THE EASY CORE CASE FOR JUDICIAL REVIEW[1]

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ABSTRACT

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

In searching for a non-instrumental justification, we establish that judicial review is designed to protect the right to a hearing. The right to a hearing consists of three components: the opportunity to voice a grievance, the opportunity to be provided with a justification for a decision that impinges (or may have impinged) on one's rights, and the duty to reconsider the initial decision giving rise to the grievance. The right to a hearing is valued independently of the merits of the decisions generated by the judicial process.

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. [4] 1

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4 Bickel 1986, 16.

1. INTRODUCTION

2 Constitutional theory has been obsessed for many years with an attempt to provide an adequate justification for judicial review. This paper joins the search for a rationale for judicial review. It also wishes to defend judicial review against the recent numerous rising voices that either wish to abolish judicial review altogether or to limit or minimize its scope.[5] 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.

3 The critical flaw of the debate concerning judicial review is the conviction that judicial review must be *instrumentally* justified, i.e., that it be grounded in *contingent* desirable features of the judicial process (for example, the superior quality of decisions rendered by judges, the superior ability of judges to protect rights, the special deliberative powers of judges, the greater stability and coherence of legal decisions, and so on).[6] 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.[7] More particularly, we argue that judicial review is indispensable because it grants individuals opportunities to challenge decisions that impinge (or may have impinged) on their rights, to engage in reasoned deliberation concerning these decisions, and to benefit from a reconsideration of these decisions in light of this deliberation. Under this view, judicial review is intrinsically rather than instrumentally desirable; its value is grounded in procedural features that are essential characteristics of judicial institutions per se. The right to a hearing as understood in this

5 The most influential recent contributions include Waldron (1999); Tushnet (1999, 2008b); Kramer (2004); Vermeule (2009).

6 Very few of the constitutional theorists examine or even mention non-instrumentalist concerns. Even when these concerns are mentioned they are typically dismissed. Adrian Vermeule maintains that: "In principle, these consequentialist premises exclude a domain of (wholly or partially) nonconsequentialist approaches to interpretation. It turns out, however, that this is not a very large loss of generality, because few people hold views of that sort. Interpretative consequentialism is an extremely broad rubric" (Vermeule 2006, 6).

7 This idea was first introduced in an earlier paper written by one of us (Eylon & Harel 2006) and is developed here.

paper is grounded in the fundamental duty of the state to consult its citizens on matters of rights, and in particular to consult those whose rights may be affected.

4 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 (Fallon 2008; Waldron 2006). 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. More specifically, the right to a hearing can only justify a minimalist, i.e., case-specific judicial review. In conjunction with other considerations, the case for a minimalist case-specific judicial review provides the foundations for a full-fledged justification of judicial supremacy. It is also an easy case because, in contrast to instrumental justifications for judicial review, it does not require establishing complex empirical assertions such as the claim that courts render better decisions or the claim that courts' decisions are more protective of democracy, rights, or stability and coherence. Establishing the easy case for judicial review requires merely establishing that courts are faithful to the values embodied in the adjudicative process. It is the adjudicative process itself and not any complex contingent consequences of this process that are sufficient to justify judicial review.

5 This paper develops and generalizes earlier arguments made by one of us. In an earlier article one of us contrasted the watchdog model with the right-to-a-hearing model and defended the latter (Eylon & Harel 2006). According to the watchdog conception of judicial review, the function of judicial review is to guard against the legislature's inclination to overstep the bounds of authority (Eylon & Harel 2006, 994). This article establishes that the watchdog model is only one among a family of theories—instrumentalist theories—which maintain that judicial review is desirable because of its contingent desirable outcomes. This article contrasts therefore not two theories of judicial review (the watchdog model and the right-to-a-hearing model) but two types or families of theories of judicial review: instrumentalist and non-instrumentalist. It demonstrates that the more traditional and established existing theories purporting to justify judicial review are instrumentalist theories and that their failure should be attributed to the instrumentalist approach. Finally, it shows that the right to a hearing justification is a non-instrumentalist justification. The judicial

process is not an instrument designed to protect the right to a hearing or to "maximize" the amount of hearing. Instead, we maintain that the right to a hearing is constitutive of the judicial process; the judicial process is in reality a realization or manifestation of the right to a hearing. Hence, the case for judicial review does not depend on judicial review being an efficient instrument in guarding democracy, rights, or indeed, even in protecting the right to a hearing itself. Consequently, in contrast to previous (instrumental) justifications of judicial review, the soundness of the right-to-a-hearing model of judicial review does not hinge on complex (and dubious) empirical conjectures.

6 Section 2 of the Article explores five popular arguments favoring judicial review. It establishes that these arguments are instrumentalist and that their instrumentalist nature exposes them to powerful objections. Section 3 argues that individuals have a right to raise their grievances in front of judicial (or quasi-judicial) bodies, and that these bodies also ought to have the power to make authoritative judgments. This "right to a hearing" or "right to raise a grievance" ought to be respected independently of the instrumental contributions that judicial review makes (or may make) to other values of democratic or liberal societies.

