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THE EASY CORE CASE FOR JUDICIAL REVIEW

by

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

ABSTRACT

This paper defends judicial review on the grounds that judicial review is necessary for protecting "a right to a hearing."

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

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

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[1] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (Yale University Press, 1986) (1962).

I INTRODUCTION

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

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

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[2] See KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN THE U.S. HISTORY 4 (2007) [hereinafter Whittington, Political Foundations] (It is "wishful thinking" to treat judicial supremacy "as a matter of normative directive and accomplished fact. … American history is littered with debates over judicial authority and constitutional meaning"); Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning* 33 POLITY 365, 395 (2001) [hereinafter Whittington, *Presidential Challenges*] ([T]reating judicial authority as a matter of deductive logic flowing from a politically and historically abstract Constitution misconstrues the dynamic and political nature of constitutional governance"); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* 7 HARVARD L. REV. 129, 130-33 (1893) (choosing the courts as the primary institution in charge of enforcing and explaining the constitution was by no means a necessary choice).

[3] Bickel, *supra* note 1.

This paper joins the relentless search for a rationale for judicial review. It also wishes to defend judicial review against the recent numerous rising voices that either wish to abolish judicial review altogether or to limit or minimize its scope.[4] Its main task is to expose a critical flaw shared by both advocates and opponents of judicial review and to propose a framework for addressing this difficulty.

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

Constitutional theorists justify judicial review on instrumentalist grounds, that is, because of its desirable *contingent*

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[4] The most influential recent contributions include: JEREMY WALDRON, LAW AND DISAGREEMENT (1999); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURT (2000); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

consequences.[5] For example, such theorists contend that judicial review is justified because it contributes to the efficacious protection of rights,[6] to the operation of representative institutions,[7] to the stability of legal decisions and settlement of disputes,[8] to the facilitation of the realization of the ideals of dualist democracy,[9] or to the maintenance of other valuable aspects of liberal democracy.[10] Hence, to evaluate the desirability of judicial review and its optimal scope, one ought to examine the long-term practical effects of judicial review.[11] The most influential contemporary advocates of instrumentalism are constitutional institutionalists who use sophisticated methods to compare the performance of courts with that of other institutions and take into account a wide variety of consequentialist considerations.[12] One of the principal advocates of

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[5] See, e.g., ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 5 (2006) ("My premises are thus firmly consequentialist. Indeed they are rule-consequentialist: judges should interpret legal texts in accordance with rules whose observance produces the best consequences overall"); Ronald Dworkin, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 34 (1996) ("I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding them. The best institutional structure is the one best calculated to produce the best answers to the essentially moral questions of what the democratic conditions actually are, and to secure stable compliance with those conditions").

[6] See *infra* section IIB.

[7] See *infra* section IIC.

[8] See *infra* section IID.

[9] See *infra* section IIE

[10] See *infra* section IIF.

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

[12] Adrian Vermeule, *supra* note 5 at 233 points out that "whether, and to what extent, judicial review is desirable turns upon a range of empirical and institutional variables, including the agency costs, error costs, and decision costs of the alternative regimes, moral hazard effects, the optimal rate of legal change, the costs of transition from one regime to another, and the relative capacities of legislatures and courts at updating obsolete constitutional provisions." Other influential institutionalists who share this view include Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review* 101 YALE L.J. 31 (1991); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW,

this perspective – Adrian Vermeule – argues: "In principle, these consequentialist premises exclude a domain of (wholly or partially) nonconsequentialist approaches to interpretation. It turns out, however, that this is not a very large loss of generality, because few people hold views of that sort. Interpretative consequentialism is an extremely broad rubric."[13]

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

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

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ECONOMICS, AND PUBLIC POLICY 269 (1997) ("Institutional choice is the core of constitutional law and constitution making").

[13] Vermeule, *supra* note 5, at 6.

[14] The debate concerning judicial review turns out too often to be a debate between those who believe that we ought to learn about the performance of courts from Dred Scott, Plessy, and Lochner and those who believe that we ought to learn about the performance of courts from Brown. *See* Stephen M. Griffin, *Review Essay: Legal Liberalism at Yale* 14 CONST. COMMENTARY 535, 553 (1997) ("In general… law professors have not been willing to engage with relevant research from political scientists and historians. … Without such engagement, analysis by law professors of the place of the court in American government will remain a matter of armchair generalizations and folk wisdom.").

Adrian Vermeule has criticized effectively this anecdotal unsystematic approach and has pointed out that: "For every rights-protective Supreme Court decision, there is a decision that undermines rights. The question is not whether, say, the Court's decision in *Brown v. Board of Education* is "good" or "bad" in isolation. Ambitious judicial review is an institutional rule that necessarily produces a package of outcomes, both good and bad. If the package includes *Brown*, it also includes horrors such as Chief Justice Taney's proclamation in *Dred Scott v. Sandford* that there is constitutional right to own slaves." *See* Vermeule, *supra* note 5, at. 231; Elhauge, *supra* note 12, 101 ("After all we have no guarantee

features of courts and legislatures suggests that none of the simple factual conjectures of constitutional theorists designed to defend judicial review can be established. Furthermore, instrumentalists fail to capture the nature of the political controversy between advocates and foes of judicial review. This controversy, we argue, is not about the expertise or competence of judges versus legislatures; it is about the political morality of constitutional decision-making. It involves questions concerning the legitimacy of the coercive powers of the state and questions concerning the appropriate justifications owed by the state to its citizens. The fundamental convictions of advocates and foes of judicial review do not depend on comparing the quality of decision-making of judges or legislatures or any other contingent (desirable or undesirable) effects of granting powers to the judiciary or the legislature.

If judicial review cannot be grounded in instrumentalist explanations concerning its desirable effects, how can it be justified? This paper proposes that judicial review is grounded in features intrinsic to the adjudicative process itself. Judicial review can be successfully justified if it can be shown that individuals have a right to judicial review of legislative decisions independent of the "correctness" of judicial decisions or other long-term contingent effects of judicial decision-making. More specifically, we maintain that judicial review is designed to protect the "right to a hearing" or the "right to raise a grievance."[15] Judicial review provides an opportunity for individuals whose rights are infringed (either justifiably or unjustifiably) or individuals whose rights may have been infringed to raise their grievance against the (actual or

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that judges empowered to review laws will only strike down…undesirable political outcomes; their review may also produce … undesirable political outcomes and strike down desirable political outcomes."); Christopher Wolfe, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY (2nd ed. 1997) 84 (["W]hat grounds are there to believe that the court will enforce the right principles at the right time? If some courts have correctly perceived the wave of the future and ridden the crest of the wave…, others have not had notable success in similar attempts. Ultimately, the defense of judicial activism on the basis of its good results flounders on the strikingly different results that judicial activism has had over time").

[15] See Yuval Eylon & Alon Harel, *The Right to Judicial Review* 92 VA. L. REV. 991 (2006).

presumed) infringement.[16] The right to a hearing as understood in this paper is a procedural one. It is distinct from the right to secure a different outcome – an outcome that respects one's rights; it is a right grounded in the fundamental duty of the state to consult its citizens on matters of rights, in particular to consult those whose rights may be affected.

Establishing the case for judicial review does not imply establishing a core case or an easy case for judicial review. The title of this article draws its inspiration from the titles of two recent articles.[17] But this title is not merely a play on words. Our case is a core case for judicial review because in reality there are considerations that come into play once this core case is established. Our case for judicial review is bolstered therefore by other important considerations. It is also an easy case in the sense that in contrast to the instrumental justifications for judicial review it does not require the establishment of complex empirical assertions such as courts render better decisions or the courts' decisions are more protective of democracy or rights. Establishing the easy case for judicial review requires merely establishing that courts are faithful to the values embodied in the adjudicative process.

Section II of the paper explores five arguments favoring judicial review and establishes that these arguments are instrumental and that they fail precisely because they are instrumental. These arguments include claims that: judicial review is conducive to the protection of (substantive) rights; the protection of democracy or, more broadly, participatory values; the sustaining of the achievements made by public-spirited generations during periods of "constitutional moments"; the reaching of stability and coherence; and, last, institutional instrumentalism designed specifically to overcome these difficulties by weighing a wide variety of institutional considerations. Section III argues that individuals have a right that judicial (or quasi-judicial) bodies provide them with an opportunity to raise their grievances and that these bodies also ought

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[16] *Id.* at 997-99.

[17] The articles whose titles inspired this article are by Richard H. Fallon, *An Uneasy Case for Judicial Review* 121 HARV. L. REV. 1693, 1699 (2008) and by Jeremy Waldron, *The Core of the Case Against Judicial Review* 115 YALE L.J. 1346 (2006).

to have the power to make authoritative judgments. This "right to a hearing" or the "right to raise a grievance" ought to be respected independently of the instrumental contributions that judicial review makes (or may make) to other values of democratic or liberal societies. Section IV examines and criticizes the recent proposals to substitute judicial review with various types of "democratic constitutionalism." The primary targets of section IV include Kramer's popular constitutionalism and Tushnet's legislative constitutionalism. This section challenges the widespread conviction that judicial review is illegitimate because it is antidemocratic, elitist, or aristocratic. In fact we argue that the antidemocratic features of judicial review are necessary to protect the right to a hearing and, consequently, are necessary for constitutional legitimacy.

II THE INSTRUMENTALIST JUSTIFICATIONS FOR JUDICIAL REVIEW

A. Introduction

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

Judicial review as understood here consists of the following two components: 1) Courts have the power to make binding decisions concerning the validity of statutes that apply to individual cases brought before them and these decisions ought to be respected by all other branches of government. 2) No branch of government has the power to immunize its operation from judicial scrutiny. Judicial review, as defined by us, is incompatible with theories of democratic constitutionalism, namely theories that advocate an "equal partnership" of courts and other representative institutions (or, more broadly, citizens) in interpreting the Constitution.[18] Our analysis implies that courts are not "equal partners" in the enterprise

[18] See *infra* section IV.

of constitutional interpretation, but, instead, they have a privileged role in constitutional interpretation.[19]

The constitutional theorists whose views are presented below are theorists who investigated the role of courts in constitutional interpretation. Our primary task in this section is to establish that the prominent theories purporting to justify judicial review are instrumentalist and that these theories fail for this reason. Under these theories, judicial review is justified to the extent that it is likely to bring about *contingent* desirable consequences. While there are important differences between the five theories examined in this section, they all share important structural similarities. Under each one of these theories, the constitutional theorist differentiates sharply between two stages of analysis. At the first stage, the theorist addresses the question of what the point of the Constitution is and, consequently, how it should be interpreted. Once the "point" of the Constitution is settled, the theorist turns to identify the institutions best capable of realizing the "point" of the Constitution. Instrumentalist theories of judicial review perceive this second step, namely identifying the institutions in charge of interpreting the Constitution, as subservient to the findings in the first stage. The institution in charge of interpreting the Constitution is simply the institution most likely to interpret the Constitution "rightly" or "correctly" or whose decisions are the most conducive to the constitutional goals or values as defined at the first stage of analysis. Interpreting the Constitution can therefore be described as a task in search of an agent capable of performing it, the agent being an instrument whose suitability depends solely on the quality and the costs of its performance.[20]

This section starts by examining five theories purporting to justify and determine the scope of judicial review of statutes. The

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[19] Our claim however is insufficient to justify judicial supremacy. Judicial supremacy as opposed to judicial review includes a third component, namely the claim that courts do not merely resolve particular disputes involving the litigants directly before it. They also authoritatively interpret constitutional meaning. Judicial supremacy requires deference by other government officials to the constitutional dictates of the courts not only with respect to the particular case but also with respect to the validity of the legal norms. For a definition of judicial supremacy, see Whittington, *Political Foundations* supra note 2 at 7.

[20] See, e.g., Vermeule, *supra* note 5 at 233.

theories examined below are merely examples of contemporary theories of judicial review. The general structure of these theories is shared by other theories. The critical discussion of these theories enables us to expose some general limitations of instrumentalist theories.

B. Judicial Review and the Protection of Rights

It is indisputable that individuals have rights and that the legal system ought to protect these rights.[21] Identifying the scope of these rights, assigning them the proper weight, and allocating their protection to various institutions is often difficult and controversial. Many believe that judges are superior in their ability to identify the scope of rights and assign them the proper weight. Some theorists believe that the superiority of judges is attributable to their expertise; judges, under this view, form a class of experts on rights.[22] Others believe that judicial review can be justified not on the basis of judicial expertise but on the basis of the nature of the judicial process and the relative detachment and independence of judges from political constraints.[23] At the core of these views is the belief that

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[21] See, e.g., Alon Harel, *Rights-Based Judicial Review* 22 LAW AND PHILOSOPHY 247, 250-251 (2003).

[22] See, e.g., CHARLES BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 125 (1997) ("Human rights claims are made *in the name of the law*, as the outcome of reasoning from commitment; judges are practiced in this kind of reasoning, and some of them are expert at it").

[23] Owen Fiss, *Two Models of Adjudication*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 36, 43 (Robert A. Goldwin & William A. Schambra, eds., 1985). ("The capacity of judges to give meaning to public values turns not on some personal moral expertise, of which they have none, but on the process. … One feature of that process is the dialogue judges must conduct. … Another is independence: the judge must remain independent of the desires or preferences both of the body politic and of the particular contestants before the bench"); Owen Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 12-13 (1979). "Their [the judges'] capacity to make a special contribution to our social life derives not from any personal traits or knowledge, but from the definition of the office in which they find themselves and through which they exercise power"); See also MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICY MAKING BY THE JUDICIARY 102 (1982). ("As a matter of comparative institutional competence, the politically insulated federal judiciary is more likely, when the human rights issue is

(some or all) decisions concerning rights require a certain professional/institutional framework and that majoritarian decision-making is often not sufficiently informed or deliberative and, consequently, cannot guarantee that the rights will be protected adequately. Either the special expertise of judges or the institutional circumstances in which they operate (or both) provide judges a better opportunity to successfully identify either the scope of rights or their weight vis-à-vis other considerations. This view is well entrenched in American legal thought and has most famously been argued by Alexander Hamilton.[24]

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a deeply controversial one, to move us in the direction of a right answer (assuming there is such a thing) than is the political process left to its own devices, which tends to resolve such issues by reflexive, mechanical reference to established moral conventions); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 199 (2004) (pointing out "structural features of a constitutional judiciary that make it a promising environment for the contestation of rights").

