right to a hearing: a strong or a demanding interpretation and a weak interpretation. We establish below that theories of constrained judicial review are sufficient to satisfy the weak understanding of the right to a hearing but insufficient to satisfy the strong understanding.

To examine the difference between strong judicial review and constrained judicial review, think of the difference in the status of (real or imaginary) victims of rights violations in a system with strong judicial review and in a system that endorses principles of constrained judicial review. Under both strong and constrained judicial review the first and the second components of the right to a hearing are honored. Thus, unlike systems of legislative supremacy, under most systems of constrained judicial review, it is the case that 1) real or imaginary victims of rights violations are entitled to raise their grievances in the courts, and 2) courts are required to provide a reasoned decision and address the grievance. The primary difference between strong and constrained judicial review lies in the third condition, namely the duty of reconsideration on the part of the courts. Strong judicial review imposes a robust and demanding duty of reconsideration on the part of the courts. The adjudicative process is most typically focused on a particular grievance and the reconsideration performed by courts is not only triggered by the grievance but is

to provide a hearing has inherent additional difficulties. Such a proposal requires examining the necessary qualifications required of legislatures and those required of individuals who are in charge of providing a hearing. If these qualifications are very different then there are instrumental reasons not to use the legislature as an institution in charge of a hearing.

110 See supra note 1.
intimately tied up with the particularities of the grievance. Systems of constrained judicial review often require some degree of reconsideration; nevertheless, the reconsideration required is less robust and demanding than the reconsideration characterizing strong judicial review. After we establish this claim by examining the requirements of reconsideration imposed by theories of constrained judicial review, we shall explore whether constrained judicial review is sufficiently attentive to the constitutional grievances of the citizens.

Under popular constitutionalism, courts are entitled to make constitutional decisions. Petitioners can file a claim, asserting that a law unjustifiably violates a constitutional right. The Court will conduct a hearing and provide a reasoned analysis. Suppose, further, that the Court sided with the petitioner and found his constitutional claim to be justified. Under strong judicial review a decision concerning the constitutionality of a law is an end to the process. In contrast, under popular constitutionalism such a decision on the part of the Court is merely the beginning of a political process that may eventually override the Court's judgments. Let us illustrate this claim by considering the recent case of *Salazar v. Buono*.

In *Salazar*, the petitioner claimed that the placement of a cross (used as a memorial to honor fallen soldiers of WWI) violated the Establishment Clause. The Supreme Court eventually upheld the constitutionality of the cross on the land, but the original litigation started in 2002, eight years before the Court rendered its decision. In the first round of the litigation, the petitioner won in the District Court, a decision that was affirmed on appeal to the Ninth Circuit and became final.

This decision was so unpopular among some members of Congress that instead of removing the cross Congress passed a bill prohibiting the use of government funds to remove the cross. This did not allay congressional concerns, so it went a step further, enacting a land transfer statute, giving the land to the Veterans for War in exchange for another parcel of land. For various reasons, the litigation was reinstated; but let us suppose otherwise. According to popular constitutionalism, we should have "judicial review without judicial supremacy," which means letting courts have a voice, but not the last or conclusive voice. Thus, if a court makes an unpopular decision, the people (in this case through their representatives) have the right to resist the decision. If the resistance is persistent, eventually the court's judgment ought to be set aside. The Court is therefore important and central but its judgment ought not to be conclusive.

It is evident that under popular constitutionalism, courts have the power to examine grievances and also the duty to provide reasoned judgments concerning the soundness of these grievances. But courts are not assigned the exclusive power to reconsider the decision. The ultimate decision is subject to a broad participation of other agents.