2. THE INSTRUMENTALIST JUSTIFICATIONS FOR JUDICIAL REVIEW

7 This section establishes that the prominent theories purporting to justify judicial review are instrumentalist and that these theories fail for this reason. Before we present the instrumentalist justifications, let us first describe what we mean by judicial review and the general structure of instrumentalist justifications for judicial review.

8 Judicial review, as understood here, consists of the following two components: (1) Courts have the power to make binding decisions concerning the constitutional validity of statutes that apply to individual cases brought before them and these decisions ought to be respected by all other branches of government. (2) No branch of government has the power to immunize its operation from judicial scrutiny.[8] Our analysis implies that

8 Hence the new constitutional schemes under which the legislature can protect statutes from judicial intervention e.g., the Canadian Notwithstanding Clause, are incompatible with judicial review as understood here.

courts are not "equal partners" in the enterprise of constitutional interpretation, but instead that they have a privileged role in constitutional interpretation.[9]

9 Under instrumentalist theories, judicial review is justified to the extent that it is likely to bring about *contingent* desirable consequences. While there are important differences among 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.

10 To establish the dominance of instrumentalist theories, let us briefly survey five influential theories purporting to justify judicial review: rights-based theories, democracy-enhancement theories, the settlement theory of judicial review, the dualist democracy argument, and institutionalist instrumentalism. Each one of these theories characterizes differently the constitutional goals. Yet, once the constitutional goals are identified, each one of the theories justifies judicial review on the grounds that it is the best institutional means of realizing the constitutional goal.

9 Our claim, however, does not directly justify judicial supremacy. Judicial supremacy as opposed to judicial review includes a third component, namely the claim that courts do not merely resolve particular disputes involving the litigants directly before it. They also authoritatively interpret constitutional meaning. Judicial supremacy requires deference by other government officials to the constitutional dictates of the courts not only with respect to the particular case but also with respect to the validity of the legal norms. For a definition of judicial supremacy, *see* Whittington (2007, 7). At the same time, we provide some arguments why the conclusions of this paper, in conjunction with some additional common sense conjectures, support judicial supremacy.

11 *Rights-based theories* maintain that judicial review is justified in order to guarantee an efficacious protection of rights (Harel 2003). Many theorists believe that judges are superior to other officials in their ability to identify the scope of rights and assign them the proper weight. Some theorists believe that the superiority of judges is attributable to their expertise; judges, under this view, form a class of experts on rights (Black 1997, 125). Others believe that judicial review can be justified on the basis of the nature of the judicial process, and the relative detachment and independence of judges from political constraints (Fiss 1979, 12–13; Fiss 1985, 43; Perry 1982, 102; Sager 2004, 199). 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 would violate individual rights (Abraham 1998, 371). This view is perhaps the most popular and well entrenched in American legal thought.[10]

12 *Democracy-enhancing theories* argue that the Constitution is designed to protect the representative nature of government. The most influential advocate of this view—John Hart Ely—maintains that 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…" (Ely 1980, 74). The Constitution, in Ely's view, is essentially a procedural document, and the goals of the Constitution and those of the institutional structures designed to protect the Constitution should favor a "participation-oriented representation reinforcing approach to judicial review" (Ely 1980, 87). Judicial review is justified to the extent that it serves the purpose of enhancing participation.[11]

10 It has most famously been argued by Alexander Hamilton. *See The Federalist* No. 78 (Hamilton 1891, 544–45). Jeremy Waldron also expressed the view that "the concern most commonly expressed is that legislative procedures….[are] endemically and constitutionally in danger of encroaching upon the rights of individuals or minorities" (Waldron 1999, 11).

11 Despite major differences, it is easy to detect the structural similarity between traditional rights-based theories 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 of decisions. 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 and enhancing popular participation. 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" (Dworkin 1996, 349).

13 *Settlement theories* of judicial review maintain that judicial supremacy is justified on the grounds that it is conducive to settlement, coordination, and stability (Alexander & Schauer 1997, 1359; Alexander & Schauer 2000, 455).[12] Alexander and Schauer—the most influential contemporary advocates of settlement theories—suggest that authoritative settlement of disagreements is sometimes desirable, even when the settlement is suboptimal. In their view:

> [O]ne of the chief functions of law in general, and constitutional law in particular, is to provide a degree of coordinated settlement for settlement's sake of what is to be done. In a world of moral and political disagreement law can often provide a settlement of these disagreements, a settlement neither final nor conclusive, but nevertheless authoritative and thus providing for those in first-order 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 (Alexander & Schauer 2000, 467).

