

ESSAY

THE RIGHT TO JUDICIAL REVIEW*

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Judicial review is typically justified on consequentialist grounds, namely that it is conducive to the effective protection of individual rights. This Essay disputes this popular explanation for judicial review and argues that judicial review is based on a “right to voice a grievance” or a “right to a hearing”—a right designed to provide an opportunity for the victim of an infringement to challenge that infringement. The state must justify and, in appropriate cases, reconsider any infringement in light of the particular claims and circumstances of the victims of the infringement. This right-to-a-hearing-based justification implies that judicial review is justified even if, ultimately, it is found to be detrimental to the protection of rights. Finally, this Essay concludes that the right to a hearing is a participatory right and, consequently, that judicial review does not conflict with the right to equal democratic participation.

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INTRODUCTION

Judicial review is a *bête noire* of democratic theory. Even some of its staunchest advocates shift uneasily when called upon to defend an institution that seems to depend on, and in many cases expresses, a deep mistrust of elected representatives. The controversy surrounding the role of judicial review in a democratic system of government focuses on the relationship between two distinct bodies: an elected legislature and an appointed judiciary. The struggle for political power between these bodies is mirrored in the intellectual arena. Advocates of judicial review are branded as enemies of the legislature, while proclaimed friends of the legislature oppose judicial review. This image of the two branches of government locked in a struggle is closely related to another powerful image, that of the institution of judicial review as a watchdog. Traditionally, this watchdog was perceived as constraining the power of other branches, in particular the legislative branch. Under this conventional view, judicial review is particularly suited to fulfill the function of the watchdog because of its relative detachment from politics, as well as its deliberative nature and moderation. Moreover, these characteristics render the judicial branch ideal to review the decisions of other branches.

More recently, the watchdog is perceived primarily as protecting individual rights from the legislature's inherent disposition to violate them. Whether it is viewed as an instrument for constraining the other branches or as a form of protection against legislative violations of rights, judicial review is ultimately justified on consequentialist grounds. That is, judicial review is presented as a scheme designed to correct and improve the decisions reached by other branches. It is often justified on the basis of the conviction that, at least with respect to individual rights, a constitutional arrangement with judicial review yields better decisions than an arrangement in which the judiciary does not have the power to review the legislature's decisions.

The discussion in this Essay is confined to statutory, rights-based judicial review, as this is the type of judicial review that seems to conflict with fundamental participatory values. As an alternative to the watchdog conception of judicial review, we develop a non-consequentialist, rights-based justification of judicial review that rests on the “right to voice a grievance” or the “right to a hearing.”¹ According to our proposed view, judicial review is designed to provide a hearing for individuals who claim that their rights were infringed. Consequently, we contend that judicial review is not justified on the grounds that it provides a superior decision-making mechanism; instead, judicial review realizes a right that ought to be respected, even when doing so is detrimental to the efficacious protection of other rights.

Part I will examine the watchdog and right-to-voice-a-grievance conceptions of judicial review and establish that the watchdog conception has traditionally been regarded as the primary justification for judicial review. Part II will assert that individuals have a “right to a hearing,” which consists of three components: the right of a person to challenge any infringement of her rights, the duty of the infringing party to provide an individualized explanation, and the infringing party’s duty to reconsider the decision to infringe and act accordingly. Part III will show that legislative deliberation cannot realize this right to a hearing because such deliberation is too removed from the particular concerns of individuals whose rights are infringed (either justifiably or unjustifiably). Rather, the body suited to provide an individualized hearing is the judiciary. Thus, the legislature and the judiciary are not rivals, but instead are partners in an open-ended, collaborative process that serves to legitimize legal norms. Part IV will claim that the right to a hearing should be understood as a participatory right, and that judicial review, properly understood, protects, rather than undermines, the equal right to political participation.

I. TWO CONCEPTIONS OF JUDICIAL REVIEW: THE WATCHDOG AND THE RIGHT TO A HEARING

This Part briefly presents and contrasts two arguments purporting to explain the function of judicial review: the watchdog concep-

¹ We use both terms interchangeably for stylistic reasons.

tion of judicial review and the right-to-voice-a-grievance conception of judicial review. Adopting one of these views does not imply that courts do not (or ought not) promote the values identified by the competing approach.