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115 KRAMER, *supra* note 6, at 249.
Such participation does not preclude a serious reconsideration of the decision that gave rise to the grievance. Popular constitutionalists firmly believe that the courts ought to participate in public deliberation and their judgments ought to be taken seriously.\textsuperscript{116} If indeed courts’ decisions are taken seriously, it follows that there is some degree of reconsidering the initial decision giving rise to the petition. The grievance is heard by the polity as a component in a broader set of considerations. Yet, it is also evident that under popular constitutionalism the ability and the willingness to reconsider the decision in light of the grievance are much weaker than the one performed under strong judicial review. After all, the courts are the only agent that confronts the petitioner and its decisions are the ones that focus primarily or exclusively on the grievance. Even if other institutions are attentive to the grievance (as they ought to be under the view of popular constitutionalists), the grievance giving rise to reconsideration is less prominent in their deliberations. After all, they are inevitably less familiar with the grievance and more distant from the petitioners’ grievances; furthermore they are also subjected to broader set of considerations that are extrinsic to the grievance.

Now consider departmentalist theories. Here, too, the court provides a forum where the petitioner can raise her grievance. The court will also provide a reasoned decision evaluating the soundness of the petitioner’s constitutional claims. Let us further suppose that the court finds the state in violation of a constitutional provision and strikes down the law. Let us assume that the petitioner was subject to a deportation order but now the statute has been struck down on equal protection grounds. Will the immigration authorities deport her nonetheless? The answer, it appears, depends on the particular departmentalist theory. According to one version of departmentalism, each branch retains “interpretive authority over its own sphere of action, and no branch may invade the interpretive domain of another branch.”\textsuperscript{117} Thus, the executive has interpretive power over all matters in Article II, which means that immigration authorities might refuse to uphold the court’s decision and promptly deport out petitioner. Or, perhaps, the executive will acquiesce in the court’s ruling, but Congress, having interpretive authority over all matters in Article I, will nevertheless refuse to repeal the statute or may even reenact the exact same statute in an act of defiance. A different version of departmentalism, such as the one we described above,\textsuperscript{118} holds that although a court’s decision is “entitled to very high respect and consideration,”\textsuperscript{119} it nevertheless “does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore.”\textsuperscript{120} Thus, the other branches will respect the court’s holding, and might even enforce it, but this will not constitute a binding precedent. According to this

\textsuperscript{116} Id., at 248 (”…the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse.”).

\textsuperscript{117} Alexander and Solum, supra note 32 at 1610 (calling this version ”divided departmentalism”).

\textsuperscript{118} See supra part II.B.


\textsuperscript{120} Meese, supra note 36 at 983.
version, the petitioner would in fact receive the remedy prescribed by the court, but similarly situated persons would not necessarily benefit from the remedy.

The similarity to our previous discussion of popular constitutionalism is evident. Under departmentalism the grievance of an individual is reconsidered. Yet the relevance and the power of the grievance is diluted as the entities in charge of interpreting the constitution (other branches of the government) are more remote from the grievance and less familiar than the Court with the petitioner raising the grievance.

Similarly, weak judicial review is also fully aware of the importance of the first two components of a right to a hearing, but is less demanding with respect to the third component. For example, under the British Human Rights Act, the petitioner can raise a grievance and she is entitled to a full account of whether her rights have been violated (declaration of incompatibility). A declaration of incompatibility issued by a British court is nothing but a deliberative effort on the part of the court to examine the soundness of a grievance. But the reconsideration is left to the legislature and its good will. Thus, section 4(6) of the Human Rights Act of 1998 stipulates that “A declaration under this section (‘a declaration of incompatibility’) (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.” Presumably Parliament is expected to reconsider the statute given the court's decision and such reconsideration ought to be sensitive to the grievance giving rise to that decision; yet the reconsideration is more remote from the particular grievance and less attuned to its particularities.

Canada, of course, does not have incompatibility declarations. In fact, the Canadian system grants a greater role to the grievance in the adjudicative process. Thus, in Canada, some theorists believe that it is inappropriate to use the legislative override prospectively, without a prior court decision examining the statute. But despite the greater reverence given to the judicial process, the court's decision is still subject to the possibility of the legislative override. Dissatisfied with a judicial ruling, the national or provincial legislature can decide to overrule the decision, thus giving it in effect the final say over the case. Here, as in previous examples, the final reconsideration is not with the court, but with the legislature.