14 Alexander and Schauer believe that courts in general and the Supreme Court in particular are better capable of maintaining stability and achieving settlement than other institutions, e.g., the legislature.[13]

15 The *"dualist democracy"* position advocated by Bruce Ackerman distinguishes between two different types of decisions: Decisions made by the American people and decisions made by their governments (Ackerman 1991, 6). The American Constitution is designed to protect the first type of decisions—decisions of "We the People" from being eroded by the second type—decisions of "We the Politicians."

16 The rare periods in which supreme law is being formed by the American people are labeled by Ackerman as periods of "constitutional politics." In contrast, in periods of "normal politics" decisions made by the government occur daily, are made primarily by politicians, and are undeserving of the status of higher law. The courts are assigned the task to preserve

12 This argument was first made by Daniel Webster (1830). More recently, the argument has been raised and rejected by Alexander Bickel, who maintains 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" (1986, 12).

13 In purporting to establish the Supreme Court's special virtues in realizing these goals, Alexander and 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 (2000, 477).

the dual structure. In Ackerman's view "*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" (2007, 1806–07).

17 *Institutionalist Instrumentalism* aims at providing a more coherent and scientific instrumentalist theory. Institutionalists raise many concerns with respect to the four instrumentalist theories described above, in particular with respect to the question of whether judicial review is indeed instrumental in realizing the constitutional goals set by constitutional theorists (Elhauge 1991). Yet institutionalists such as Einer Elhauge, Neil Komesar, and Adrian Vermeule share with other instrumentalists the belief that constitutional design is ultimately an instrument used to achieve desirable social goals. 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)" (Komesar 1994, 254).

18 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" (Vermeule 2006, 5). Rule consequentialism requires the theorist to look not at any particular decision that courts or legislatures are likely to generate but at the broader and more foundational institutional characteristics of courts and legislatures. In Vermuele's view, the relevant variables for determining the powers of judicial institutions are highly complex, and include "the agency costs and the costs of uncertainty, systemic effects (especially a form of moral hazard), the optimal rate of constitutional updating, and the transition costs of switching from one regime to another" (2006, 5).

19 We have surveyed five influential theories purporting to justify judicial review. All of these theories are instrumentalist theories; they are all based on a conjunction of two claims: (1) the Constitution is designed to realize certain goals (to protect rights, to enhance democracy, to guarantee stability and coherence, to protect constitutional politics or, more generally, to bring about the best consequences overall. (2) Judicial review is desirable only to the extent that it succeeds in realizing the constitutional goals.

20 We believe that this instrumentalist structure is responsible for the failure of these theories. Instrumentalist theories are misguided for three reasons. First, we are skeptical as to whether instrumentalists can in fact make

reliable assertions concerning the likely performance of courts versus legislatures or other institutions. Second, even if instrumentalist advocates of judicial review establish that courts are better in protecting constitutional rights or other constitutional values, it hardly follows that courts ought to be granted review powers. Participatory concerns are very likely to override or even annul the relevance of the concerns for a better decision-making process. Third, instrumentalist arguments in general and institutionalist arguments in particular misconstrue the debate concerning judicial review; they conceptualize it as a technocratic debate about the likely quality of decision-making or other consequences of different forms of institutional design. But the real debate is a debate about political and moral institutional legitimacy. It is not about whether judicial review is efficient, stable, or effective in protecting substantive rights, but about what justifications citizens are entitled to when their rights or, what is perceived by them to be their rights, are at stake.

The first flaw of instrumentalist theories provides the basis for a standard objection on the part of opponents of judicial review. Many constitutional theorists point out the weaknesses in establishing that judicial review is conducive to the realization of the constitutional goals. Critics of rights-based justifications point out that judges are not necessarily or even typically the best protectors of rights (Komesar 1994, 256–261; Vermeule 2006, 243). As Vermeule argues, "Courts may not understand what justice requires, or may not be good at producing justice even when they understand it" (2006, 243). Historical evidence does not support the conjecture that courts are better protectors of rights, even in the context of classical rights such as freedom of speech (Rabban 1997, 131; Sadurski 2002, 278; Vermeule 2006, 231).[14] Similar objections have been raised with respect to Ely's defense of judicial review. Neil Komesar challenged Ely's conviction that

14 Using historical experience is dubious, however. Historical arguments fail to capture the complex interdependencies 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 superior quality of the legislature's decision-making by deterring legislatures from infringing individual rights (Abraham, 1998 371). 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 (Thayer 1893, 155–56). These possibilities only serve to illustrate the complexity of the considerations required for establishing rights-based arguments for or against judicial review.

courts are indeed necessary both to "clearing the channels for political change" and to "facilitate the representation of minorities" (Komesar 1994, 203). In his view Ely's analysis fails because it does not engage in *comparative* institutional analysis; it fails to compare the quality of decision-making of different institutional alternatives (Komesar 1994, 199). While Ely detects the imperfections of the legislature in making procedural decisions, he is mistaken to infer from these imperfections that courts should be assigned powers to make these decisions. Such a conclusion requires comparing the virtues and vices of courts and legislatures, while taking into account the complex interdependencies between these institutions and, as Komesar establishes, such a comparison does not necessarily favor courts over legislatures. Other theorists have questioned whether courts in general, and the Supreme Court in particular, are the institutions most capable of maintaining stability and reaching settlement (Whittington 2002, 794–96). 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?" (Vermeule 2006, 249). Another critic even asserts that "Court opinions can unsettle as well as settle the legal and constitutional environment" (Whittington 2002, 800). Finally no evidence has been provided by Ackerman to establish his conjecture that judges are more faithful to constitutional politics than legislatures.