A. The Watchdog Conception of Judicial Review

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 its authority. Just as the police fight crime, and the Holy Inquisition protected the faith, the institution of judicial review supervises the decisions made by the political branches. The watchdog conception of judicial review relates the institution of judicial review to an intellectualist, non-majoritarian tradition originating with Plato.² Alexander Hamilton expresses this view clearly:

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 infractions of the Constitution only, that the independence of the Judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws.³

Here, Hamilton articulates two variants of the watchdog conception of judicial review, both of which remain influential. According to the first variant, judicial review serves as a necessary and proper

² Karl Popper famously wrote an entire volume to criticize this Platonic tradition. 1 Karl R. Popper, *The Open Society and Its Enemies* (1963). Our choice of the term "watchdog" derives from Plato's analogy of the guardians and watchdog. Plato, *The Republic* 64 (Frances M. Cornford trans., Oxford Univ. Press 1945).

³ The Federalist No. 78, at 544-45 (Alexander Hamilton) (Henry B. Dawson ed., 1891).

check on the legislature,⁴ which has a natural tendency to exceed the authority granted to it by the Constitution.⁵ Thus, the function of judicial review is to improve decision-making by facilitating “Machtkampf”⁶ (struggle for power) among the branches of government.⁷

According to the second version of the watchdog conception of judicial review, judicial review is designed to protect rights. Under this view, constitutional restraints “could be justified by appeal to moral rights which individuals possess against the majority.”⁸ Judicial review is therefore justified to the extent that it is likely to contribute to the protection of rights, either directly, by correcting decisions which violate individual rights, or indirectly, by inhibiting the legislature.⁹ The rights-based watchdog conception of judicial review has dominated the numerous debates conducted in recent years between advocates and foes of judicial review.¹⁰

⁴ As Hamilton wrote: “the Courts were designed to be an intermediate body between the People and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority.” *Id.* at 542.

⁵ Hamilton expresses this view in Federalist No. 78:

The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the Judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular Act proceeding from the Legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute; the intention of the People to the intention of their agents.

Id. For a description of the historical precursors of this view, see Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 13–44 (1990).

⁶ See Henry J. Abraham, *The Judicial Process* 371 (7th ed. 1998).

⁷ The power to override legislative decisions not only allows courts to void wrongful laws, but it also inhibits the legislature from enacting them in the first place. Benjamin Cardozo articulated this claim:

By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 93 (1921).

⁸ Ronald Dworkin, *Taking Rights Seriously* 133 (1977).

⁹ See Cardozo, *supra* note 7, at 93.

¹⁰ Jeremy Waldron pointed out the prevalence of the concern that individual rights must be protected from legislative incursions and said:

The concern most commonly expressed about legislation is that legislative procedures may give expression to the tyranny of the majority and that legislative

Both sides in the dispute over judicial review strongly support taking rights seriously. In accordance with this commitment, advocates of judicial review claim that the institution is instrumental to an effective protection of rights from unwarranted infringement by the legislature.¹¹ Although foes of judicial review sometimes deny the effectiveness of such an instrument,¹² they also appeal to the right to “equal participation” in the political process. Judicial review, they argue, violates this right.¹³ Hence, the debate is inherently asymmetrical: it pits a consequentialist camp, founded on the conviction that judicial review is instrumental to the protection of rights, against a camp that relies on a rights-based argument—that judicial review infringes on the right to equal democratic participa-

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.

Jeremy Waldron, *Law and Disagreement* 11 (1999). This reasoning is often accompanied by statements explaining why judges are good at identifying the boundaries of rights. Judicial review is often defended by appealing to the structural features of the judicial branch that facilitate judicial objectivity and make the judiciary particularly well-suited to the task of identifying the meaning of public values. E.g., Owen M. Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 *Harv. L. Rev.* 1, 12–13 (1979); see also Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 *Law & Phil.* 247, 255–56, 556 n.12 (2003) (discussing this structural argument).

¹¹ Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 34 (1996). Professor Dworkin “see[s] no alternative but to use a result-driven rather than a procedure-driven standard for deciding The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions.” For an effective critique of this view, see Gopal Sreenivasan, *Judicial Review and Individual Self-Rule*, 2 *Revista Argentina de Teoría Jurídica de la Universidad Torcuato Di Tella* 6–13 (July 2001), available at <http://www.utdt.edu/departamentos/derecho/publicaciones/rtj1/pdf/Sreenivasan-F.PDF> (defending conventional wisdom that evaluations of judicial review must recognize the tradeoff between protecting individual rights and producing counter-majoritarian outcomes, and criticizing Dworkin for trying to avoid recognizing this tradeoff).