The discussion above illustrates that constrained judicial review is not oblivious or indifferent to the right to a hearing. In this respect it is superior to legislative supremacy. Under constrained judicial review, petitioners can raise grievances and these grievances are addressed and investigated and even reconsidered by the polity. Yet the reconsideration characterizing constrained judicial review is (at least ultimately) performed (partially) by non-adjudicative bodies. Judicial reconsideration is inevitably more attuned to the grievance and its particularities than reconsideration performed by non-adjudicative bodies. Non-adjudicative bodies that are assigned to reconsider the decision giving rise to the grievance are often removed

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121 See Tsvi Kahana, _Understanding the Notwithstanding Mechanism_, 52 U. TORONTO L. J. 221, 226-237 (2002) (discussing the various theories on the appropriateness of using the Notwithstanding clause without a prior judicial determination).

122 In cases where such a possibility applies, according to the Charter.
from the conflict as they are not present during the hearings. It is inevitable therefore that under constrained judicial review, less weight is given to the individual grievance. Constrained judicial review, then, differs from strong judicial review because the third component of the right to a hearing – the reconsideration – is differently conceived and is typically performed by a non-adjudicative body. Such a reconsideration is more remote, diffused and less focused on the particular grievance at stake.

It is this difference that distinguishes systems of constrained judicial review from strong judicial review. Under systems of constrained judicial review, the grievance and the discourse following the grievance are diluted because the body that has the power to reconsider the decision is not the adjudicative body that conducted the hearing. What differentiates strong judicial review from theories of constrained judicial review is the fact that under strong judicial review the adjudicative body is exclusively assigned the task of reconsideration, while under constrained judicial review the decision is subject to reconsideration by non-adjudicative entities – entities that are not necessarily fully and completely attentive to the grievance and the adjudicative discourse triggered by the grievance.

D. Strong Judicial Review, Constrained Judicial Review, and the Right to a Hearing

As we have shown earlier, it is commonly assumed that theories of constrained judicial review aim at enriching the political debate or improving the quality of decision-making by providing an opportunity for the court to insert its own input to the political discourse. The focus of attention of these theories is the Court and the judges and, in particular, the quality of its decision-making. We reject this view. The ultimate justification for judicial review is grounded not in the courts, nor in their institutional interactions with the other political branches, but in addressing individual grievances of petitioners. This is as true about theories of constrained judicial review as it is about theories of strong judicial review.

That said, it is now time to evaluate the controversy between strong judicial review and constrained judicial review. Given the fundamental differences in the scope and nature of the reconsideration of the grievance between strong and constrained judicial review, the question is whether constrained judicial review is sufficiently attentive to the right to a hearing.

The answer, we believe, ultimately depends on empirical observations. Constrained judicial review can be sufficiently protective of the right to a hearing the more non-adjudicative bodies are willing to attend to the grievance and its particularities, i.e., resemble in their reasoning adjudicative bodies. In other words, the more these bodies are responsive to the grievance, the more constrained judicial review provides sufficient protection of the right to a hearing. By doing so, these bodies take upon themselves some adjudicative functions. This is equally true of popular constitutionalism, departmentalism, and weak judicial review.

This willingness to attend to the grievance and its particularities is crucial for evaluating the success of constrained judicial review in honoring the right to a hearing. Evaluating this willingness enables us to differentiate between these three systems of constrained judicial review on the basis of the nature and identity of the
bodies assigned constitutional responsibilities and, in particular, their ability to give grievances a prominent role in their reasoning.

Ultimately, whether non-adjudicative bodies attend to the grievance and its particularities and whether the reconsideration process performed by them is satisfactory depends on empirical contingencies. The answer to such questions undoubtedly involves an evaluation that, due to its complexity, cannot be taken up here. Different bodies respond to court decisions differently, and it is plausible that responsiveness also varies among countries and legal cultures and is dependent on factors such as the nature of the judicial decision, the particular institutional setting, the legal area in which the decision was rendered, the popularity of the decision, the ideological alignment between the courts and the particular non-adjudicative body, and so on.