[24] Hamilton argues:

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

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

A rights-based justification for judicial review appeals to "moral rights which individuals possess against the majority."[25] The legislature represents the will of the majorities and majorities are inclined to make decisions that unjustifiably infringe minorities' rights.[26] Judicial review is justified to the extent that it is likely to contribute to the protection of rights, either directly, by correcting legislative decisions that violate individual rights, or indirectly, by inhibiting the legislature from making decisions that violate individual rights.[27]

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

These two concerns are general institutional concerns. They apply not only to courts but also to other institutions. Vermeule labels both considerations as "agency costs" and distinguishes between agent incompetence and agent self-dealing. See Vermeule, *supra* note note 5 at 257. Vermeule rightly points out that the distinction between incompetence and self-interest is fuzzy since "cognitive mechanisms such as motivated reasoning and self serving bias may transmute self-interest into 'sincere' error." See *id* at 258.

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

[26] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 896 (3rd ed., Foundation Press 2000) ("Subject to all of the perils of antimajoritarian judgment, courts and all who take seriously their constitutional oaths – must ultimately define and defend rights against government in terms independent of consensus or majority will"); Jesse Choper and John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues From the Federal Courts*, 95 CAL. L. REV. 1243, 1246-7 (2007): ("I begin from the proposition that the paramount justification for vesting the federal courts with the awesome power of judicial review is to guard against governmental infringements of individual liberties secured by the Constitution").

[27] See HENRY J. ABRAHAM, THE JUDICIAL PROCESS 371 (7th ed. 1998) (arguing that judicial review disciplines legislatures and deters them from infringing individual rights).

> The concern most commonly expressed about legislation is that legislative procedures may give expression to the tyranny of the majority and that legislative majorities are constantly – and in the United Kingdom, for example, endemically and constitutionally – in danger of encroaching upon the rights of the individual or minorities. So widespread is this fear, so familiar an element is it in our political culture, that the need for constitutional constraints on legislative decisions has become more or less axiomatic.[28]

The first premise of the argument, namely, that majorities may be inclined to violate the rights of minorities, is well documented and seems self-evident.[29] Yet, to justify judicial review, it is not sufficient to point out that legislatures fail to protect rights effectively. Two additional premises are necessary. First, it is necessary to establish that judges are more inclined to protect these rights than legislatures. Second, it is necessary to establish that judicial mistakes resulting from judicial overzealousness in protecting rights, i.e., mistakes encroaching on the legitimate powers of the government, are not too costly such that they outweigh the benefits resulting from the better and more efficacious protection of rights.[30]

The alleged greater inclination of judges to protect rights is often defended by appealing to the structural features of the judicial branch that make the judiciary particularly appreciative of the significance of rights. Arguably, judges' insularity to public and populist pressures and the deliberative nature of judicial reasoning make judges particularly attentive to the significance of rights and less prone to populist hysteria.[31] At the same time, the relative

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[28] See *supra* note 4 at 11.
[29] See, e.g., *supra* note 23.
[30] See Harel, *supra* note 21 at 251-52.
[31] See, e.g., sources in *supra* note 23. See also RONALD DWORKIN, THE FORUM OF PRINCIPLE in RONALD DWORKIN, A MATTER OF PRINCIPLE 33, 71 (1985) (maintaining that the judiciary alone serves as "forum of principle" which is free from the din of "the battleground of power politics").

weakness of the judicial branch and its vulnerability guarantee that judges will not be too overzealous in the protection of rights.[32]

This view of the rationale underlying judicial review is highly influential. It is a theory that purports both to explain what values ought to be protected by the Constitution and to provide a justification for judicial review. The Constitution is designed primarily to protect individual rights. Judicial review is justified instrumentally because judges are more likely to guard against violations of rights than the legislature.

Opponents of judicial review remain unconvinced. One argument they raise is that the claim that courts are indeed more effective in protecting rights than other institutions is likely to be false.[33] For one, it has been pointed out that historical evidence does not support the claim that courts are always or even typically better in protecting rights than legislatures.[34] The notorious case of Dred

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[32] See, e.g., Bickel, *supra* note 1 at 252 ("In an enforcement crisis of any real proportions, the judiciary is wholly dependent upon the Executive…They respond naturally to demands for compromise)." A rare statement by a famous Justice supports this conjecture. See Joseph P. Lash, FROM THE DIARIES OF FELIX FRANKFURTER 86 (1975) ("Justice Jackson, as close to Frankfurter as anyone on the Court, put the matter of the Court's consciousness of its own vulnerability with considerable candor: the Court 'is subject to being stripped of jurisdiction or smothered with additional justices any time such a disposition exists and is supported strongly enough by public opinion. I think the Court can never quite escape consciousness of its own infirmities, a psychology which may explain its apparent yielding to expediency, especially during war time'").

[33] See Komesar, *supra* note 12 256-261 (arguing against "the fundamental rights approach to constitutional law" on the grounds that judges are not necessarily the best protectors of rights); Vermeule, *supra* note 5 at 243 ("Courts may not understand what justice requires or may not be good at producing justice even when they understand it").

[34] DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 131 (1997) ("The historical record poses a substantial challenge to current constitutional theorists who identify an independent judiciary as the best protection for individual rights in a democracy"); Waldron, *supra* note 4 at 288: "[T]he record on judicial review is far from perfect …; Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights* 22 OXFORD JOURNAL OF LEGAL STUDIES 275, 278 (2002) (pointing out that there are many cases "implicating important issues of rights in which the legislature was more rights-protective than the Supreme Court …"); Vermeule, *supra* note 5 at 231 ("For every rights-protective Supreme Court decision, there is a decision that undermines rights").

Scott is a live example that courts are often not good at identifying what the rights protected by the Constitution are or ought to be.[35] Lochner, on the other hand, is an example establishing that courts may be overzealous in protecting what they wrongly perceive as rights and intrude into zones which ought to be governed by legislatures.[36] These cases may suggest that the success of courts in protecting rights without intruding on other important values of public life depends upon particular social and political contingencies.[37] Hence the claim that courts are better at protecting rights cannot provide a solid basis for justifying judicial review. This is simply because: "Before accepting [the authority of the court]… it is necessary to ask about judicial competence to evaluate moral arguments of this sort, and also to ask about facts and incentives. Perhaps the Court is not especially well equipped to evaluate those arguments; and if consequences matter, the moral arguments might

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[35] *Dred Scott v. Sandford*, 60 U.S. 393 (1856)

[36] See, e.g., CHRISTOPHER WOLFE, THAT EMINENT TRIBUNAL JUDICIAL SUPREMACY AND THE CONSTITUTION 154 (2004) (explaining that the court erred in *Lochner* by overextending rights protection beyond the provisions of the constitution); WILLIAM M. WIECK, LIBERTY UNDER THE LAW: THE SUPREME COURT IN AMERICAN LIFE, 123-125 (1988) ("Lochner has become in modern times a sort of negative touchstone. Along with *Dred Scott*, it is our foremost reference case for describing the Court's malfunctioning … we speak of 'lochnerizing' when we wish to imply that judges substitute their policy preferences for those of the legislature").

[37] Using historical experience is dubious for another reason. Historical arguments fail to capture the complex inter-dependencies between different institutions. Thus, even if one can establish that courts have systematically been worse than legislatures in protecting rights, it does not follow that eliminating judicial review is conducive to the protection of rights since judicial review may have contributed to the quality of the legislature's decision-making. See, e.g., Abraham, *supra* note 27 at 371 (arguing that judicial review disciplines legislatures and deters them from infringing individual rights). Similarly, even if one can establish that courts have systematically been better than legislatures, it does not follow that judicial review is conducive to the protection of rights because it is possible that a legislature operating in a world without judicial review is more reflective and deliberative than a legislature in a world with judicial review. See, e.g., Thayer, supra note 2 at 155-56 (maintaining that the availability of judicial review diminishes legislature's willingness to deliberate about questions involving rights). These possibilities only serve to illustrate the complexity of the considerations required for establishing rights-based arguments for or against judicial review.

not be decisive…"[38] In other words, "Courts may not understand what justice requires, or may not be good at producing justice even when they understand it."[39]

Even under ideal conditions, namely, under the assumption that courts are indeed better than legislatures in identifying and protecting rights, it is still unclear whether the quality of courts' decision-making can justify judicial review. The overall success of the courts in protecting rights depends not only on the courts' rate of success in correctly deciding cases but also on the composition of the cases brought to the court. If the courts decide correctly in 70% of the cases while the legislature decides correctly in 50%, courts may still do worse than legislatures if 80% of the petitions brought to the court are flawed or frivolous.[40]

Recently, in an article whose title inspired us in choosing the title of this article, Richard Fallon suggested a new defense of the rights-based justification for judicial review.[41] Fallon argued that even if courts are no better than legislatures in protecting rights, establishing multiple safeguards or veto powers to different institutions is desirable given that "errors of underprotection – that is, infringements of rights – are more morally serious than errors of

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[38] Vermeule, *supra* note 5 at 242. See also Komesar, *supra* note 12 at 256-61 (disputing the view that judges are "preferred searchers for moral principles and fundamental values"); Sadurski, *supra* note 34 at 299 (arguing that "it might be rational to support judicial review of the institutional particularities of judicial institutions compared with those of the political branches, render courts more sensitive to rights considerations in general. But this judgment will be contingent on specific institutional comparisons and cannot be made in abstraction from the particular circumstances in a particular country"); MARK TUSHNET RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 120 (1988) ("Those who write about constitutional law tend to ignore or discount the moral rhetoric that pervades politicians' discourse, but there seems to be little reason to be any more skeptical about politicians' sincerity in using that language than about judges").

[39] Vermeule, *supra* note 5 at 243.

[40] We thank Dick Markovitz for raising this point.

[41] See, e.g., Fallon, *supra* note 17 at 1699. As Fallon himself indicates the argument appeared earlier. See, e.g., Frank B. Cross, Institutions and Enforcement of the Bill of Rights, 85 CORNELL L. REV. 1529, 1576 (2000) (arguing that judicial review may be justified even if a judiciary lacks "any intrinsic advantage in constitutional interpretation and enforcement" because "adding an additional check on government action will enhance the liberty the Bill of Rights offers").

overprotection."[42] It is better therefore to err on the side of too much rather than too little protection of rights. Judicial review "may provide a distinctively valuable hedge against errors of underenforcement."[43]

Fallon is of course aware of the complex set of assumptions that is required in order to justify such a conclusion.[44] Among the most troubling aspects of Fallon's argument is that it applies only to cases of conflicts between a right and interest-based or policy-based considerations. Yet, very often the relevant controversy is a controversy between conflicting rights claims.[45]

But even if these assumptions are granted, it is difficult to see how this argument could justify a system of *judicial review* as opposed to any other system that imposed burdens on legislation. Admittedly, "[c]ourts are likely to have a distinctive perspective, involving both a focus on particular facts and sensitivity to historical understandings of the scope of certain rights, that would heighten their sensitivity to some actual or reasonably arguable violations that legislature would fail to apprehend."[46] Yet, it is also the case that "the judicial branch may labor under some relative disadvantages too."[47] There is no attempt on the part of Fallon to establish that the *judicial* "hedge against error of underenforcement" is superior to alternative institutional mechanisms designed to minimize the risks of underenforcement of rights such as a third house of Congress, requirements of consultation with eminent legal theorists, etc.

On the one hand this omission is understandable. The only way to establish that courts rather than other institutions are better designed to protect rights would necessarily rely on some claims about courts' special sensitivity to rights. But Fallon is reluctant to make such claims. Courts, in his view, are not particularly sensitive to the protection of rights; they are as good as any institution

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[42] Fallon, *Id.* at 1699.
[43] *Id.* at 1709.
[44] *Id.* at 1710.
[45] Jeremey Waldron, *Freeman's Defense of Judicial Review* 13 Law & Phil. 27, 36 (1994) (arguing that "usually the circumstances we face is that a number of citizens think a given piece of legislation respects and even advances fundamental rights and a number of citizens believe that it unjustifiably encroaches on rights").
[46] *Id.* at 1710.
[47] *Id.* at 1697.

designed to monitor the decisions of the legislature. At the same time, this objection is particularly fatal to Fallon's reasoning given that Fallon's analysis is based exclusively on an instrumentalist outcome-oriented approach. Perhaps therefore Fallon succeeded in establishing that it is desirable to have *some* institution empowered to monitor the legislature but he said nothing as to why this institution is or ought to be a court or why it ought to operate in a judicial manner.

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

C. Does Judicial Review Improve the Democratic Process?

In his important contribution to constitutional theory, John Ely has argued that the Constitution is designed to protect the representative nature of government. In Ely's view the "pursuit of participational goals of broadened access to the processes and bounty of representative government" ought to replace "the more traditional and academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental…"[48] The US Constitution in Ely's view is essentially a procedural rather than a substantive document and the goals of the Constitution as well as the goals of the institutional structures designed to protect the

[48] See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 74 (1980)

Constitution should favor "participation-oriented representation reinforcing approach to judicial review."[49] In his attempt to unearth the underlying principles guiding the Warren Court, Ely identifies as central the "desire to ensure that the political process – which is where such values [substantive values] *are* properly identified, weighted, and accommodated – was open to those of all view-points on something approaching an equal basis."[50] It follows that judicial review must protect rights that engender participation in the political process. Courts have a central role in protecting these rights.