¹² See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346, 1376–86 (2006) (arguing that legislatures may be better suited to protect fundamental rights than courts).

¹³ This right is defined by Professor Waldron as “a right to participate on equal terms in social decisions on issues of high principle.” Waldron, *supra* note 10, at 213. Professor Waldron argues that the right to equal participation counsels for political, not judicial, resolution of disagreements regarding rights. *Id.* at 246–54.

tion.¹⁴ Thus, on one hand, in attacking judicial review, the opponents invoke a right; they condemn judicial review on the grounds that it violates the right to participation. On the other hand, the advocates of judicial review only put forward a consequentialist argument, contending merely that judicial review is conducive to the protection of rights.

B. The Right-to-a-Hearing Conception of Judicial Review

Compare the watchdog conception of judicial review with an alternative. The right-to-voice-a-grievance conception of judicial review holds that the purpose of judicial review is to facilitate the voicing of grievances by providing a hearing. Like the watchdog conception of judicial review, the right-to-voice-a-grievance justification is grounded in historical practice. For example, addressing grievances was one of the main functions of Roman tribunals that had the power to veto proposed legislation and administrative actions.¹⁵ Furthermore, one of the main functions of the English Parliament has been to procure the redress of individual grievances.¹⁶ As will emerge in Part III, one of the reasons judicial review is required is that parliaments cannot fulfill this function any longer, because they replaced the king as sovereign. Whereas opponents of judicial review usually treat it as antithetical to the sovereignty of legislatures, it is actually this very sovereignty that bars members of parliaments from providing a fair and impartial hearing. Parliaments engage in determining norms, legislating, and overseeing policy, all of which require general deliberation detached from in-

¹⁴ Admittedly, one could argue that consequentialist arguments could also be rights-based. Arguably, a person could have a right to live in an institutional scheme which promotes and protects her rights. Under this view, a person could justify judicial review on the ground that it is an institution conducive to the protection of rights *and* that a person has a right to live in an institutional environment which is conducive to the protection of her rights. Most advocates of judicial review, however, do not make this claim, and, furthermore, it does not fit the discourse of rights. People typically do not have a right to institutional mechanisms which are conducive to the protection of their rights.

¹⁵ See H.F. Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* 12 (3d ed. 1972).

¹⁶ See Stanley de Smith & Rodney Brazier, *Constitutional and Administrative Law* 233 (6th ed. 1989) (“It has often been said that Parliament has three main constitutional functions . . . [one of which includes] procuring the redress of individual grievances.”).

dividual concerns. This implies that representatives, as such, must commit themselves to various general views in these matters. Since the outcome of a fair hearing might conflict with these commitments, members of parliaments cannot hold a hearing in good faith without violating their obligations as representatives. The result is a need for an uncommitted third party to hear grievances through judicial review.

According to the right-to-voice-a-grievance conception of judicial review, judicial review realizes the right to a hearing because it provides access to the courts for those who have a grievance; moreover, judicial review also supplies the necessary type of deliberation. What is required is a body that deliberates over particular cases and provides access to individuals, not a body that will oversee the legislature. The opportunity to hear individual cases and deliberate—an opportunity which is a defining characteristic of judicial review—is one that is regarded as essential by the right-to-a-hearing conception of judicial review.¹⁷ Hearing grievances is what courts are designed to do. Hence, in contrast to the watchdog hypothesis, our account is one that inevitably explains the judicial nature of judicial review. Courts are bodies that are naturally suited to provide a hearing because of their sensitivity to the particular circumstances of the case rather than to generalities and abstractions. Accordingly, if individuals have a right to a hearing, then this right both explains and justifies the fact that it is a judicial body that is entrusted with review, and that statutory judicial review, as practiced in common law countries, occurs not in the abstract, but only with regard to concrete cases and controversies where the rights of individuals are involved. In statutory judicial review, a judicial body adjudicates a dispute between an individual and a representative of the legislature. Such a portrayal of the individual litigant and her particular case—as a party in a dispute involving a grievance—suggests that the right-to-voice-a-grievance conception

¹⁷ The second variant of the watchdog conception of judicial review—in which judicial review is justified because it protects individual rights—cannot provide an immediate account for the judicial nature of the review because it is not clear why courts are better equipped to protect rights than, for example, a committee of wise persons that will review every piece of legislation. The first variant of the watchdog conception of judicial review—in which judicial review serves as a necessary and proper check on the legislature—can provide such an account, but without the claim that judicial review aims to protect rights.

of judicial review accounts for the institution of judicial review as is currently practiced. This is so because this right accounts not only for the existence of an institution designed to protect rights, but also for the fact that the relevant institution is the judiciary.