However, it seems that some tentative conjectures can be made, even at this stage, at least with respect to one form of weak judicial review. Popular constitutionalism and departmentalism are difficult to quantify, mainly because there is no jurisdiction that subscribes to such theories in a consistent way. Even though constitutional history provides some cases where these theories were used, they are too few and far apart to deduce any meaningful conclusions about their responsiveness to a grievance and its particularities.

Likewise, experience with weak judicial review is of relatively recent origin, in that it is still too early to arrive at conclusions that definitively evaluate these systems. Thus, for example, there is very little experience with declarations of incompatibility under the British Human Rights Act. Since the Act went into effect, in 2000, only twenty-six declarations of incompatibility have been made, eighteen of which have become final (eight were overturned on appeal).123 Out of these eighteen, ten were remedied by primary legislation, one by remedial order,124 four had already been remedied by the time of the declaration, and three are still under consideration.125 This means that out of the eighteen declarations, only eleven were remedied, too small a sample to conclude whether the British type of constrained judicial review is sufficiently protective of the right to a hearing.

There is more data on the situation in Canada, especially with regard to the use of section 33, the Notwithstanding Clause. As many commentators have observed, the use of section 33 has fallen into disrepute, leading some to suggest that Canadian weak judicial review has transformed into a system of strong judicial review.126 As Mark Tushnet argues, “the evidence seems to be that judicial interpretations generally 'stick'. “127 Thus, the legislature has the formal power to respond to the judicial ruling, but it consistently chooses not do so, making the judicial decision

124 A remedial order is issued by a minister and amends subordinate legislation or, in some cases, primary legislation, subject to parliamentary approval. See Human Rights Act of 1998, section 10 and Schedule 2.
125 This information is correct for July 2010.
126 See TUSHNET, WEAK COURTS, supra note 66, at 43.
127 Id. at 47.
effectively the last word on the matter. This means that a kind of constitutional convention has developed in Canada, such that their type of constrained judicial review is now closer, if not identical, to strong judicial review.

Statistics of this type, however, are only one aspect of the picture, as the real question is the ability of an individual petitioner to draw attention to her circumstances and to the ways in which the law impacts her rights and triggers a normative investigation of this question by the polity—an investigation that ultimately may lead to a legislative change. This is what the right to a hearing is ultimately about. Courts are of course institutions designed specifically to conduct such a process, but other institutions can also perform such a task successfully. One can even think of institutional mechanisms that may be conducive to such a process of reconsideration on the part of the legislature, for example, a specially designated office in the legislature or executive meant to expose the legislature to particular grievances. Although theories of constrained judicial review have yet to propose such mechanisms, similar proposals have been made in the literature discussing legislative-judicial interaction.\textsuperscript{128}

Our point, however, is not to evaluate each and every kind of theory of constrained judicial review. Rather, we seek to show that similarities between constrained judicial review and strong judicial review are ultimately empirical in nature and depend on complex circumstances that vary greatly between jurisdictions. Thus, constrained judicial review \textit{can} in principle be sufficiently protective of the right to a hearing, but this is neither necessary nor preordained.\textsuperscript{129} Therefore, when judicial review is justified based on a right to a hearing, the conceptual difference between constrained judicial review and strong judicial review very much exists. It is also the case that this difference can be mitigated in practice, and thus theories of constrained judicial review should be evaluated based on their performance and the degree to which they succeed in protecting the right to a hearing. This does not necessarily imply that the decisions rendered in schemes of legislative supremacy would be identical to those rendered in systems of constrained judicial review. It implies, however, that the bodies in charge of reconsidering the decision giving rise to the grievance take the grievance seriously. Such seriousness does not flow automatically from the institutional design of constrained judicial review. Rather, it happens given the right circumstances and the existence of an appropriate legal culture.