There are two types of concerns that are central to participation: concerns aimed at "clearing the channels of political change"[51] and concerns aimed at "facilitating the representation of minorities."[52] The first type of concerns gives rise to the right to free speech, the right to vote, maintaining a visible legislative process, and so on. Ely believes that: "Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so; ins have a way of wanting to make sure that the outs stay out."[53] Judicial review "must involve, at a minimum, the elimination of any inhibition of expression that is unnecessary for the promotion of government interest."[54] The right to vote is equally important to protect this type of concerns. Ely believes that "unblocking stoppages in the democratic process is what judicial review preeminently [is] about and the denial of the vote seems the quintessential stoppage."[55] The courts' role in voting cases is justified because they "involve rights 1) that are essential to the democratic process and 2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo."[56] Furthermore, Ely puts great emphasis on the Court's role in preventing majoritarian tyranny and protecting distributive concerns.

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[49] *Id.* at 87.
[50] *Id.* at 74.
[51] *Id*. chap. 5.
[52] *Id.* chap. 6.
[53] *Id.* at 106.
[54] *Id.* at 105.
[55] *Id.* at 117.
[56] *Id.* at 117.

The second type of concerns gives rise to constitutional rights that are designed to facilitate the representation of minorities. Ely points out that minorities are often excluded from political power and that there is an inherent risk of inequalities among competing groups in American politics.[57] Pervasive prejudices prevent genuine participation. Hence, there is a need for designing mechanisms that will facilitate genuine minority participation in the political process. The Constitution is designed to protect minority participation and the courts are effective mechanisms to protect these participational values.

Despite major differences, it is easy to detect the structural similarity between traditional rights theorists and Ely's participational theory. Under both theories, courts are assigned review powers because of the alleged superior quality of their decisions with respect to a certain sphere. While rights theorists believe that judicial review is justified because courts are better than legislatures at protecting rights, Ely believes that it is justified because courts are better than legislatures at protecting democratic representation. Indeed this similarity was noted by Ronald Dworkin who believes that Ely was wrong only "in limiting this account to constitutional rights that can be understood as enhancements of constitutional procedure rather than as more substantive rights."[58]

This similarity, however, is the source of the weakness of Ely's theory. The claim that courts are better able and more willing to "police the process of representation" is dubious for reasons similar to those explored in the last section. The most effective critic of Ely's theory is Neil Komesar, who challenged Ely's conviction that courts are indeed necessary both to "clearing the channels for political change" and to "facilitate the representation of minorities." With respect to the first goal, Komesar has argued that:

> Even within the traditional arenas of judicial activism that Ely means to describe with his theory, the political process is not completely unable to police

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[57] *Id.* at 81, 135. This argument was extended by Ely to include the protection of "the right to be different." John Hart Ely, *Democracy and the Right to be Different* 56 N.Y.U.L.REV. 397 (1981).

[58] Dworkin, *supra* note 5 at 349.

> itself. Is it obvious that attempts to "choke off the channels of political change" in order to retain the power for the "ins" would not or could not be deterred or controlled in the absence of judicial intervention? Our political process has many public officials and political actors with a great diversity of desires. This diversity of individuals and desires impedes the formation of a stable majority capable of choking off change. For most of American constitutional history, the courts were inactive about process, voting, and speech. During this period legislatures, not courts, produced reforms, the franchise was extended, and the press functioned.[59]

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

> Nor have the political branches shown themselves completely unable to combat legislative prejudices and stereotypes – the second type of malfunction that Ely identifies. Remedies for gender discrimination have come as often from the political process as from the judiciary. The political process, for example, eventually provided suffrage for women through the Nineteenth Amendment.[60]

In Komesar's view, Ely's analysis fails because it does not engage in *comparative* institutional analysis; it fails to compare the quality of decision-making of the different institutional alternatives.[61] While Ely detects the imperfections of the legislature in making procedural decisions, he is mistaken to infer from these imperfections the conclusion that courts should be assigned powers to make these decisions. Such a conclusion requires comparing the virtues and vices of courts and legislatures, while taking into account the complex interdependencies between these institutions, and, as

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[59] Komesar, *supra* note 12 at 203.
[60] *Id.* at 203.
[61] See Komesar, *supra* note 12 at 199.

Komesar establishes, such a comparison does not necessarily favor courts over legislatures.[62]

D. The Settlement Function of Judicial Review

In their recent contributions to constitutional theory, Larry Alexander and Frederick Schauer defend not only judicial review but judicial supremacy on the grounds that judicial supremacy is conducive to settlement, coordination, and stability.[63] The previous two theories examined in sections B and C maintain that the superiority of the courts rests on the fact that the quality of the decisions rendered by courts is superior to the quality of decisions rendered by other institutions. Alexander & Schauer provide a justification for judicial supremacy that is independent of the quality of judicial decisions. Instead, Alexander & Schauer suggest that authoritative settlement of disagreements is sometimes desirable even when the settlement is a sub-optimal settlement. In their view:

> [O]ne of the chief functions of law in general, and constitutional law in particular, is to provide a degree of coordinated settlement for settlement's sake of what is to be done. In a world of moral and political disagreement law can often provide a settlement of

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[62] *Id.* at 199

[63] Larry Alexander & Fredrick Schauer, *On Extrajudicial Constitutional Interpretation* 110 HARV. L. REV. 1359 (1997) [hereinafter Alexander & Schauer, *Extrajudicial Constitutional Interpretation*]; Larry Alexander & Fredrick Schauer, *Defending Judicial Supremacy: A Reply* 17 CONSTITUTIONAL COMMENTARY 455 (2000) [hereinafter Alexander & Schauer, *Defending Judicial Supremacy*]. This argument was first made by Daniel Webster who maintained that: "Could anything be more preposterous than to a make a government for the whole union, and yet leave its powers subject, not to one interpretation, but to thirteen or twenty four, interpretations? Instead of one tribunal, established by and responsible for all, with power to decide for all, shall constitutional questions be left to four and twenty popular bodies, each at liberty to decide for itself, and none bound to respect the decisions of the others?" See Daniel Webster 6 Cong. Deb. 78 (1830). More recently, the argument has been raised and rejected by Alexander Bickel. Bickel believes that: "The ends of uniformity and of vindication of federal authority" can be served "without recourse to any power in the federal judiciary to lay down the meaning of the Constitution." See Bickel, *supra* note 1 at 12.

> these disagreements, a settlement neither final nor conclusive, but nevertheless authoritative and thus providing for those in first-order disagreement a second-order resolution of that disagreement that will make it possible for decision to be made, actions to be coordinated, and life to go on.[64]

Stability and coherence are highly important in facilitating the coordinative function of law. It is necessary to establish institutions that will be capable of doing so. Alexander & Schauer believe that courts in general and the Supreme Court in particular are better capable of maintaining stability and achieving settlement than other institutions. In purporting to establish the Supreme Court's special virtues in realizing these goals, Alexander & Schauer rely on the relative insulation of the Court from political winds, on the "established and constraining procedures through which constitutional issues are brought before the court," on the small number of members of the Supreme Court, the life term they serve, and the fact that the Court cannot pick its own agenda.[65] In their view these institutional features of the Supreme Court provide reasons to believe that judicial supremacy is conducive to the reaching of settlement and to the maintenance of stability.[66]

Several legal theorists have raised objections to Alexander & Schauer's conjectures. Some theorists have disputed the importance attributed by Schauer & Alexander to stability and settlement.[67] In fact, it is claimed that the constant anarchic dynamism and shifting interpretations generated by competing constitutional interpretations of different institutions may be more desirable than the rigidity generated by a single authoritative judicial interpretation.[68] Even if one concedes that maintaining stability with respect to some

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[64] See Alexander & Schauer, *Defending Judicial Supremacy*, *id.* at 467.
[65] *Id.* at 477.
[66] *Id.*
[67] See Keith E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses 80 N.C.L.REV. 773, 788 (2002) (Noting that: "The settlement function of the law is valuable one, but it is not the only value that the Constitution serve").
[68] *Id.* at 790 (pointing out the tradeoffs between stability and other dimensions of the legal system).

constitutional questions is important, it seems that at least with respect to many substantive disagreements, the value of reaching the right, correct, or desirable interpretation overshadows the value of maintaining stability. As Whittington argues in his penetrating critique of Alexander & Schauer, "It is sometimes better to have no rule than a substantively bad rule. Moreover, a substantively good but fluid rule may be better than a substantively bad but fixed rule."[69]

Others have questioned whether indeed courts in general and the Supreme Court in particular are the institutions most capable of maintaining stability and reaching settlement.[70] One of the critics of Alexander and Schauer asks, "Would legislative supremacy produce more or less stability than judicial supremacy? Inertia or structural status quo bias is built into legislative institutions by voting rules, bicameralism, and other features. Is this stronger or weaker than the status quo built into judicial institutions?"[71] Another critic even asserts that "Court opinions can unsettle as well as settle the legal and constitutional environment."[72] To sum up, Alexander & Schauer fail to establish that coherence and stability are central values for

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[69] *Id.* at 790. Some examples of persistent constitutional disputes provided by Alexander & Schauer can highlight this concern. Alexander & Schauer mention among others the constitutional disputes concerning prayers in public schools, the maintenance of single-sex colleges and universities and capital punishment. See Alexander & Schauer, *Defending Judicial Supremacy* 470-01. Take the case of capital punishment. Assume now that an official believes that the Court wrongly decided that capital punishment does not violate the Eighth Amendment. In the official's view executing a person is a violation of that person constitutional right to life. It seems that the value of protecting the constitutional right to life is much greater than the value of facilitating settlement with respect to the true meaning of the Eighth Amendment. Executing a person against the dictates of the Eighth Amendment simply in order to facilitate authoritative (but flawed) settlement concerning the meaning of this Amendment is clearly wrong. It is better to save the lives of some individuals than to save none simply for the sake of reaching consensus.

[70] *Id.* at 797 ("The capacity of the judiciary to settle constitutional disputes can be overstated … Critics of extrajudicial constitutional interpretation assert and assume that the Court can do so, but there are reasons to doubt their assumption in this regard"). See, e.g., Kramer *supra* note 4 at 234-6 (providing numerous reasons why there is no reason to believe that courts' decisions are more stable than political ones).

[71] See Vermeule, *supra* note 5 at 249.

[72] See Whittington, *supra* note 54 at 800.

constitutional issues and they also fail to establish that courts are better than other institutions in maintaining stability and reaching settlement.

E. The Dualist Democracy

The "dualist democracy" position advocated by Ackerman seeks to distinguish between two different decisions that can be reached in the American democracy. The first is a decision made by the American people and the second, a decision made by their governments.[73] The American Constitution is designed to protect the first type of decisions from being eroded by the second type.

Decisions by the people are only rarely made and under special conditions.[74] Before gaining the authority to make supreme law in the name of the people political partisans must operate in the public sphere and gain support for their position. These achievements are the byproduct of a lengthy public deliberation under circumstances that are ripe for active deliberation and a genuine disposition for public-spiritedness giving rise to "higher lawmaking."[75] These rare periods are labeled by Ackerman as periods of "constitutional politics." In contrast, in periods of "normal politics" decisions made by the government occur daily and are made primarily by politicians. They are the product of deliberation conducted by "public citizens": elected politicians, staffers, bureaucrats, government officials, party leaders, lobbyists and the like, who are subject to the normal constraints of interests, ideologies, and powers.[76] During these periods most citizens – "private citizens," as Ackerman puts it – are relatively disengaged from politics and are distanced from having a real impact or interest in public deliberation. Ackerman believes that the Constitution is designed to protect the first type of decisions – decisions made during periods of constitutional politics – from gradual erosion during periods of "normal politics."

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[73] BRUCE ACKERMAN, WE THE PEOPLE: VOL 1 FOUNDATIONS 6 (1991).
[74] *Ibid*
[75] *Ibid*
[76] *Ibid*

After identifying the values the Constitution is designed to protect, Ackerman investigates what the role of courts in preserving the dual structure is. In an attempt to address this question Ackerman says:

> It follows, then, that the dualist will view the Supreme Court from a very different perspective than the monist. The monist treats every act of judicial review as presumptively antidemocratic and strains to save the Supreme Court from the "countermajoritarian difficulty" by one or another ingenious argument. In contrast, the dualist sees the discharge of the preservationist function by the courts as an essential part of a well-ordered democratic regime. Rather than threatening democracy by frustrating the statutory demands of the political elite in Washington, the courts serve democracy by protecting the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support for their innovations.[77]

Hence Ackerman believes that:

> [D]ualists cannot dismiss a good faith effort by the Court to interpret the Constitution as "antidemocratic" simply because it leads to the invalidation of normal statutes; this ongoing judicial effort to look backward and interpret the meaning of the great achievements of the past is an indispensable part of the larger project of distinguishing the will of the We the People from the acts of We the Politicians.[78]

The Court therefore furthers the cause of democracy by preserving and protecting constitutional politics against erosion by political elites who are engaged in "normal politics." The Court is valued in Ackerman's scheme to the extent to which it serves the purpose of reaching decisions that express more faithfully the values

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[77] *Id.* at 10.
[78] *Id.* at 10.

cherished by the mobilized citizenry. The success or failure of the court is measured by the degree to which it succeeds in preserving these values.