22 A recent historical work by Tushnet supports this skepticism (Tushnet 2008a). 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. Reliable predictions concerning the performance of the courts can be made only with respect to certain historical or social circumstances. The optimal institutional design depends therefore on the particular contingencies of the relevant society. The ambition of constitutional theorists to design foundational institutional mechanisms independently of these contingencies indicates that non-instrumentalist considerations are at stake.

23 A second reason for the failure of instrumentalist theories is based on the observation that even if, contrary to our conjecture, instrumentalists

develop accounts that can reliably predict the performance of courts versus legislatures and allocate constitutional powers among these institutions accordingly, it does not follow that courts ought to exercise review powers. Jeremy Waldron distinguishes between outcome-related reasons and process-related reasons (Waldron, 2006 1346). The alleged superior performance of courts is an "outcome-related reason" supporting judicial review. Yet, in addition to disputing the premises underlying this outcome-related argument, Waldron also maintains that courts are inferior to legislatures for process-related reasons since while "legislators are regularly accountable to their constituents and they behave as though their electoral credentials were important…[n]one of this is true of Justices"(2006, 1391). The mere fact that moral philosophers may perhaps be even better than both legislators *and* Justices in protecting rights does not justify granting moral philosophers review powers over legislation. It is difficult to see why the alleged superiority of Justices in rendering decisions justifies granting them these very same powers.

Furthermore, instrumentalist accounts misconstrue the essence of the 24
debate concerning judicial review. This controversy 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. The institution in charge of making constitutional decisions is the institution that is more likely to get it right (Vermeule 2006, 5). Thus, the debate between advocates and foes of judicial review is perceived to be a technocratic debate about the quality of the performance of the different institutions.

Yet, it is difficult to believe that this grand and perennial debate about the 25
constitutional powers of the Court is a technocratic debate resembling perhaps the debates concerning the institutional powers of agencies. The judicial review debate is conducted by political philosophers, constitutional lawyers, and citizens. While some of the arguments raised by the participants are instrumentalist, the spirit of the debate and the range of participants indicate that the debate concerning judicial review and its optimal scope cannot reasonably be construed as a technocratic debate concerning the likely consequences of different systems of constitutional design. The debate is not about institutional competence but about political morality and institutional legitimacy. The flaw in institutionalism is simply its failure to comprehend

the foundations of the controversy and its insistence on instrumentalizing a question that ought not to be instrumentalized.[15] Section 3 will attempt to defend judicial review on non-instrumentalist grounds.

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

3.1. Introduction

26 Section 2 demonstrated the inadequacy of instrumentalist justifications for judicial review. Our main aim in this section is to establish a non-instrumentalist justification for judicial review. What is distinctive about courts is not the special wisdom of judicial decisions or other special desirable contingent consequences that follow from judicial decisions, but the procedures and the mode of deliberation that characterize courts. These procedures are intrinsically valuable independently of the quality of decisions rendered by courts because these procedures are, in themselves, a realization of the right to a hearing.

27 Our argument proceeds in two parts. Subsection 3.2 discusses the right to a hearing and establishes its importance. It argues that protecting rights presupposes the protection of the opportunity to challenge what is considered (by the rightholder) to be their violation. Subsection 3.3 establishes that the right to a hearing is embedded in the procedures of the legal process, and that judicial review or quasi-judicial review is the only manner in which the right to a hearing can (as a conceptual matter) be protected. Judicial review is not a means for protecting the right to a hearing; it is, in reality, its institutional embodiment.

3.2. The Right to a Hearing

28 Our proposal rests upon the view that judicial review is designed to facilitate the voicing of grievances by protecting 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

15 Institutionalists could argue that their analysis also explains the relevance of political morality. After all, as institutionalists concede, to establish the superiority of one institution over another, one must first identify the goals that the institution is designed to achieve (Vermeule 2006, 83–85). Yet, even under this concession, there is a substantial component of the controversy that is technocratic, namely identifying the institution that is most capable of realizing the constitutional goals.

impinges (or may impinge) on one's rights, and the duty to reconsider the initial decision giving rise to the grievance (Eylon & Harel 2006, 1002). The right to a hearing is valued independently of the merit of the decision likely to be generated at the end of this process.