\textsuperscript{128} An early intervention is Harry J. Friendly, \textit{The Gap in Lawmaking – Judges Who Can’t and Legislators Who Won’t}, 63 Colum. L. Rev. 787 (1963) (suggesting an agency that will attend to judicial decisions that point to legislative imperfections). \textit{See also} Ruth Bader Ginsburg, \textit{A Plea for Legislative Review}, 60 S. Cal. L. Rev. 995 (1987) (suggesting a joint congressional committee which will remedy ambiguities and imperfections that courts uncover); Shirley S. Abrahamson and Robert L. Hughes, \textit{Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation}, 75 Minn. L. Rev. 1045, 1059-1081 (1991) (pointing to formal and informal state institutions (executive and legislative) that monitor and oversee judicial opinions that affect statutory interpretation. Law revision commissions also perform similar tasks. The authors report, however, that the performance of such mechanisms has been mixed, at best). Despite the existence of such mechanisms, it is still difficult to tell how particularized (with relation to the grievance) is the reconsideration.

\textsuperscript{129} Indeed, Tushnet suggests that systems of weak judicial review can devolve back to legislative supremacy. \textit{Tushnet}, \textit{Weak Courts}, supra note 66, at 44-47.
V. Conclusion

This Article re-examined theories of constrained judicial review, namely systems that grant courts a privileged, but not supreme, role in interpreting the Constitution. Our re-examination is divided into two stages. We first rejected the traditional justifications provided for these theories. Instrumental justifications ought to be rejected as they are based on speculative conjectures concerning the quality of judicial decisions. Ironically, instrumental justifications raise legitimacy-based concerns, since the mere fact that courts are better at promoting constitutional values is not sufficient to justify granting courts constitutional privileges. Legitimacy-based grounds for constrained judicial review are also unsatisfactory. Legitimacy-based considerations arguably dictate that courts ought not to have any greater input than any other individual or institution. Courts are not elected institutions and their privileges cannot be grounded in their own distinctive input or perspective or even the special quality of their judgments. Consequently, to the extent that courts ought to benefit from any constitutional privileges it is because courts’ decisions voice the grievances of petitioners. Judicial review facilitates the amplifying of the voice of petitioners and it is ultimately only these voices that may justify judicial review.

Strong and constrained judicial review differ in the weight they give to the grievance, as is evidenced by the reasoning at the third stage of the hearing – the reconsideration stage. What is unique about strong-form reconsideration – the one conducted by courts – is that the grievance is given a prominent role at the reconsideration stage. The grievance and the attempts to address the grievance are the focal center of the adjudicative reconsideration. In contrast, weaker schemes of judicial review are characterized by a different process of reconsideration – one that ideally takes into account the grievance but need not assign it a central status. Such schemes of judicial review dilute the weight of the grievance and the arguments aimed at addressing the grievance by distancing the reconsideration from the adjudicative body. This observation has important normative implications as it suggests how to evaluate systems of constrained judicial review. Systems of constrained judicial review need to be designed such that grievances trigger a genuine reconsideration of the decisions giving rise to the grievance. A person who has a grievance ought to be able to challenge legislation and such a challenge ought to be seriously considered by the polity. The process of reconsideration ought to be attentive to the grievance and its particularities. This need not imply a fully fledged adjudicative process (which characterizes judicial supremacy) but it must resemble such a process.

One of the important implications of our analysis is that it exposes the fact that the debate between strong and constrained judicial review is fundamentally misguided. It is assumed that the advocates of constrained judicial review have a non-instrumentalist legitimacy-based argument against strong judicial review (based on the right to political participation), while the proponents of strong judicial review must rely on instrumentalist concerns based typically on the superior quality of decision-making of the courts (or other contingently desirable consequences of judicial review). More specifically it is assumed that advocates of strong judicial review ought to compromise legitimacy for the sake of the quality of decision-
making. Our argument establishes that this view is false. The advocates of strong judicial review speak the language of rights; they argue not that courts are good instruments in promoting and protecting rights but that the adjudicative process is necessary for protecting and honoring the right to a hearing, and, in particular, for protecting a robust grievance-based reconsideration. To defend constrained judicial review one ought to establish that it can be sufficiently protective of the very same concern.