Surprisingly, however, Ackerman says very little as to *why* judges are especially qualified to fulfill the function assigned to them within his scheme. In response to the central question of this article, namely: why judges?, Ackerman notes the following:

> Sometimes the Justices will make serious mistakes, but these blunders should be placed into a larger perspective. Political life is full of pathologies… Within this human-all-too-human tragicomedy, the Court adds something valuable to the mix. Quite simply, the Justices are the only ones around with the training and the inclination to look back to past moments of popular sovereignty and to check the pretensions of our elected politicians when they endanger the great achievements of the past. By expanding the canon to include the twentieth century, the profession will be providing the courts with the intellectual resources needed to discharge the function of judicial review in a more thoughtful fashion.[79]

Ackerman's sole justification for the conjecture that granting powers to courts is conducive to preserving the achievements reached during periods of constitutional politics is simply that "justices are the only ones around with the training and the inclination to look back to past moments of popular sovereignty and to check the pretensions of our elected politicians."[80] But he provides no structural or institutional reasons why this should be the case.

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[79] Bruce Ackerman, *The Living Constitution* 120 HARV. L. REV. 1737, 1806-07 (2007)

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

F. The Rise of Institutionalist Instrumentalism

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

Institutionalists share many of the reservations made by us against the four instrumentalist theories described above.[81] Yet institutionalists such as Einer Elhauge, Neil Kommisar, and Adrian Vermeule share with instrumentalists the belief that ultimately, constitutional design is an instrument to achieve desirable social goals. To remedy the defects of traditional instrumentalists, institutionalists believe constitutional design is ultimately an enterprise in "comparative institutional analysis."[82] More specifically, what ought to determine the scope of judicial powers to review legislation is an institutional choice based on "the relative strengths and weaknesses of the reviewer (the adjudicative process) and of the reviewed (the political process)."[83]

Adrian Vermeule describes institutionalism as a form of rule consequentialism. In his view "judges should interpret legal texts in accordance with rules whose observance produces the best consequences overall."[84] Rule consequentialism requires the theorist to look not at any particular decision that courts or legislatures are likely to generate but at broader and more foundational institutional characteristics of courts and legislatures. After criticizing traditional instrumentalists on the grounds that they fail to grasp the consequences following their own favorite institutional design, Vermeule turns to investigate the institutional competence of courts and legislatures.[85] In his view the relevant variables for determining

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[81] See *supra* note 14.
[82] Komesar, *supra* note 12 at 3.
[83] Komesar, *supra* note 12 at 254.
[84] Vermeule, *supra* note 5 at 5.
[85] *Id.* at 256.

the powers of judicial institutions are highly complex and include: "the agency costs and the costs of uncertainty, systemic effects (especially a form of moral hazard), the optimal rate of constitutional updating, and the transition costs of switching from one regime to another."[86] Institutionalism thus aspires to provide a more systematic and less anecdotal instrumentalist theory of judicial review.

These attempts are admirable. Yet we believe that the institutionalist accounts are misguided for three reasons. First, we are skeptical as to whether institutionalists can in fact make reliable assertions concerning the likely performance of courts versus legislatures or other institutions. Second, we believe that instrumentalist arguments misconstrue the debate concerning judicial review; they conceptualize it as a technocratic debate about the likely quality of decision-making or other consequences of different forms of institutional design. But the real debate is a debate about political and moral institutional legitimacy. It is not about whether judicial review is efficient, stable, or effective in protecting substantive rights, but about what types of justifications citizens are entitled to. Third, institutionalists often fail to acknowledge the very possibility that non-instrumentalist arguments can play a primary role in justifying judicial review.

Historical work indicates that predictions concerning the performance of courts versus legislatures are often flawed. A recent historical work by Tushnet supports this skepticism.[87] Tushnet establishes that many of the institutional debates concerning courts and legislatures were politically motivated. He shows convincingly that the sectarian support or opposition to courts (on the grounds that courts are likely to be more liberal or more conservative than legislatures) is misguided because legislatures' and courts' inclinations cannot be reliably predicted. Historical evidence does not provide support for the conviction that the courts' or legislatures' performance over time can be reliably predicted.

But even if, contrary to our conjecture, institutionalists develop accounts that can reliably predict the performance of courts versus legislatures and allocate constitutional powers among these

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[86] *Ibid*

[87] See Mark Tushnet, *The Rights Revolution in the Twentieth Century* (unpublished manuscript).

institutions accordingly, their accounts misconstrue the debate concerning judicial review. This controversy, we believe, is not about the expertise of judges versus legislatures or the quality of the performance of these institutions; it is to a large extent a debate about the political morality of constitutional decision-making. Instrumentalist theories rely heavily on empirical generalizations concerning the institutional dispositions of courts and legislatures.[88] The institution in charge of making constitutional decisions is the institution that is more likely to get it right.[89] Thus the debate between advocates and foes of judicial review is perceived as a technocratic debate about the quality of performance of the different institutions.

Yet, it is difficult to believe that the debate about the constitutional powers of the Court is a technocratic debate resembling perhaps the debates concerning the institutional powers of agencies. The debate concerning the powers of the Court is conducted by political philosophers, constitutional lawyers, and citizens. While some of the arguments raised by the participants are instrumentalist, the spirit of the debate and the range of participants indicate that the debate concerning judicial review and its optimal scope cannot reasonably be construed as a technocratic debate concerning the likely consequences of different systems of constitutional design. The debate is not about institutional competence but about political morality and institutional legitimacy. The flaw in institutionalism is simply its failure to comprehend the foundations of the controversy and its insistence on instrumentalizing a question that ought not to be instrumentalized.[90]

Finally, it seems that institutionalists are blind to the possibility that non-instrumentalist justification can play a central role in justifying judicial review. In conveying such blindness Adrian

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[88] See *supra* note 12.

[89] See Vermule, *supra* note 5 at 5.

[90] Institutionalists could argue that their analysis also explains the relevance of political morality. After all, as institutionalists concede that to establish the superiority of one institution over another, one must first identify the goals that the institution is designed to achieve. See Vermeule, *supra* note 5 pp. 83-85 (arguing that value theory may be necessary for institutionalist analysis). Yet, even under this concession, there is a substantial component of the controversy that is technocratic.

Vermeule asserted, "In principle, these consequentialist premises exclude a domain of (wholly or partially) nonconsequentialist approaches to interpretation. It turns out, however, that this is not a very large loss of generality, because few people hold views of that sort. Interpretative consequentialism is an extremely broad rubric."[91] Vermeule's assertion acknowledges that perhaps other non-consequentialist voices may be relevant to constitutional theory but he fails to identify who these voices are and what their arguments could be. Instrumentalists in general and institutionalists in particular fail to account for an important way of justifying judicial review. It is after all possible that judicial review is not desirable because of its likely *contingent* consequences; it may be desirable because the judicial process alone grants individuals an opportunity to raise their grievances, to be provided with an explanation, and to benefit from a reconsideration of their rights. The next section explores this possibility.

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

A. Introduction

Section II raised doubts concerning the soundness of instrumentalist justifications for judicial review. Our main aim in this section is to establish that an adequate defense of judicial review can be grounded in a non-instrumentalist justification. What is distinctive about courts is not the special wisdom of judicial decisions or other special desirable contingent consequences that follow from judicial decisions but the procedures and the mode of deliberation that characterize courts. The procedures that are characteristic of courts are designed, we argue, to provide a right to a hearing.

To accomplish this task we divide this section into two parts. Section B discusses the right to a hearing and establishes its importance. It argues that protecting rights presupposes also protecting an opportunity to challenge what is reasonably considered

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[91] Vermeule, *supra* note 5 at 6.

to be their violation. Section C establishes that the right to a hearing is embedded in the procedures of the legal process and that judicial review or quasi-judicial review is the only effective manner in which the right to a hearing can be protected. This latter claim is based on examining carefully the nature of the judicial process and the modes of reasoning characterizing it.

B. The Right to a Hearing

Our proposal rests upon the view that judicial review is designed to facilitate the voicing of grievances by protecting a right to a hearing. The right to a hearing consists of three components: the opportunity to voice a grievance, the opportunity to be provided with a justification for a decision that impinges (or may impinge) on one's rights, and the duty to reconsider the initial decision giving rise to the grievance.[92] The right to a hearing is valued independently of the merit of the decision likely to be generated at the end of this process.

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

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[92] Eylon & Harel, *supra* note 15 at 1002.

her grievance, she is entitled to a hearing. Let us investigate and examine each one of these cases.

The first case to be examined is the case in which the rightholder challenges the justifiability of an infringement of a right. A right is justifiably infringed when it is overridden by conflicting interests or rights.[93] If, in the course of walking to a lunch appointment, I have to stop to save a child and, consequently, miss my appointment, the right of the person who expects to meet me is being (justifiably) infringed.

Infringements of rights can give rise to two types of complaints on the part of the rightholder.[94] One type is based simply on the claim that the infringement is an unjustified infringement; i.e., it is a violation. The second type however is procedural in nature. When one infringes another person's rights, one typically encounters a complaint based not on the conviction that the infringement is, all things considered, unjustified but on the basis of the conviction that an infringement, even when justified, must be done only when the rightholder is being provided with an opportunity to raise a grievance. The complaints elicited by a disappointed promisee may illustrate the force of such a grievance. The disappointed promisee may protest that "you have no right to break your promise *without consulting me first*." This rhetorical use of "right" invokes the commonplace intuition that when someone's rights are at stake, that person is entitled to voice her grievance, demand an explanation, or challenge the infringement. Such a right cannot be accounted for by the conviction that honoring it guarantees the efficacious protection of the promisee's rights. Even under circumstances in which the promisee's rights would be better protected if no such hearing were to take place, the promisee should be provided with an opportunity to challenge the promisor's decision.

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[93] For the distinction between infringement and violation of rights, see Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 50 (1977); Alon Harel, *Theories of Rights* in THE BLACKWELL GUIDE TO LAW AND LEGAL THEORY EDS. MARTIN P. GOLDING & WILLIAM A. EDMUNDSON 198-99 (2004). For doubts concerning the soundness of the distinction between infringement and violation, see John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights*, 23 LAW & PHILOSOPHY 325 (2004).

[94] See Eylon & Harel, supra note 15 at 1002-03.

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

> If Jones has a right to do A and is prevented from acting, then he is owed an apology at least. But if Jones has only a prima facie right to do A, so that preventing him from acting is permissible, then whoever prevented him from acting has no obligation to apologize. *He almost certainly owes Jones an explanation, however.* And this obligation to explain strikes me as sufficient to distinguish situations in which prima facie rights are infringed from situations in which no rights – not even prima facie rights – are at stake.[95] (emphasis added)

The right to a hearing in cases of a dispute concerning the justifiability of an infringement hinges on the existence of a prior right that is being infringed. There is thus an important link between individual rights and the derivative right, the right to a hearing. The existence of a prior independent right gives the rightholder a stake in that right even when the right is justifiably overridden. The rightholder retains some powers over the execution of the right even when the right is justifiably infringed. The right to a hearing is grounded in the fact that people occupy a special position with respect to their rights. Rights demarcate a boundary that has to be respected, a region in which the rightholder is a master. One's special relation to the right, i.e., one's dominion, does not vanish when the right is justifiably overridden. When the infringement of the right is at stake, the question whether it might be justifiable to infringe that right is not tantamount to the question whether one should have dominion over the matter. A determination that the right has been justifiably infringed does not nullify the privileged position of the

[95] Phillip Montague, *The Nature of Rights: Some Logical Considerations* 19 NOUS 365, 368 (1985). See also Phillip Montague, When Rights Are Presumably Infringed 53 PHILOSOPHICAL STUDIES 347, 350 (1987).

rightholder. Instead, his privileged position is made concrete by granting the rightholder a right to a hearing. Thus, infringing the right unilaterally is wrong even when the infringement itself is justifiable because the rightholder is not treated as someone who has a say in the matter.

What does the right to a hearing triggered by an infringement of a prior right consist of? In a previous work one of us identified three components of the right to a hearing: an opportunity for the victim of infringement to voice her grievance – to be heard, an explanation to the victim of infringement that addresses her grievance, and a principled willingness to respect the right if it transpires that the infringement is unjustified.[96]

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

The first component is self-explanatory. The second and the third components require further clarification. To understand the significance of the willingness to engage in meaningful moral deliberation, imagine that the promisor informs the promisee that some time in the past, after thorough deliberation, she adopted a rule that in cases of conflicts between lunches and memorials, she always ought to attend the memorial. When challenged by the promisee, the promisor recites the arguments used in past deliberations without demonstrating that those arguments justify infringing this promise and without taking the present promisee into consideration in any way. Such behavior violates the promisor's duty to engage in

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[96] Eylon & Harel, *supra* note 15 at 1002-06.

meaningful moral deliberation.[97] The duty requires deliberation concerning the justifiability of the decision in light of the specific circumstances. This is not because the original deliberation leading to forming the rule was necessarily flawed. Perhaps the early deliberation leading to forming the rule was flawless, and perhaps such an abstract detached rule-like deliberation is even more likely to generate sound decisions than deliberation addressed to evaluating the present circumstances. The obligation to provide a hearing is not an instrumental obligation designed to improve the quality of decision-making and, consequently, its force does not depend on whether honoring this obligation is more likely to generate a better decision. The obligation to engage in moral deliberation is owed to the rightholder as a matter of justice. The promisee is entitled to question and challenge the decision because it is her rights that are being infringed.

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

So far we have examined the right to a hearing in cases of infringement of rights. Let us turn our attention to examining a second case, namely, the case in which there is a genuine and reasonable dispute concerning the existence of a right in the first place. To establish the existence of a right to a hearing in such a case let us first establish the intuitive force of the claim by providing an

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[97] The example is taken from Eylon & Harel *supra* note 15 at 1002-03.

example and later explore what principled justifications one can provide for the existence of a right to a hearing under such circumstances.