When and why do individuals have a right to a hearing? The right to a hearing, we argue, depends on the rightholder's claim concerning the existence of an all-things-considered right that is subject to a challenge. The right to a hearing therefore presupposes a moral controversy concerning the existence of a prior right. There are two types of controversies that give rise to a right to a hearing.[16] The first is a controversy concerning the justifiability of an infringement of a right X. In such a case, the rightholder challenges the justifiabilit*y* of the infringement on the basis of the shared assumption that there is a (prima-facie) right and that there was an infringement of that right. Here, the right to a hearing is designed to provide the rightholder with an opportunity to establish that, contrary to the conjectures of the person who bears the duty to honor X, the infringement of X is unjustified. The second type of controversy occurs when there is a genuine dispute concerning the very existence of a prior right X. In this case, the rightholder challenges the claim that no right is being infringed. Here, the right to a hearing is designed to provide the rightholder with an opportunity to establish the existence of such a right. In both cases, we argue, the right to a hearing does not hinge on the soundness of the grievance of the rightholder. Even if the rightholder is wrong in her grievance, she is entitled to a hearing. Let us investigate and examine each one of these cases. 29

The first type of controversy occurs when the rightholder challenges the justifiability of an infringement of a right. A right is justifiably infringed when it is overridden by conflicting interests or rights.[17] If, in the course of walking to a lunch appointment, I have to stop to save a child and I consequently miss my appointment, the right of the person who expects to meet me is being (justifiably) infringed. 30

Infringements of rights can give rise to two distinct complaints on the part of the rightholder (Eylon & Harel 2006, 1002–03). One complaint is 31

16 In Eylon & Harel (2006) only one type of controversy was discussed. As we show below however there is a second type of dispute that also gives rise to a right to a hearing.

17 For the distinction between infringement and violation of rights, *see* Judith Thomson (1977, 50); Harel (2005, 198–199). For doubts concerning the soundness of the distinction between infringement and violation, *see* Oberdiek (2004, 325).

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

32 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 (Montague 1985, 368, emphasis added).[18]

33 The right to a hearing in cases of a dispute concerning the justifiability of an infringement hinges on the existence of a prior right that is being infringed (either justifiably or unjustifiably). There is thus an important link between individual rights and the derivative right, the right to a hearing. The existence of a prior independent right gives the rightholder a stake

18 *See also* Montague (1988, 350).

in that right, even when the right is justifiably overridden. The rightholder retains some power over the execution of the right even when the right is justifiably infringed. The right to a hearing is grounded in the fact that people occupy a special position with respect to their rights. Rights demarcate a boundary that has to be respected, a region in which the rightholder is a master. One's special relation to the right, i.e., one's dominion, does not vanish even when the right is justifiably overridden. When the infringement of the right is at stake, the question of whether it might be justifiable to infringe that right is not tantamount to the question of whether one should have dominion over the matter. A determination that the right has been justifiably infringed does not nullify the privileged position of the rightholder. Instead, his privileged position is made concrete by granting the rightholder a right to a hearing. Thus, infringing the right unilaterally is wrong even when the infringement itself is justified because the rightholder is not treated as someone who has a say in the matter.

34 What does the right to a hearing triggered by an infringement of a prior right consist of? In a previous work, one of us identified three components of the right to a hearing: an opportunity for the victim of infringement to voice her grievance (to be heard), the provision of an explanation to the victim of infringement that addresses her grievance, and a principled willingness to honor the right if it transpires that the infringement is unjustified (Eylon & Harel 2006, 1002–06).

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

36 The first component, namely the duty of the promisor to provide the promisee with an opportunity to challenge her decision, is self-explanatory. The second and the third components require further clarification. To understand the significance of the willingness to engage in meaningful moral deliberation, imagine the following: the promisor informs the promisee

that some time in the past, after thorough deliberation, she adopted a rule that in cases of conflicts between lunches and memorials, she always ought to attend the memorials. When challenged by the promisee, the promisor recites the arguments used in past deliberations without demonstrating that those arguments justify infringing this promise in the specific circumstances at hand, and without taking the present promisee into consideration in any way. Such behavior violates the promisor's duty to engage in meaningful moral deliberation.[19] 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.

37 Does this view entail that rules can never be used in addressing a rights-based grievance? If so, does not this proposal undermine the very ability to use rules-based deliberation and thereby impose unrealistic burdens on decision-making? To address this objection another clarification is necessary. The concrete examination required by the promisor or any other duty-holder does not preclude the use of rules. The use of rules is sometimes necessary to identify the scope and weight of rights of individuals. Yet even in order to establish that rules of the type "memorials always override lunches" ought to guide the promisor, a concrete examination is necessary as in some cases the use of rules-based deliberation is impermissible (Harel & Sharon 2008). A concrete examination of the appropriateness of applying a rule in this case is always required. Sometimes the appropriate scope & depth of concrete examination is minimal and consequently it imposes little burdens on the decision-maker. At other times, the scope and depth required of the decision-maker is extensive.