According to the proposed right-to-voice-a-grievance conception of judicial review, the normative debate regarding judicial review boils down to two related questions. First, is realizing the right to a hearing a worthy function? Second, if the right to a hearing is a worthy function, then does judicial review optimally realize this right? These questions are discussed in the following two Parts.

II. THE RIGHT TO A HEARING

This Part argues, first, that individuals have a right to a hearing whenever their rights are infringed, and, second, that respecting this right to a hearing does not compromise legitimate authority. This Part also identifies the content of this right.

A. Rights and Hearings

When one intends to infringe another person's rights, one typically ought to provide that person with an opportunity to be heard. The complaints elicited by a failure to provide a hearing indicate the existence of such an obligation. For example, a disappointed promisee may protest "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. Note, however, that it is not the importance of the consequences of the action to an affected party that determines whether a hearing is owed. In some cases, we make decisions that may alter the lives of others, such as a decision to lower prices that affects the lives of competitors or consumers. But this action, in itself, does not grant anyone the right to a hearing. Rather, the right to a hearing only extends to infringements of rights. Furthermore, the right to a hearing does not depend on whether the infringement was justified. The assertion that "you

had no right” invokes the fact that even if the infringement is justified, the injured party has a right to voice her grievance.¹⁸

These observations point to an important link between individual rights and the right to a hearing: a person whose right is infringed is entitled to a hearing. This is so even if infringing the right is morally justified, that is, if the right was supposedly overridden or annulled by moral considerations. Even when the presumption that a right exists and should not be infringed is defeated, the presumption that the right-bearer is entitled to present her grievance remains. That is, the right-bearer still retains the right to defend her right. The question we must ask is why a hearing is owed to anyone whose rights are being infringed. In other words, what might be missing in a society that aims to prevent unjustifiable infringements, but which does not provide the victims of an infringement an opportunity to be heard?

The importance of the right to a hearing stems from the fact that people occupy a special position with respect to their rights. Rights may be based on different considerations, such as enhancing autonomy, serving vital interests, or embodying respect for individuals. Whatever their source or justification, however, rights demarcate the realm that should be respected—the region in which one is master. Thus, respect for one’s rights entails recognition of both the demarcated region and the person’s position with respect to it.¹⁹ It is because of the personal nature of this demarcated re-

¹⁸ The right to a hearing does not depend on the hearing being conducive to improving the decision to infringe; rather, the right to a hearing has a non-instrumental rationale. In his discussion of the right to a hearing in the administrative law context, Professor Paul Craig argues that “[p]rocedural rights are also seen as protecting human dignity by ensuring that the individual is told why he is being treated unfavourably and by enabling him to take part in that decision.” P.P. Craig, *Administrative Law* 408 (5th ed. 2003). Similarly, Professor Denis Galligan argues that “[t]he right to be heard then follows directly from the principle of respect . . . since to hear a person is to show respect for him.” D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* 351 (1996).

¹⁹ The most evident linguistic feature of rights provides support for this claim:

A right is always somebody’s right, and we never attempt to secure things *as a matter of right* unless there is some individual or unless there are some individuals whose rights we conceive to be in question. . . . The language of rights is not simply another way of expressing the moral desirability of some object or state of affairs. Rights express moral desirability *to* or *for* or *from the point of view of* some individual

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gion that many hold that a violation of one's rights also violates one's dignity.²⁰ In discussing the dignity which accrues to a rightholder, Professor Pettit argues that such dignity is retained only if the rightholder:

preserves a certain dominion over how he fares at the other's hands: only if that other agent is not free to do to him whatever he wills, or even whatever some beneficent plan requires. The person must be able to block certain sorts of behaviour—those, as we might say, which invade his personal space If he cannot exercise such a veto, then he is merely a pawn in the enterprises of the other.²¹

The harm occasioned by the violation of one's rights is not confined to the damage to the protected interest. Clearly, a violation of rights is directly harmful to a person inasmuch as it harms some vital interest of that person. But a violation of rights is also wrong because it undercuts the authority a person has over this private, demarcated realm.