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

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

The right to a hearing in such a case has a similar structure to the right to a hearing triggered by a case where the dispute is about the justifiability of the infringement. It consists of three components. First, John must provide Susan with an opportunity to challenge his decision to stay at home, i.e., to establish that she has a right that he take her to the airport. Second, John must be willing to engage in meaningful moral deliberation, addressing Susan's grievance in light of the particular circumstances. It would thus be wrong on the part of John to use a general rule, e.g., a rule that states that "any physical

inconvenience is a special reason to infringe such a promise," without examining the soundness of the rule in light of the particular circumstances. Finally, John must be willing to reconsider the decision in light of the arguments provided in the course of the moral deliberation and act accordingly. Principled and genuine willingness on the part of John to act in accordance with the deliberation rather than merely to reexamine his decision is necessary for honoring the right to a hearing.

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

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

It might be argued that both cases aimed at establishing a general right to a hearing are irrelevant to the case at hand. Unlike a promisor, the state is in a position of authority legitimized by the democratic process. It might be claimed that locutions such as "you have no right" belong to the interpersonal realm and the intuitiveness of the right to a hearing is confined to such contexts, and that therefore the supposed right to a hearing does not extend to authoritative relationships. This view would hold that just as an army commander is not required to reconsider her commands in light of

every grievance, neither is the state. The state cannot be required to provide a hearing without compromising its legitimate authority.

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

> Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange expresses the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one. [98]

The contours of our position favoring judicial review can now be discerned more clearly. There are two types of cases that, under our view, justify judicial review of legislative decisions. First, when a person has a right and that right is (justifiably or unjustifiably) infringed by the legislature that person is owed a right to a hearing. Second, when there is a reasonable dispute over whether a person has a right and the legislature passes a statute that, arguably, violates the disputed right, the individual is owed a right to a hearing.[99] In both cases, the right to a hearing consists of a duty on the part of the state

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[98] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 503 (1st ed. 1978).

[99] The distinction between these two cases is of course familiar to foreign constitutional lawyers. Both Canadian and South African constitutional law distinguishes sharply between two stages of constitutional scrutiny analogous to the ones discussed here. In Canada the issue has been discussed in the context of section 1 of the Charter of rights and liberties. See, e.g., PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 808 (1985) ("Because of s. 1, judicial review of legislation under the Charter of rights is a two-stage process. The first stage of judicial review is to determine whether the challenged law derogates from a Charter right … the second stage is to determine whether the law is justified under s. 1 as a reasonable limit prescribed by law that can be demonstrably justified in a free and a democratic society"). For the South African discussion of this issue, see M.H. CHEADLE et al., SOUTH AFRICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS 696 (2002) ("A limitation clause necessarily gives rise to two stages of analytical enquiry. The first stage is to determine whether the right in question is infringed. The second is to determine whether that infringement can be justified as a reasonable limitation of the right").

to provide the rightholder an opportunity to challenge the infringement, willingness on the part of the state to engage in moral deliberation and provide an explanation, and, last, willingness to reconsider the presumed violation in light of the deliberation. Furthermore, the moral deliberation required of the state cannot consist of an abstract or general deliberation – the kind of deliberation that characterizes the legislative process. It must consist of a particularized or individualized deliberation that accounts for the particular grievance in light of the particular circumstances.

The right to a hearing is not designed to improve decision-making. We are not even committed to the view that granting a right to a hearing is more likely to generate superior decisions. The soundness of the right-to-a-hearing conception of judicial review does not depend on establishing that judicial review is more congenial to the protection of the rights than alternative systems or that granting the right to a hearing protects democracy or stability or the dual-democracy structure. This is precisely what makes this position immune to the objections raised against instrumentalist views. The only virtue of review is the fact that it protects the right to a hearing – a right designed to examine and reconsider the justifiability of the decision in light of the particularities of the case.

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

C. The Right to a Hearing and the Judicial Process

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

To establish our claim that the right to a hearing provides a different type of justification for judicial review we need to establish that courts are both specially and exclusively designed to protect the right to a hearing. By specially we mean that courts are specially designed to protect the right to a hearing and that this is not merely a contingent feature of courts. By exclusively we mean that to the extent that other institutions protect such a right to a hearing, they operate in a quasi-judicial manner. The reason for both the special suitability and the exclusivity of courts is that there is a special affinity between courts and the right to a hearing such that it is only

courts or at least court-like institutions that can effectively protect the right to a hearing.

The first task, i.e., establishing that courts are specially suited to protect the right to a hearing, requires looking at the procedures that characterize courts. It seems uncontroversial (to the extent that anything can be uncontroversial) that courts, as opposed to legislatures, are designed to investigate individual grievances. This is not a feature that is unique to constitutional litigation. It characterizes both criminal and civil litigation and it is widely regarded as a characteristic feature of the judicial process as such.[100] The assessment of individual grievances comprises three components. First, the judicial process provides an opportunity for an individual to form a grievance and challenge a decision.[101] Second, it imposes a duty on the part of the state (or other entities) to provide a reasoned justification for the decision giving rise to the challenge.[102] Last, it

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

[101] This is of course implied by the due process clause of the Constitution. See *Mullane v. Hanover Central Bank & Trust Co*. 339 U.S. 306, 313 (1950) (maintaining that: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case"); *Boddie v. Connecticut* 401 U.S. 371, 377 (1971) ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of rights and duty through the judicial process must be given a meaningful opportunity to be heard").

[102] The duty to provide a reasoned response is an essential part of the judicial process. See, e.g., Daniel L. Shapiro, *In Defense of Judicial Candor* 100 HARV L. REV. 731, 737 (1987) ("[R]easoned response to a reasoned argument is an essential aspect of that [judicial] process. A requirement that judges give reasons for their decisions – grounds of decision that can be debated, attacked and defended – serves a vital function …"); Scott C. Idelman, Judicial Candor 73 TEXAS L. REV. 1307, 1309 (1995) ("[T]he basic rule that judges ought to be candid in their

involves, ideally at least, a genuine reconsideration of the decision giving rise to a challenge,which may ultimately lead to an overriding of the initial decision giving rise to the grievance.[103] If the review of statutes can be shown to be normatively grounded in these procedural features it follows that courts are particularly appropriate in performing such a review.

One way of articulating this claim is to think of the nature of a failure on the part of courts to protect the right to a hearing. Such a failure is different from a failure on the part of the court to render a right or a just decision. The latter failure may suggest that the courts have not paid sufficient attention to the particular decision or that they do not have sufficient expertise. But it does not challenge their status as courts. In contrast, the former failure, namely a failure to protect the right to hearing, is a failure on the part of courts to do what courts are specially designed to do; it is a failure to act judicially. It seems evident therefore that courts are specially suited to protect the right to a hearing.

The second task, i.e., establishing that courts are exclusively suited to protect the right to a hearing, is perhaps the more challenging task. At the first stage let us show why the legislature is utterly unsuited to protect the right to a hearing. At the second stage we will examine the suitability of institutions that are neither legislative nor judicial to perform this task and establish that to the extent that such institutions can perform this task, these other institutions operate in a quasi-judicial way, i.e., use court-like modes of reasoning.

To establish the unsuitability of the legislature consider a small and self-governing polis that does not have a constitution or a bill of rights.[104] In this polis, each and every citizen may present or

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opinions that they should neither omit their reasoning nor conceal their motives seems steadfastly to have held its ground"); Fallon, *supra* note 100 at 966.

[103] 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.").

[104] This argument is based on Eylon & Harel, *supra* note 15 at 1010-12.

challenge a piece of legislation before the assembly. In particular, each citizen who reasonably believes that his right has been breached by the legislation has the right to stand up in the citizen's assembly, present his case, and demand a reconsideration of the statute in light of his argument. Clearly, the envisioned procedure does not limit the power of the legislature: the legislature itself is addressed, and decides whether to reconsider the statute. The right to stand up and speak, to propose a law, or to challenge a policy is granted to every citizen equally, whatever her reasons.

Such an arrangement seems to be an ideal one. On the one hand, it seems to protect the right to a hearing and, on the other hand, it seems to protect the participatory values cherished by opponents of judicial review. Yet, there is something disturbing in this ideal arrangement. This arrangement fails to differentiate sharply between two types of grievances. The allegedly "democratic" procedure does not differentiate between a person who reasonably believes that her rights are being violated and a person who opposes the legislative measure on the grounds that it is unwise or undesirable for policy-related reasons. Distinguishing the grievances of citizens whose rights are allegedly being affected from the grievances of those who oppose legislation for other reasons is important since these two grievances are of different types and require two different modes of reasoning. The procedure of this legislature puts on par those grievances that give rise to a right to a hearing (alleged violations of rights) and those grievances that are of a political nature. It is perhaps justifiable to examine both types of grievances but the modes of reasoning required to investigate them are different and incompatible with each other.

The tension between the two modes of reasoning is even greater in a representative system. Whereas the individual members of our mythical and purely democratic assembly may find it difficult to switch from their role as legislators to that of jurists, representatives as such cannot make this switch at all. Modern representatives represent partial views about norms and policies and often advocate some local interests. In order to provide a hearing, the representatives would need to abstract themselves from their role and commitments as representatives. Put differently, representatives, as representatives, cannot provide a hearing at all; they could only do so by transcending their role as representatives.

This analysis may still seem unsatisfactory. It may be argued that what we have established is that the right-to-a-hearing justification for judicial review may explain the need for certain modes of reasoning and deliberation and that legislators are unsuited for performing the modes of deliberation necessary for protecting the right to a hearing. Yet, it is not sufficient to establish that only courts are suited for this task. To further examine this question and related concerns, let us address two possible objections to our analysis. Both of these objections challenge not the importance of protecting a right to a hearing but the further claim that protecting such a right justifies judicial review.

First, it could be argued that the right-to-a-hearing justification for judicial review requires merely a guarantee that grievances be examined *in certain ways* and *by using certain procedures* and *modes of reasoning* but it tells us nothing of the identity of the institutions in charge of performing this task. Second, it could be argued that the right to a hearing can, at most, justify courts in making *particular and concrete* decisions applying to the case at hand – decisions that are designed to remedy particular grievances. Yet the right to a hearing cannot explain why these decisions should have any force extending beyond the particular dispute.

Our strategy in addressing each one of these objections will be similar. First we concede the soundness of the objections; i.e., we concede that the right to a hearing strictly understood cannot justify all the features that are associated with *judicial* review. The right to a hearing can justify only a narrow and strict form of review. Second we show that once such a strict and narrow form of judicial review is in place, compelling pragmatic considerations require the establishment of a more robust form of judicial review.

Under the first objection, neither courts nor judges are required in order to protect the right to a hearing. As stated above, the right to a hearing requires establishing *some* institution capable of following certain procedures and conducting certain modes of reasoning. Yet there is no reason to believe that only courts are capable of performing these tasks.

In line with the strategy described above, we concede that this objection is sound. The right to a hearing, it could be argued, can only justify what may be labeled a minimalist form of review, which

need not be judicial. Arguably, the right to a hearing justifies certain modes of deliberation and reasoning but says little about the institutional structures necessary for performing these tasks.

A careful investigation exposes the limitation of this objection. In principle, the right to a hearing can be protected by any institution. Yet, in practice, it is evident that an effective protection of the right to a hearing presupposes establishing institutions that are indistinguishable from courts. We have argued earlier in this section that courts are designed to investigate individual grievances and that such an investigation is crucial for protecting the right to a hearing. This suitability of courts however is not accidental; it is a natural characteristic of courts. Courts provide individuals an opportunity to challenge what they perceive as a violation of their rights; they are also designed to engage in moral deliberation and provide an explanation for the violation and, last, they have the power to reconsider the presumed violation in light of the deliberation. Institutions that develop similar modes of operation – modes that are suitable for protecting the right to a hearing – thereby inevitably become institutions that operate in a quasi-judicial manner. The more effective institutions are in protecting the right to a hearing, the more these institutions resemble courts. The right to a hearing justification for judicial review accounts not only for the need of establishing *some* institution designed to protect this right but also establishes the claim that *the* institution capable of protecting such a right operates in a court-like manner and that the procedures and modes of reasoning and the modes of operation of such an institution must resemble those of courts.

Under the second objection, the right-to-a-hearing justification for judicial review can only justify courts (or any other institutions designed to protect the right to a hearing) in making particular and concrete decisions that apply to the case at hand. The right to a hearing merely dictates that *persons whose rights may be at stake* will have an opportunity to raise their grievances, will be provided with an explanation that addresses their grievances, and, last, that the decision *in their cases* will be reconsidered in light of the hearing. But why should such a decision carry further normative force? Why should it set a precedent for other cases or carry any normative weight?

Many of the traditional justifications for judicial review aim at providing a single, simple, and unified justification for judicial review. The complexity of the real world suggests however that an adequate justification for judicial review often involves several complementary stages. Strictly speaking, the right to a hearing can only justify courts in reconsidering concerns raised by a person whose rights may have been infringed and who wishes to challenge the alleged infringement. We can label a system that satisfies these conditions a system of "minimal judicial review." The ancient Roman system is an example of such a system. Under the Roman system, the tribunes had the power to veto, that is, to forbid the act of any magistrate that bore unjustly upon any citizen, but not to invalidate the law on the basis of which act was performed.[105]

It is easy however to see the deficiencies of such a system. There are compelling reasons why decisions rendered in courts have normative ramifications that extend beyond the case at hand. Glancing at the huge amount of literature concerning precedents provides us with a variety of such arguments. Considerations of certainty, predictability, coordination, etc., provide independent reasons for granting courts' decisions a broader and more extensive normative application.[106] Compelling considerations support the

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[105] See H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 12 (3d ed. 1972).