19 The example is taken from Eylon & Harel 2006, 1002–03.

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

39 So far we have examined the right to a hearing in the first type of controversy about rights, namely controversies concerning whether a given *infringement* of a right is justified. Let us turn our attention to a second type of controversy; namely, the case in which there is a genuine dispute concerning the existence of a right in the first place. To establish the existence of a right to a hearing in such a case, let us first establish the intuitive force of the claim by providing an example. We will later explore what principled justifications one can provide for the existence of a right to a hearing under such circumstances.

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

41 Unlike in the previous case, the dispute between Susan and John is not over whether the promise is justifiably overridden by unexpected circumstances but whether the conditions giving rise to the right were fulfilled to start with. John maintains that a mild sore throat is "a special reason making it particularly inconvenient for him" to take Susan to the airport and, consequently, he believes that Susan has no right whatsoever to be taken to the airport. Susan disagrees. She believes that a mild sore throat is not "a special reason making it particularly inconvenient" for John to take her to the airport and, consequently, that she has a right to be taken 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.

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

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

44 If there is a right to a hearing in such a case, it must be grounded in the special status of rightholders. Arguably, rightholders ought to have the opportunity of establishing their conviction that they are indeed owed a particular right. Depriving them of such an opportunity (even in cases in which they wrongly maintain they have a right) is unfair because such a deprivation fails to respect them as potential rightholders. Under this argument, precisely as a prima facie right that is justifiably infringed leaves its

fingerprint (or moral residue) in the form of a right to a hearing, so too a dispute concerning the existence of a right leaves a fingerprint in the form of a right to hearing even when, after further inquiry, one can conclude that the "right" giving rise to the dispute never existed in the first place.

45 Common sense intuitions underlying the discourse of rights provide additional support to the view that rights are conceptually intertwined with a right to a hearing. Theories of rights have been obsessed with an attempt to explain the special status of rightholders and in particular the intuition that rightholders have some control over rights. The idea of control is central to "choice theories" of rights—theories that maintain that rights are protected choices (Hart 1982, 182). Most significantly, according to choice theorists, rightholders have powers to waive the duties owed to them, leave the rights-based duty unenforced, or waive the right to compensation in cases of a violation. Yet the ways in which choice theorists understand the role of rightholders has been subjected to powerful criticisms (Harel 2005). Our proposal can provide an alternative way of understanding what the control of rightholders consists of. Under this view, control of rightholders (or purported rightholders) grants rightholders an opportunity to participate in rights-based reasoning or deliberation. This conjecture concerning the conceptual relation between the discourse of rights and the right to a hearing is speculative. It serves, however, to bolster the case established independently by our earlier discussion.

46 Arguably it seems that the right to a hearing cannot apply in any case of a moral dispute concerning rights. Under this objection it seems that our claim is too demanding as individuals can trigger the right to a hearing for no reason whatsoever simply by asserting that they have a right. A person who crazily believes that each time I have breakfast I violate her rights would be entitled to a hearing. The right to a hearing—if it is to retain any plausibility—must be granted more selectively, e.g., the right must be granted only to those who raise reasonable or plausible claims of rights.[20]

47 We disagree and maintain that the right to a hearing ought to be granted in any case of a dispute. Admittedly the scope and depth of satisfactory hearing could differ from one case to another. In the case of crazy demands, a simple shrug of the shoulders could constitute a satisfactory hearing. Yet what is distinctive about the discourse of rights is that grievances concerning their real or imagined violation give rise to a hearing. The scope and

20 We are grateful to David Enoch for raising this objection.

depth of the hearing differs in accordance with the nature of the grievance and its reasonableness.

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

49 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 (1978, 503).

50 The contours of our position favoring judicial review can now be discerned more clearly. There are two types of cases that, under our view, justify judicial review of legislation. First, when a person has a right and that right is (justifiably or unjustifiably) infringed by the legislature, that person is owed a right to a hearing. Second, when there is a dispute over whether a person has a right and the legislature passes a statute that, arguably, violates the disputed right, the individual is owed a right to a hearing.[21] In both cases, the right to a hearing consists of a duty on the part of the state to provide the rightholder an opportunity to challenge the infringement, willingness on the part of the state to engage in moral deliberation and provide an explanation, and a willingness to reconsider the presumed violation in

21 The distinction between these two types of cases is familiar to foreign constitutional lawyers. Both Canadian and South African constitutional law distinguishes sharply between two stages of constitutional scrutiny analogous to the ones discussed here. For the Canadian discussion of this issue *see*, e.g., Hogg 1985, 808. For the South African legal situation, *see* Cheadle, Davis, & Haysom 2002, 696.

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.