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

[106] See, e.g., Gerald J. Postema, *Some Roots of Our Notion of Precedent* in PRECEDENT IN LAW 9, 15 (ed. Laurence Goldstein) (describing the rationales underlying the following of precedents in terms of "certainty and predictability of

conjecture that judicial decisions have normative repercussions that extend beyond the particular grievances considered by courts. The normative forces that such decisions carry may be controversial. But, it is evident that particular decisions made by courts have some normative force that extends beyond the particular cases at hand.

To sum up, we have argued that (strictly speaking) the right-to-a-hearing justification for judicial review can justify only a minimalist and weak version of review. The "minimalist review" requires the establishment of institutions that are capable of following certain procedures and conducting certain forms of reasoning designed to protect the right to a hearing. Yet the minimalist review cannot directly justify the further, stronger claim that *courts* rather than other institutions ought to be in charge of performing these tasks. Furthermore such a minimalist version justifies granting courts (or any other institutions designed to protect the right to a hearing) only the powers to examine and reconsider grievances brought to them by individuals whose rights may have been affected. Minimalist judicial review does not explain however why these decisions have broader normative ramifications. Yet we have also shown why minimalist review must be extended in two ways. First, the institutions that can effectively protect the right to a hearing are only courts or court-like institutions. Second, *given* that courts have (or should have) the powers necessary to protect the right to a hearing, their decisions ought to have ramifications that extend beyond the particular cases considered by them. These two extensions of minimalist review are necessary for justifying the conventional understanding of judicial review.

IV THE ILLEGITIMACY OF DEMOCRATIC CONSTITUTIONALISM

A. Introduction

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decisions … and in terms of utilitarian benefits of coordination of social interaction and respect for established expectations").

In recent years constitutional theorists have tried hard to reconcile constitutionalism with democratic and participatory values. In contrast with earlier voices calling for such reconciliation,[107] recent theorists believe that such reconciliation requires developing a new institutional paradigm. More particularly, constitutional theorists advocate the weakening of the constitutional powers exercised by courts and granting greater constitutional powers to non-judicial institutions, particularly legislatures.[108] These revisionist institutional proposals embodying what Frank Michelman refers to as "judicial leadership without judicial finality"[109] draw inspiration from foreign legal systems such as the British and the Canadian legal systems. This section investigates which, if any, among the proposals to endorse what we label "democratic constitutionalism," can be reconciled with the right to a hearing. We establish that while democratic constitutionalists believe that their proposals strengthen the legitimacy of the constitutional order by making it more democratic, in fact, democratic constitutionalists undermine the

Antecedent is **:[1b]Comment** unclear: what is being labeled? Concrete nouns (proposals) cannot be designated by an abstract noun (constitutionalism). The grammar breaks down too.

[107] See, e.g., Owen Fiss, *Between Supremacy and Exclusivity* in THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard Bauman & Tsvi Kahana eds., 2006) 452 at 462 (arguing that "although the judiciary may not be directly responsive to the people, as the legislature is, it is sufficiently embedded within a larger system of democratic governance to meet the objection that judicial review is undemocratic").

[108] Classical examples include Frank Michelman, *Judicial Supremacy, the Concept of Law, and the Sanctity of Life* in JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 139 (A. SARAT AND T.R. KEARNS, EDS., 1996); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* 49 AM. J. COM. L. 707 (2001); CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER – CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM 2nd ed. (2001); Whittington, *supra* note 67; Robert C. Post, *The Supreme Court, 2002 Term – Forward: Fashioning the Legal Constitution: Culture, Courts, and Law* 117 HARV. L. REV. 4 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act* 112 YALE L.J. 1943 (2003); Kramer, *supra* note 4, Janet Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?* 82 TEXAS L. REV. 1963 (2004); Sanford Levinson, *Constitutional Engagement "Outside the Courts" (and "Inside the Legislature"): Reflections on Professional Expertise and the Ability to Engage in Constitutional Interpretation*" in Kahana and Bauman, *supra* note 1, 378; Tushnet, *WEAK COURTS*, *supra* note 4; Whittington, *supra* note 2.

[109] Michelman, *id.* 145.

legitimacy of the Constitution by depriving individuals of their right to a hearing.

The discussion of democratic constitutionalism seems especially timely, since in the past decade or so even mainstream American constitutional theory has turned against judicial supremacy, and at times even against judicial review. More and more American constitutional scholars have become "democratic constitutionalists."[110] That is, they do not oppose judicial review

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[110] The rise of democratic constitutionalism might be connected to one judicial development and two intellectual developments in American legal academia. The judicial development is the conservative inclination of the Rehnquist Court. The opposition to this Court from liberal legal academia may explain the recent attempt to weaken judicial power. See Robert Post & Reva Segal, *Roe Rage: Democratic Constitutionalism and Backlash* 42 HARV. C.R-C. L. REV. 373, 374-75 (2007) ("One of the many reasons for this shift [in the inclination of liberals to support judicial review] is that progressives have become fearful that an assertive judiciary can spark 'a political and cultural backlash that may … hurt, more than help, progressive values").

The two intellectual developments are the rise of comparative constitutionalism and the inter-disciplinarization of legal scholarship. The rise of comparative constitutionalism has made American academics more familiar with foreign legal systems. These foreign systems often limit the review powers of courts. Fiss, *supra* note 107 at 458 (arguing that the "worldwide move toward constitutional governments maybe help explain the growth of legislative constitutionalism"). Another indication of the connection between democratic constitutionalism and comparative constitutionalism is that even though in the United States the Executive has as strong a claim to represent the people as the legislative branch, there has been no discussion of "executive constitutionalism". This might be due to the fact that the countries most studied in the context of democratic constitutionalism – Canada, the UK, and New Zealand – have a parliamentary system where the executive is not accountable directly to the people.

In addition to the conservative inclination of the Rehnquist Court and the rise of comparative constitutionalism we believe that there might be an additional factor contributing to the rise of democratic constitutionalism. The inter-disciplinarization of legal scholarship has led to the replacement of the all-or-nothing approach to judicial review towards a more nuanced socio-historical examination of American constitutional traditions and practices. This nuanced approach allowed some scholars to be skeptical about judicial supremacy and to propose alternatives to this mechanism. See e.g. DAVID P. CURRIE THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 x (1997) (demonstrating that "before 1800 nearly all of our constitutional law was made by Congress or the President" that "a number of constitutional issues of the first importance have *never* been resolved by judges" and that "what we know of their

altogether; rather, they oppose judicial supremacy or judicial finality. They say that while the Court should have a say in constitutional issues, it should not have the final or the exclusive say.[111]

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solution we owe to the legislative and executive branches, whose interpretations have established traditions almost as hallowed in some cases as the Constitution itself"); DAVID P. CURRIE THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-29 at 344 (2001) (demonstrating that many "constitutional issues, great and small [were] ventilated in the pitiless glare of political debate" in Congress and the executive branch, during the studied period"); Kramer, *supra* note 4 at 8 (offering an interdisciplinary study of American constitutional history and suggesting that for most of it "[f]inal interpretive authority rested with 'the people themselves,' and the courts no less than elected representatives were subordinate to their judgments"); Whittington, *Political Foundations*, *supra* note 2 at 15 (demonstrating that "over the course of American history, there has been no single, stable, allocation of interpretive authority. Rather, various political actors have struggled for the authority to interpret the Constitution").

[111] See Michelman, *supra* note 108 at 145-46 (suggesting that while "legal-interpretative work benefits strongly from [qualifications found] in a special concentration among occupants of a judicial office … ordinary citizens and their electorally accountable representatives are intellectually or motivationally [capable] of arguing competently or judging honestly among contestant constitutional-legal interpretations"); Gardbaum, *supra* note 108 at 747 (asserting that the "dialogue, competition, and joint responsibility between courts and legislatures … add new dimension and perspective to the task of constitutional interpretation"); Manfredi, *supra* note 108 at 193, 188 (asserting that "liberal constitutionalism does not establish a judicial monopoly" over constitutional interpretation and that "the legislative and executive branches of government possess *equal* responsibility and authority to inject meaning into the indeterminate words and phrases of the Charter."); Whittington, *supra* note 67 at 847 (arguing that "[t]he judiciary has a useful role to play in the constitutional system, but so do other political institutions"); Post & Siegel, *supra* note 108, 1947 (proposing a constitutional model that "attributes equal interpretive authority to Congress and to the Court"); Kramer, *supra* note 4 at 7-8 (opposing judicial supremacy and arguing that throughout American constitutional history "[f]inal interpretive authority rested with "the people themselves," and courts no less than elected representatives were subordinate to their judgments" and that "[t]he idea of turning [final constitutional interpretation] over to judges was simply unthinkable"); Post, *supra* note 108 at 44 (asserting that one reason for the Supreme Court to respect the constitutional interpretation of Congress is "that interpretation of the Constitution ought to be responsive to democratic will, and Congress is more democratically accountable than the Court"); Hiebert, *supra* note 108 at 1985 (asserting that rights can "be adequately protected without presuming that courts have the only valid role in resolving conflicts between legislation and individual rights and the only valid interpretation of those rights"); Levinson, *supra* note 108 at 378 (arguing that

Advocates of democratic constitutionalism provide a variety of arguments. Some of these arguments are instrumental and are based on the conviction that true partnership between courts and legislatures generates better public discourse and ultimately better decisions.[112] Democratic constitutionalists maintain that Congress is just as qualified to interpret the Constitution as the Supreme Court, and that, despite what advocates of judicial supremacy argue, interpretation by legislatures is not anarchic, irrational, or tyrannical.[113] To the extent that legislative decisions are irrational, judicial interpretation also suffers from the same flaw, and in any

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"the legislature – although it is obviously a nonjudicial institution – can legitimately play a meaningful role in interpreting its particular national constitution"); TUSHNET, WEAK COURTS, *supra* note 4 at 157 (arguing that "the performance of legislators and executive officials in interpreting the constitution is not … dramatically different from the performance of judges").

[112] See Christine Bateup, *Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOKLYN L. REV 1109, 1139 (2006). ("The result of this interactive process in which no branch dominates and in which constitutional meaning is steadily formed is constitutional dialogue, as 'all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional issues'); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty* 94 MICH. L. REV. 245, 275 (1995) (arguing that "in transferring responsibility for articulating constitutional norms from the public and their representatives to the courts, more-than-minimal judicial review may … deprive the courts of information they should find useful"); Gardbaum, *supra* note 108 at 748 (arguing that democratic constitutionalism "might lessen the perception that courts are engaged in discretionary policymaking, which in turn may result in both better and more appropriate constitutional decision-making and greater legitimacy attaching to the court's functions").

[113] The most eloquent advocate is Keith E. Whittington, who argued: "Extrajudicial constitutional interpretation need not be as majoritarian, or as tyrannous, as this objection implies … Elected officials may be responsive and accountable to the public will, but they are not therefore purely majoritarian in their actions. The very insecurity of elective office discourages nonjudicial officials from ignoring minority interests. Politicians gain security in office by servicing broad, heterogeneous constituencies, not by relying on a homogeneous but narrow group of supporters. "See Whittington, *supra* note 67 at 835-6, 839; Tushnet, *WEAK COURTS*, *supra* note at 4 at 157 (maintaining that it is "important to avoid being romantic about judges while being realistic or cynical about legislatures and executive officials").

case, the difference between the two institutions is insignificant.[114] Others have relied on what they believe to be the true historical understanding of the principle of checks and balances between the branches of government – a principle that has been a building block of the American constitutional tradition.[115] Other influential writers are motivated by a democratic, participatory, and anti-elitist political vision.[116] They argue that it is simply unfair to grant judges so much

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[114] Tushnet, *id*. at 79 (asserting that "the task is comparative, so that we must also ask whether constitutional courts are constitutionally responsible to any greater degree. My answer is that they probably are, but not dramatically so"); Kramer *supra* note 4 at 240 (maintaining that "like Congress, the Court now leaves most of its business to staff working behind closed doors"); Peter H. Russell *Standing Up For Notwithstanding* 29 ALBERTA L. REV. 293 at 301 (1991) (explaining that "in designing the institutional matrix for making decisions on rights issues it is a mistake to look for an error-proof solution. Both courts and legislatures are capable of being unreasonable and, in their different ways, self-interested"; Michelman, *supra* note 108 at 151 (arguing that, as a matter of principle, "independent judges surely can fail; an engaged people, as we are for the moment supposing, can possibly succeed; neither I can do better than their best").

[115] See Kramer, *supra* note 4 at 228 (arguing that "'[n]either the Founding generation nor their children nor their children's children, right on down to our grandparents' generation, were so passive about their role as republican citizens. ..Something would have gone terribly wrong, they believed, if an unelected judiciary were being given that kind of importance and deference"); JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 79-95 (1984) (arguing that while judicial review was part of the vision of the American founding fathers, judicial finality was not, and that objections to judicial finality can be traced to the writings and views of Abraham Lincoln and James Madison.); Michelman, *supra* note 108 at 147 (suggesting that "it is embarrassing to Abraham Lincoln's posterity" to fear "replacing the independent judiciary, as last-word constitutional interpreter, with the people's tribune").

[116] See Gardbaum, *supra* note 108 at 740-41 (asserting that "the judicial veto of legislation … gives final decision making power on fundamental, usually hotly-contested matters of principle … to the branch of government that is least accountable and which, if it is representative at all, represents the sovereignty of the past over the present); Kramer, *supra* note 4 at 8 ("Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with 'the people themselves,' and the courts no less than elected representatives were subordinate to their judgments"); Tushnet, *WEAK COURTS*, *supra* note 4 at x ("Every variant of strong-form judicial review raises basic questions about democratic self-governance, because every variant allows the

power to interpret the Constitution rather than to grant this power to the people or to their representatives. Finally, some democratic constitutionalists have relied heavily on structural arguments based on the view that the Constitution is not a legal document in the simple sense of the word.[117] The Constitution is a political statement; a deliberate, rhetorical, deliberative, and discursive device around whose majestic generalizations the polity – individuals and institutions – should organize their arguments. However, it is not binding in the same sense that statutes are.