51 The right to a hearing is not designed to improve decision-making. We are not even committed to the view that granting a right to a hearing is more likely to generate superior decisions. The soundness of the right-to-a-hearing conception of judicial review does not depend on establishing that judicial review is more congenial to the protection of the rights than alternative systems, or that granting the right to a hearing better protects democracy, stability, the dual-democracy structure, or even that it serves to maximize the hearing given to grievances. This is precisely what makes this position immune to the objections raised against instrumentalist views. The only virtue of judicial review is the fact that it constitutes the hearing owed to citizens as a matter of right.

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

3.3. The Right to a Hearing and the Judicial Process

53 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 (justifiably or unjustifiably). It is time to explore the exact relationship

between a right to a hearing and judicial review. In what ways, if any, can a right to a hearing provide a justification for judicial review? Can we not entrench procedures of "legislative review" or non-judicial review that will be superior or, at least, adequate in protecting the right to a hearing? This possibility can be regarded as a challenge to the fundamental distinction drawn earlier in this paper between instrumentalist and non-instrumentalist justifications for judicial review. Under this objection, the attempt to replace instrumentalist justifications for judicial review founded on extrinsic goals (such as protecting rights or participation, or maintaining stability and coherence) with non-instrumentalist justifications (based on the right to a hearing) fails because there is nothing intrinsically judicial in the procedures designed to protect a right to a hearing. Put differently, under this objection the institutional scheme designed to protect the right to a hearing could itself be conceptualized as instrumentalist. Such an instrumentalist approach to the right to a hearing would maintain that the Constitution is designed to protect or promote hearing and that the institution which ought to be assigned with the task of reviewing statutes should be an institution that facilitates or maximizes respect for the right to a hearing. Arguably, even if such an institution happens in our system to be a court, it does not *necessarily* have to be a court. Thus, judicial review is always subject to the instrumentalist challenge that it is not the best institutional mechanism to facilitate a hearing. According to this objection, there is no fundamental structural difference between the instrumentalist justifications described and criticized in Section 2 (maintaining that judicial review is designed to protect substantive rights, democracy, or stability) and the right-to-a-hearing justification for judicial review (maintaining that judicial review is designed to protect the right to a hearing, or maximize the hearing of grievances, etc).

54 To establish our claim that the right to a hearing provides a non-instrumentalist justification for judicial review, we need to establish that judicial procedures are not merely an instrument to providing a hearing. In fact these procedures *constitute* a hearing. There is a special affinity between judicial deliberation and the right to a hearing such that establishing judicial procedures is tantamount to protecting the right to a hearing. To defend this claim, we shall show that (a) courts are specially designed to conduct a hearing, and (b) to the extent that other institutions can conduct a hearing, it is only because they operate in a judicial manner. Operating in a judicial manner is (as a matter of conceptual truth) a form of honoring the right to

a hearing. If these observations are correct, the right to a hearing theory of judicial review differs fundamentally from other theories of judicial review as its soundness does not hinge upon empirical conjectures.

55 The first task, i.e., establishing that courts are specially suited to facilitate a hearing, requires looking at the procedures that characterize courts. It seems uncontroversial (to the extent that anything can be uncontroversial) that courts are designed to investigate individual grievances. This is not a feature that is unique to constitutional litigation. It characterizes both criminal and civil litigation, and it is widely regarded as a characteristic feature of the judicial process as such (Bickel 1986, 173; Horowitz 1982, 131; Fallon 1994, 958). The judicial way of assessing individual grievances comprises three components. First, the judicial process provides an opportunity for an individual to form a grievance and challenge a decision.[22] 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.[23] Last, the judicial process involves, ideally at least, a genuine reconsideration of the decision giving rise to a challenge, which may ultimately lead to an overriding of the initial decision giving rise to the grievance (Wechsler 1959, 19; Burton 1992, 36–37). If the judicial review of legislation can be shown to be normatively grounded in these procedural features, it follows that courts are particularly appropriate in performing such a review.

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

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

22 This is of course implied by the Due Process Clause. *See Mullane v. Hanover Central Bank & Trust Co*. 339 U.S. 306, 313 (1950); *Boddie v. Connecticut* 401 U.S. 371, 377 (1971).

23 The duty to provide a reasoned response is an essential part of the judicial process (Shapiro, 1987 737; Fallon 1994, 966; Idleman 1995, 1309).

58 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. Thus, in principle, the right to a hearing can be protected by any institution, including perhaps the legislature.

59 Yet whatever institution performs this task, such an institution would inevitably use processes that are indistinguishable from those used by 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 an essential characteristic of the judicial process. Courts provide individuals an opportunity to challenge what individuals perceive as a violation of their rights; courts also engage in moral deliberation and provide an explanation for the alleged violation, and last, courts reconsider the presumed violation in light of the deliberation. Institutions that develop similar modes of operation—modes that are suitable for protecting the right to a hearing—thereby inevitably become institutions that operate in a judicial manner. The more effective institutions are in facilitating a hearing, the more these institutions resemble courts. The right-to-a-hearing justification for judicial review accounts not only for the need of establishing *some* institution designed to honor this right but also establishes the claim that *the* institution conducting a hearing operates in a court-like manner and that the procedures, modes of reasoning, and modes of operation of such an institution must resemble those of courts.

60 So far we have established that the right to a hearing justifies judicial review. However, we shall argue that this view may also support judicial supremacy. Judicial supremacy, as opposed to judicial review, maintains that courts do not merely resolve particular disputes involving the litigants directly before them, but also authoritatively interpret constitutional meaning.[24] Judicial supremacy therefore requires deference by other government officials to the constitutional dictates of the courts not only with respect to the particular case but also with respect to the validity of legal norms.

61 Arguably, it seems that the right-to-a-hearing justification for judicial review cannot justify judicial supremacy. At most, it can justify courts (or any other institutions designed to protect the right to a hearing) in making

24 *See* note 9.

particular and concrete decisions that apply to the case at hand. The right to a hearing merely dictates that *the persons whose rights may be at stake* will have an opportunity to raise their grievances, that they will be provided with an explanation that addresses *their* grievances, and that the alleged violation *in their cases* will be reconsidered in light of the hearing. But why should such a decision carry further normative force? Why should it set a precedent for other cases or carry any normative weight?

Strictly speaking, the right to a hearing can only justify courts in reconsidering concerns raised by a person whose rights may have been infringed and who wishes to challenge the alleged infringement. We can label a system that satisfies these conditions a system of "case specific review." The ancient Roman system is an example of such a system. Under the Roman system, the tribunes had the power to veto—that is, to forbid the act of any magistrate that bore unjustly upon any citizen—but not to invalidate the law on the basis of which the act was performed (Jolowicz & Nicholas, 1972, 12).[25] 62

However, it is easy to see the deficiencies of such a system. There are compelling reasons why decisions rendered in courts should have normative ramifications that extend beyond the case at hand. Glancing at the huge amount of literature concerning precedents provides us with a variety of such arguments. Considerations of certainty, predictability, coordination, etc., provide independent reasons for granting courts' decisions a broader and more extensive normative application (Postema 1987, 15). Compelling considerations support the conjecture that judicial decisions have normative repercussions that extend beyond the particular grievances considered by courts. The normative forces that such decisions carry may be controversial. But, it is evident that particular judicial decisions ought to have some normative force that extends beyond the particular cases at hand. 63

25 To some extent, this system is the one prevailing in the US. Most constitutional challenges in the U.S. 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.

64 To sum up, we have argued that the right to a hearing can justify judicial review. The right to a hearing requires the establishment of institutions that are capable of following certain procedures and conducting certain forms of reasoning designed to protect the right to a hearing. The institutions that are designed to protect the right to a hearing are only courts or court-like institutions—institutions that operate in a judicial manner. Our view justifies granting courts (or any other institutions capable of conducting a hearing) the powers to examine and reconsider grievances raised by individuals concerning their rights. Our proposal does not directly explain the precedential force of these decisions. Yet, *given* that courts have (or should have) the powers necessary to protect the right to a hearing, their decisions ought to have ramifications that extend beyond the particular cases considered by them. This extension of our view is necessary for justifying the conventional understanding of judicial supremacy. This is what makes our explanation merely a core case for judicial review. Establishing the case for a minimal, i.e., a case-specific judicial review provides the foundations for a broader and more robust claim for judicial supremacy. We dare to add at this point that perhaps the failure of traditional theories can be attributed to their too great ambition to develop a single unified theory that can both justify case-specific judicial review and judicial supremacy. Our proposal is a modest one, as it merely aims at establishing the case for a case-specific judicial review. Yet this modest argument has greater potential than seems at first sight.

4. CONCLUSION

65 This paper develops both a negative and a positive argument concerning judicial review. Part 2 establishes the negative argument. It establishes that traditional justifications for judicial review face grave difficulties and that these difficulties are attributable to their instrumental nature. Part 3 develops a positive proposal to defend judicial review on non-instrumentalist grounds. In searching for a non-instrumental justification, we establish that judicial review ought to be understood as the institutional embodiment of the right to a hearing. Hence, as a conceptual matter, it is the judicial process and the judicial process alone that honors the right to a hearing.

66 Our proposal constitutes a leveling of the playing field. Critics of judicial review typically use both instrumentalist arguments (concerning the superior quality of legislative decisions over judicial decisions) and

non-instrumentalist arguments (concerning the value of democratic participation). Advocates of judicial review rely only on instrumentalist arguments focusing their attention on the (alleged) superior quality of judicial reasoning, judicial deliberation, and on the public-spiritedness of judges as opposed to populist pressures governing legislatures. Our argument adds to the arsenal of arguments favoring judicial review a non-instrumentalist argument that, given its non-instrumentalist nature, is immune to many of the objections raised against judicial review. Advocates of judicial review can therefore rest assured that the case for judicial review does not hinge on speculative empirical conjectures.

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