These arguments of course bear a great resemblance to the arguments made by opponents of judicial review.[118] But democratic constitutionalists do not reject judicial review as such. Judicial scrutiny of constitutional provisions is still welcome. Democratic constitutionalism proposes a balanced division of power between the courts and legislatures. Advocates of democratic constitutionalism support a middle ground between two familiar, extreme positions. Supporters of legislative supremacy, such as Jeremy Waldron, oppose any form of judicial review.[119] Advocates of judicial supremacy, such as Owen Fiss[120] and Ronald Dworkin,[121] oppose any institutional scheme that deprives courts of their power to interpret

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courts to displace the present-day judgments of contemporary majorities in the service of judgments the courts attribute to the constitution's adopters").

[117] See Larry D. Kramer, *Forward: We the court* 115 HARV. L. REV. 4, 10 (2001). ("The founding generation did not see the Constitution this way [i.e., as a regular legal document] and, as a result, had very different views about the role of the judiciary. Their Constitution was not ordinary law, not peculiarly the stuff of courts and judges. It was…a special form of popular law, law made by the people to bind their governors, and so subject to rules and considerations that made it qualitatively different from (and not just superior to) statutory or common law"); Agresto, *supra* note 115 at 71 (contrasting the view that the Constitution is law with the view that the Constitution is a "framework for limited government" and favouring the latter view").

[118] See section II.

[119] See Waldron, *supra* note 17 at 1346.

[120] See Fiss, *supra* note 107 at 460 (opposing any "version of legislative constitutionalism that … disputes not only judicial exclusivity but judicial supremacy as well").

[121] See 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").

the Constitution. Advocates of democratic constitutionalism argue that constitutionalism without judicial exclusivity or finality does not compromise the fundamental values underlying constitutionalism. There is no need for the Supreme Court to be supreme, they say, only for it to be a court. As long as the Supreme Court can participate with the legislature in the dialogue, conversation, or national seminar about the meaning of the Constitution, and as long as individuals have the opportunity to go to court and present their arguments, the Court need not be supreme. Rather than viewing democratic constitutionalism as an uneasy, tolerable compromise between judicial supremacy and parliamentary sovereignty, supporters of this view see it as "the real thing."[122]

American democratic constitutionalists are not utopian fundamentalists. They realize that American constitutionalism will forever (or at least for the foreseeable future) be based on judicial supremacy.[123] Still, they insist on the importance of declaring that this form of constitutional interpretation is not the best one. Sometimes, they even look with envy at the foreign legal systems of Canada and the U.K.[124]

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[122] See, e.g., Jeffrey Goldsworthy, *Homogenizing Constitutions* 23 OXFORD J. L. STUD. 484, 485 (2003) (Forms of democratic constitutionalism "offer the possibility of a compromise that combines the best features of both the traditional models by conferring the courts the constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word"); Lorraine Weinrib, *Learning to Live With the Override* 35 MCGILL L. J. 541 at 564 (1990) (asserting that rather than merely "juxtaposing [the] contradictory elements" of legislative supremacy and judicial supremacy, the inclusion of a Notwithstanding Clause in the Canadian Charter "melds the best of the contending views into something new and better").

[123] See Daniel A. Farber "Legislative Constitutionalism in a System of Judicial Supremacy", in Bauman and Kahana, *supra* note 107 431 at 432 (explaining that "[d]espite continuing criticism, judicial supremacy is a basic fact about the American constitutional regime."); Kramer, *supra* note 4 at 251 ("Realistically speaking, there is very little chance of revising the U.S. Constitution to incorporate European ideas given the cumbersomeness of our existing amendment process. We simply have to live with the jerry-built system of accountability that evolved for us in practice").

[124] See e.g. Kramer, *supra* note 4 at 250 ("Constitutional courts in Europe have managed successfully to mimic American activism without the same controversy"); Sager, supra note 23 at 4 (maintaining that:"[m]ore or less serious proposals have been floated to give Congress a legislative veto over Supreme

The question to be addressed in this section is whether this envy is justified. Perhaps democratic constitutionalists are correct that a more balanced partnership between courts, legislatures, and citizens is indeed desirable for various reasons. It may perhaps be instrumentally desirable since such a partnership generates better decisions. It may also perhaps be more faithful to American history and to structural features of the American Constitution. But can it be reconciled with the right to a hearing? In section B, we present two types of democratic constitutionalism: popular constitutionalism, and legislative constitutionalism. Popular constitutionalism, espoused by Larry Kramer, seeks to disallow any one institution from exercising supremacy. Legislative constitutionalism, promoted by Mark Tushnet and Keith Whittington, sees the legislature as equally capable of interpreting the Constitution as the courts and thus grants the legislature the last word on constitutional questions.[125] In section

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Court decisions or even to abolish judicial review." Such a proposal demonstrates "deep discomfort with things as they are" (Sager, *supra* note at 4). For a proposal to adopt in the United States a legislative override see MICHAEL PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS 198 (1994) (suggesting that "Americans should take seriously the possibility of importing the Canadian innovation or of fashioning an Americanized version"). During the New Deal, the Department of Justice proposed to President Roosevelt a Constitutional Amendment that would allow Congressional, under some conditions, to re-enact legislation invalidated by the Supreme Court. See PETER H. IRONS, THE NEW DEAL LAWYERS 274-5 (1982). Irons also notes that this proposal has had "a lengthy history" (ibid. at 274). For the view that a legislative override would be "the perfect constitutional solution to the problem of interpretive finality and judicial imperialism" see Agresto, *supra* note 115 at 134.

[125] The terminology we use is different from what is often used in the literature. We prefer to use "democratic constitutionalism" to denote all theories seeking to endorse constitutionalism and, at the same time, provide a greater role for popular participation in constitutional interpretation. This term was initially used by Post and Siegel to describe what they called "polycentric interpretation" of the constitution. See Post and Siegel, *supra* note 108 at 1947.

Our use of this term is, however, different from that used by Post and Segal. Under Post and Siegel's model judicial supremacy still reigns, and therefore Tushnet uses the term "weak form judicial review" rather than "legislative constitutionalism" to describe models in which the legislature has final say regarding constitutional questions. See Tushnet, WEAK COURTS, *supra* note 4 at 24. However, we prefer the latter term because our focus with this type of democratic constitutionalism is on the powers given to legislatures to interpret the Constitution.

C, we establish why democratic constitutionalism fails to respect the right to a hearing. We also argue that the rationale underlying democratic constitutionalism is fundamentally misguided. Democratic constitutionalists criticize judicial review on the grounds that it is anti-democratic and therefore illegitimate; its alleged illegitimacy is based on the fact that judicial review deprives individuals of their participatory rights. In contrast, we argue that democratic constitutionalism is illegitimate precisely because participatory rights as understood by democratic constitutionalists deprive individuals of their right to a hearing.

B. Two Forms of Democratic Constitutionalism

1. Introduction

In this section we introduce two forms of democratic constitutionalism. We examine both "popular constitutionalism" and "legislative constitutionalism," and conclude that neither one of these proposed models can be reconciled with the right to a hearing.

2. Popular Constitutionalism

Many people oppose *judicial* supremacy or even weaker forms of judicial review under which judges have a final say concerning the soundness of particular constitutional arguments. Popular constitutionalists oppose *single-branch* supremacy entirely. As Larry Kramer,the most eloquent advocate of this position, has asserted: "No one of the branches was meant to be superior to any other, unless it were the legislature, and when it came to constitutional law, all were meant to be subordinated to the people."[126] 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."[127] Judicial review is perceived as legitimateonly insofar as it is understood as "another instance of the right of every citizen to refuse

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[126] Kramer, *supra* note 4 at 58.
[127] *Id* at 8.

to recognize the validity of unconstitutional laws – a 'political-legal' duty and responsibility rather than a strictly legal one."[128]

Popular constitutionalism is based on a distinctive understanding of the nature of the Constitution. The Constitution is a legal document but it is not legal in the same way that legality is understood by modern constitutional theorists.[129] For popular constitutionalists, the Constitution is in part a legal document but more dominantly a political platform, a national manifesto, a discursive anchor, and a historical narrative with which all branches of the polity should engage.[130] Kramer distinguishes sharply between this vision of constitutional politics based on a process by which constitutional law is made, interpreted, and enforced by the people and the rigid legalistic understanding of constitutional law based exclusively on judicial interpretation.[131]

In Kramer's view, modern constitutional theory is founded on a fundamental misunderstanding of American constitutional history. The original conception of judicial review was not one of judicial supremacy but one of departmentalism, where each of the three branches has an equal role to play in constitutional interpretation on the people's behalf.[132] He argues that the drafters of the Constitution

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[128] *Id* at 39.
[129] *Id* at 30-31.
[130] *Id* at 7.
[131] See *id* at 7-8 (stating that: "We in the twenty-first century tend to divide the world into two distinct domains: a domain of politics and a domain of law. … This modern understanding is … of surprisingly recent vintage. It reflects neither the original conception of constitutionalism nor its course over most of American history"). Kramer concedes that his vision of constitutional politics lacks the precision, certainty and finality, which, most typically, characterize law in the modern state. Thus Kramer believes that: "For us, legality is crucially (though, of course, not solely) a matter of authority. We expect to find a rule of recognition that assigns someone the power to resolve controversies with a degree of certainty and finality; so at the end of the day we have something we can point to and say 'yes, *that* is the law.'" *Id*. at 30.
[132] Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy* 41 VAL. U. L. REV. 697, 749 (2006) ("Madison sought to achieve [the people's] control [over constitutional law] through a system of "departmentalism," in which different departments of government were first made dependent on the people and interdependent on each other, and then given authority to pursue and act on their own best understanding of the Constitution").

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.[133] The recent development of judicial supremacy has, in Kramer's view, weakened democracy and placed a dangerous emphasis on judicial appointments and constitutional amendments.[134] 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.[135]

Kramer believes that Americans have given up their right to interpret the Constitution and have granted courts supremacy over constitutional interpretation.[136] However, he thinks that the alienation of the people's powers to interpret the Constitution to an elite class of lawyers, judges, and academics is troublesome. It is both anti-democratic and stands in opposition to the original understanding of the Constitution.[137] In arguing for a return to these traditional ideals, Kramer holds that the people should be responsible for the Constitution's interpretation and implementation. The intuitive rationale underlying Kramer's proposal was aptly described by Post and Siegel as the danger that the people "cease to maintain a vibrant and energetic engagement with the process of constitutional self-governance."[138]

Kramer's popular constitutionalism is founded on the premise that ultimate constitutional power belongs to the people. The people however can speak through a variety of social and political

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[133] See generally, Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 962-63 (2004).
[134] *Id.* at 1009
[135] Kramer, *supra* note 4, 247.
[136] Kramer says: "Americans in the past always came to the same conclusion: that it was their right, and their responsibility, as republican citizens to say finally what the Constitution means. The question is, would Americans today do the same? Are we still prepared to insist on our prerogative to control the meaning of our Constitution? … To listen to contemporary debate, one has to think the answer must be no." Kramer, *supra* note 4 at 227.
[137] See *supra* note 115.
[138] See Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy* 92 CALIF. L. REV. 1027, 1032 (2004).

institutions. Hence, the institutional implementation of popular constitutionalism is based on a diffuse system under which various branches of government are engaged in constitutional interpretation.[139] Some of these branches are naturally disposed to reflect the authentic voice of the people while others ought to listen carefully to the democratic input and act accordingly. Popular constitutionalism is only one form of democratic constitutionalism. Other democratic constitutionalists intimidated perhaps by the chaotic and diffuse nature of popular constitutionalism believe in the institutional supremacy of the legislature.

3. Legislative Constitutionalism

Legislative constitutionalism gives legislatures (always or sometimes) the final word in constitutional issues. Like popular constitutionalism, it opposes judicial supremacy. However, unlike popular constitutionalism, it does not fear any form of institutional supremacy, and trusts the legislature with the final word on constitutional issues.[140]

Legislative constitutionalism differs from what is often labeled legislative supremacy in that the latter, unlike the former, denies the desirability (and possibly the legitimacy) of a supreme constitution.[141] Under legislative constitutionalism, the Constitution

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[139] Kramer attributes this view to Madison. See Kramer, *supra* note 132 at 749.

[140] *See* Mark Tushnet, *Weak-Form Judicial Review: Its Implications for Legislatures*, 2 N.Z. J. PUB. & INT'L L. 7, 10 (2004) ("Committing the protection of constitutional values to elected representatives is, in the familiar phrase, like setting the fox to guard the chicken coop. And yet, weak-form judicial review does just that – or, at least, it relies on the fox to guard the chickens effectively most of the time").

[141] See, e.g., P.C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version* 18 U. MICH. J. OF LAW REF. 51, 68 (1984) (favoring "a regime limited by a number of constituent moral principles" that are spelled out "in a document designed to be enforced by the courts" but at the same time objecting to judicial supremacy and supporting a "partnership between court and legislature" (at 84)); Tushnet, *supra* note 112 at 279 (establishing that rather than a return to legislative supremacy, the Canadian model of judicial review with legislative override "reconciled the existence of entrenched rights with the tradition of parliamentary supremacy"; Goldsworthy, *supra* note 122 at 577 (2003) (noting that "[r]ecently, Canada and Britain have adopted 'hybrid' models, which allocate much greater

is indeed supreme and the legislature ought to comply with its dictates. Legislatures however can (or ought to) be trusted (always or at least sometimes) to interpret the Constitution and develop it. As Stephen Gardbaum put it, systems of legislative constitutionalism "decouple judicial review from judicial supremacy" by "granting courts the power to protect rights" yet "empowering legislatures to have the final word."[142] Popular constitutionalists can only envy the success of legislative constitutionalism. Legislative constitutionalism has gained great international popularity. Among other countries, Canada, the United Kingdom, and, to some extent, New Zealand have experimented with systems that can be understood as forms of legislative constitutionalism.

Canada is perhaps the clearest and the most developed example of legislative constitutionalism. Section 33 of the Canadian *Charter of Rights and Freedoms* empowers governments to temporarily override the rights and freedoms in sections 2 and 7–15 for up to five years, with the possibility of renewal.[143] To use this

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responsibility for protecting rights to courts, without altogether abandoning the principle of parliamentary sovereignty").

[142] Garbduam, *supra* note 108 at 709.

[143] S. 33 of the Canadian Charter of Rights and Freedoms reads:

Exception where express declaration

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

Operation of exception

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

Five year limitation

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

Re-enactment

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

Five year limitation

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

S. 33 can be applied to fundamental freedoms (s.2), including freedom of religion and conscience, freedom of expression and assembly and freedom of

power, the legislature must expressly declare that the legislation shall apply notwithstanding the relevant Charter provisions. Thus, if a legislature is determined to enact a law that violates some of the most fundamental Charter-protected rights, it may do so.[144] It is perhaps worthwhile to add that despite the natural temptation this power offers, it has rarely been invoked by Canadian legislatures.[145]

The language of section 33 allows legislatures to use the "notwithstanding" mechanism in advance for any reason, including its own "majoritarian or representational values"[146] and "utility maximization."[147] In this respect it could be argued that section 33 entrenches legislative supremacy rather than legislative constitutionalism. However, most Canadian constitutional scholars agree that this would be a bad practice on the part of the legislature and that it is only appropriate for legislatures to invoke section 33 in order to interpret and enforce certain rights in cases of constitutional disagreement between the courts and the legislature.[148] This is what

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association; legal rights (ss. 7-14), and equality rights (s. 15). In contrast, s. 33 cannot be invoked with respect to democratic rights (ss. 3-5), mobility rights (s. 6), rights regarding the official languages of Canada (ss. 16-22), minority language education rights, minority language education rights (s. 23), or gender equality rights (s. 28).

[144] For an elaboration of the reasons for the enactment of this provision, see H. Leeson, *Section 33, the Notwithstanding Clause: A Paper Tiger* 6:4 CHOICES 1 at 6-14 (2000). Leeson establishes that section 33 was enacted because no consensus regarding the constitutional protection of rights existed when the Charter was adopted. It was a political compromise, between those who supported a full-fledged constitution with judicial supremacy and those who did not want a constitution at all. The compromise was to have a judicially-enforced bill of rights, but to allow the legislature the final word.

[145] See Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter* 44 CAN. PUB. ADMIN. 255 (2001)

[146] See Weinrib, *supra* note 122 at 568.

[147] *Id* at 567.

[148] See, e.g., Manfredi, *supra* note 108 at 191 (asserting that section 33 should not be used "to override rights per se, but to override the judicial interpretation of what constitutes a reasonable balance between rights" since "the value of section 33 … lies in the power it confers on legislatures to re-assert democratic judgment against judicial will"; Kent Roach, *Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures* 80 CAN. BAR. REV. 481 at 525

suggests that the Canadian system is a genuine system of legislative constitutionalism; it is based on the understanding that section 33 grants legislatures the power not to violate the Constitution but to interpret it in a way that is different from the courts' interpretation.

To better understand legislative constitutionalism, it is valuable to look at the rationales provided by Canadian constitutional theorists for section 33. The most popular justification for section 33 speaks of a division of labor between courts and legislatures. The terminology used to describe this division of labor often uses terms such as "partnership,"[149] "dialogue,"[150] "conversation,"[151] and even "checks" or monitoring of judicial performance,[152] but the idea referred to by all of these different terms is clear. Judicial review, it is said, does not entail judicial supremacy. The best way to protect rights and to enforce the Constitution is through facilitating a joint venture between courts and legislatures. As Paul Weiler put it:

> The premise of the Charter is that the optimal arrangement for Canada is a new partnership between court and legislature. Under this approach judges will be on the front lines; they will possess both the responsibility and the legal clout necessary to tackle "rights" issues as they regularly arise. At the same time, however, the Charter reserves for the legislature a final say to be used sparingly in the exceptional case where the judiciary has gone awry.[153]

(2001) (arguing that use of section 33 signals "parliament's disagreement with how the Court interpreted the relevant rights").

[149] Weiler, in the text accompanying *infra* note 153.

[150] Weinrib *supra* note 122 at 564-65 (asserting that section 33 creates "a complex partnership through institutional dialogue").

[151] See Janet Hiebert, *Why Must a Bill of Rights be a Contest of Political and Judicial Wills* 10 PUBLIC L. REV. 22, 31-34 (1999).

[152] See F.L. Morton, *The Political Impact of the Canadian Charter of Rights and Freedoms* 20 CAN. J. POL. SCI. 31, 54 (1987) (maintaining that "[j]ust as judicial review serves as a check on a certain kind of legislative mistake, so 'legislative review' serves as a check on judicial error").

[153] P.C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version* 18 U. MICH. J. OF LAW REF. 51 at 84 (1984).

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

Democratic constitutionalism is hailed by its advocates on both instrumentalist grounds and, more importantly, on grounds of legitimacy. Democratic constitutionalists assert that democratic constitutionalism is superior on instrumentalist grounds since the interpretations of the courts are not necessarily superior in any way to those rendered by other institutions.[154] They also believe that democratic input is essential for legitimacy reasons.[155]

Our arguments in section II raise serious doubts concerning the persistent ambitions of constitutional theorists to develop instrumentalist justification for their institutions. The lessons drawn from that discussion are also applicable to democratic constitutionalists. However, our primary target here is not the instrumentalist arguments for democratic constitutionalism but the arguments of legitimacy. Democratic constitutionalists believe that popular or legislative input in interpreting the Constitution is necessary for, or at least conducive to, legitimacy. Judicial review, or at least certain forms of judicial review, deprives the people of powers to which they are entitled, namely, the power to interpret the Constitution, or, at least, to participate in its interpretation. Is not such participation essential to citizenship?[156] Does it not follow from genuine respect towards citizens' power of reasoning?[157]

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[154] See Tushnet, *WEAK COURTS*, *supra* note 4 at x ("[T]he courts' determinations of what the constitution means are frequently simultaneously reasonable ones and ones with which other reasonable people could disagree. This is especially true when the courts interpret the relatively abstract statements of principle contained in bills of rights").

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

[156] See Waldron, *supra* note 17 at 1391-2 (asserting that "[l]egislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decision-making" and that "the Supreme Court Justices … do not represent anybody").

[157] See Waldron, *supra* note 17 at 1353 ("By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary

Opponents of democratic constitutionalism have challenged this view on the grounds that democratic constitutionalism may deprive individuals of their rights and such a deprivation also bears on legitimacy.[158] After all, as some opponents of democratic constitutionalism have pointed out, democratic constitutionalism seems particularly appealing when the people or the legislature makes the right decisions. It seems slightly less appealing when the democratic input is fundamentally misguided.[159] On the other hand, democratic constitutionalists have been quick to point out the mixed record of the judiciary in protecting rights and those, as section II has established, are regrettably as monumental as the failures of the people or of the legislatures.[160]

The answer to democratic constitutionalists cannot rest therefore on the claim that courts are better protectors of rights. It can however rest on the right to a hearing. While courts may fail to protect rights, they cannot fail in protecting the right to a hearing.[161] People may be deprived of their rights because of wrongful judicial decisions, but to the extent that courts operate in a judicial manner, individuals' right to a hearing is always respected in courts. Under a system of judicial review, individual grievances trigger a process of examination, deliberation, and reconsideration. In practice, this may often amount to little for those whose rights are ultimately violated, but it is a necessary feature of a rights-respecting society.

Perhaps democratic constitutionalists could argue that democratic constitutionalism does not deprive individuals of the right

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citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights").

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

[159] L. A. Powe, Jr., *Book Review Essay: Are "The People" Missing in Action (and Should Anyone Care?* 83 TEX. L. REV. 855 (2005) (arguing that: "Omitting Reconstruction and the Trail of Tears, plus all of the modern examples, offers evidence that Kramer sees popular constitutionalism only when he approves of the cause. Or else it reinforces the view that popular constitutionalism in Kramer's hands is so slippery that only he can successfully apply it").

[160] *Supra note* 34.

[161] See section IIIC.

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

The first claim has been discussed in section III. Section III has argued that the right to a hearing must involve a particularized reconsideration of the initial decision giving rise to the grievance. We have stated there that moral deliberation must be conducted in a way that is sensitive to the particular claims and circumstances of the case giving rise to the grievance. We have also argued that such a particularized reconsideration is one that characterizes courts. To the extent that it is provided by other institutions, those institutions operate in a judicial manner.[162] But democratic constitutionalists do not want to turn the legislature or the people into a court. Instead, they wish to maintain their non-judicial character and yet grant them constitutional powers. It is precisely their popular non-judicial traits that make them particularly suitable to engage in constitutional interpretation.[163] It follows therefore that democratic or legislative input cannot count as adequate to satisfy the conditions of the right to a hearing.

But, as we have shown above, democratic constitutionalists are at pains to emphasize that they do not wish to exclude the judiciary from participating in constitutional decision-making. Kramer, for instance, believes that judges ought to take part in

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[162] See section IIIC.

[163] See, e.g., JANET HIEBERT, CHARTER CONFLICTS: WHAT IS PARLIAMENT'S ROLE 53 (2002) (maintaining that it is precisely because court and the legislatures have "different vantage points," that they both "have valid insights into how legislative objectives should reflect and respect the Charter's normative values").

popular constitutionalism.[164] Tushnet also greatly values judicial participation in constitutional interpretation.[165] Canadian legislative constitutionalists often maintain that courts must give their decision before the legislature can override it and that the courts' opinions ought to be consulted seriously by the legislature.[166] Could such a judicial input count as a hearing?

To establish the claim that democratic constitutionalism fails to satisfy the third condition, think of the promisor in our example above.[167] The promisor explains his decision to attend a memorial rather than have lunch with the promisee. Assume that our promisor is willing to engage in a moral deliberation. He is providing the promisee with an opportunity to challenge his decision. He is also willing to engage in moral deliberation. But, at the end of the day, he delegates the final decision to a friend of his. He instructs the friend to take seriously the deliberation but he also instructs him not to take this deliberation as binding. It seems evident that such a promisor breaches the duty to provide a hearing. A genuine hearing requires a principled commitment to reconsider one's decision in light and only in light of the moral deliberation. This is not because the commitment to reconsider necessarily generates a better decision on the part of the promisor. We can assume that the reconsideration does not increase the likelihood that the "right" decision will be rendered. Delegating the final decision to a friend seems to violate the duty to reconsider the case even if that friend is a reliable moral observer.

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[164] Kramer, *supra* note 4 at 252: "The potential usefulness of the judiciary in a separation-of-powers scheme is not difficult to comprehend, and politicians and ordinary citizens alike can and do appreciate that there are advantages in giving the Court some leeway to act as a check on politics").

[165] *See* Tushnet, *WEAK COURTS*, *supra* note 4 at 9 ("Judicial review still seems to be the best way to strike down a statute that is inconsistent with any reasonable interpretation of the Constitution's specification of fundamental rights. We might try to direct the courts to invalidate legislation only when it is truly unreasonable").

[166] See Hiebert, *supra* note 163 at 52 (emphasizing that "[t]he benefits of conceiving Charter judgment in relational terms arises from the responsibility each body incurs to respect Charter values, from the exposure to judgments made by those differently situated, and from the opportunity to reflect upon the merits of contrary opinion").

[167] See text accompanying note 96.

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

V CONCLUSION

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

Political theorists have pointed out that the institutional debate concerning judicial review hinges upon one's political inclinations. When courts are conservative and legislatures progressive, liberals are inclined to condemn judicial activism while conservatives are inclined to support courts; when courts are liberal the inclinations change accordingly.[168] Some people maintain that the disposition to condition one's views concerning the allocation of powers between courts and legislatures on their performance is wrong while others maintain that this is the right way (and indeed the

[168] See, e.g., Tushnet, *supra* note 87.

only way) to make institutional decisions. Under this view, institutional decisions concerning the division of labor between courts and the legislature ought to depend on the quality of the decisions rendered by these institutions.

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

This paper provided a rights-based analysis of judicial review. Yet the rights that are at stake are not substantive rights—rights that may often be better protected by legislatures, citizens, or perhaps moral philosophers. Instead, we suggested that judicial review is designed to protect the right to a hearing. We have said very little about the question of how this constitutional vision fits into existing doctrines of constitutional law. Our silence concerning this issue should not however be interpreted as conceding that no doctrinal support for this view can be provided. It is a basic principle of American constitutional law entrenched in Article III of the Constitution that in order to trigger judicial review of legislation, there must be an actual individual that is affected by the impugned legislation. Differentiating between the person who is affected and not affected is of course the subject of much constitutional doctrine. The Constitution limits the judicial power to "cases" and "controversies."[169] This paper can perhaps be regarded as an attempt to explore the rationale behind this famous requirement of Article III.

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[169] The first part of Art. III, s. 2, reads: "The judicial power shall extend to all *cases*, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all *cases* affecting ambassadors, other public ministers and consuls; to all *cases* of admiralty and maritime jurisdiction; to *controversies* to which the United States shall be a party."