Does the privileged status of a person—and the corresponding right to a hearing—extend to cases in which her right is justifiably infringed rather than violated? We believe that one's special relationship to one's right—one's dominion, so to speak—does not vanish if one's rights are justifiably infringed, rather than violated. When the infringement of a 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. That is, a determination that the right has been justifiably infringed does not nullify the privileged position a person has regarding her rights. Instead, this privileged position remains, and

Jeremy Waldron, *Can Communal Goods Be Human Rights?*, in *Liberal Rights: Collected Papers 1981–1991*, at 339, 345 (Jeremy Waldron ed., 1993).

²⁰ Professor Feinberg relates dignity to the ability to claim rights. Joel Feinberg, *The Nature and Value of Rights*, 4 *J. Value Inquiry* 243, 252 (1970). Professor Feinberg identifies respecting rights with dignity. We are not committed to this identification.

²¹ Philip Pettit, *The Consequentialist Can Recognise Rights*, 38 *Phil. Q.* 42, 52 (1988). It is important to note that the thesis presented in this Essay does not depend in any way on the consequentialism Pettit is defending.

is made manifest by the right to a hearing.²² Unilaterally infringing a right is wrong, not only because a right has been infringed, but also because the right-bearer is not treated as someone who has a say in the matter.

The right to a hearing recognizes and accommodates a person's dominion over her rights even when infringement of those rights is justified. The failure to recognize this right to a hearing represents a failure to respect persons as right-holders. Since respecting rights requires recognition of this demarcated realm as such, respecting rights must also recognize the significance of the position right-bearers hold with respect to their rights. In particular, individuals should be able to claim their rights and be heard before those who have the capacity to infringe. It is important to stress that according to this view, individuals whose rights are infringed are entitled to a hearing regardless of whether providing a hearing reduces the probability of an infringement (justified or unjustified) or increases the chance of securing a remedy. Instead, the reason for the hearing turns on the significance of rights in our lives, and their relation to our dignity.

B. What a Hearing Involves

We claim below that judicial review is justified because it realizes the duty of the state to provide a hearing. First, however, let us consider what the right to a hearing amounts to. This right involves three distinct components: first, an opportunity for the victim of infringement to voice her grievance—to be heard; second, an explanation to the victim of infringement that addresses her particular grievance; and third, maintaining a principled willingness to respect the right if it transpires that the infringement is unjustified.

In order to illustrate these components, consider an example that does not involve institutional arrangements or authority. Suppose someone promises a colleague to meet for lunch, but unexpected circumstances disrupt her plans. The promisor believes that

²² Providing a remedy, rather than a hearing, will not suffice. A remedy compensates for the damage, and perhaps for loss of one's dominion. Only providing a hearing, however, respects a person's dominion when a justified infringement is imminent.

these circumstances override the obligation to go to the meeting.²³ Unfortunately, the promisor also cannot inform the promisee, in advance of the appointment, of her intention to miss the meeting. What must she do?

Clearly, the promisor must apologize and perhaps offer some reparation. In addition, she owes the promisee an explanation. Perhaps, in some cases, the nature of the relationship between promisor and promisee is such that simply saying something like “I could not make it” will suffice. But normally an explanation is owed, even if the decision is ultimately justified (and even mandatory), and even if the colleague presumes that it was.

The promisor in breach must identify and justify to the promisee her grounds for infringing the promisee’s rights. Sometimes justification is superfluous; saving the life of a drowning child, for example, obviously mandates breaking a lunch appointment. When the moral stakes are lower, however, the promisor owes an explanation of her justification, even if failing to keep the promise is ultimately justified. Suppose the promisor does not show up because she was informed at the last minute about a memorial service for an acquaintance. It may not be clear whether attending *this* memorial service justifies infringing *this* promise. If it is not clear, then the promisor must provide an argument. For instance, she might contend that attending memorials is a way of expressing one’s empathy to the family of the deceased.

Endeavoring to justify herself exposes the promisor to the possibility of a reasoned challenge. If the promisee challenges her reasoning, then the promisor must reconsider her moral convictions and sometimes concede that she was wrong. This openness to the possibility that the infringement was unjustified is crucial. If the promisor is unwilling to reconsider her moral stance in light of the promisee’s arguments, then providing a moral explanation is disingenuous.

If a promisor informs the promisee of her intention to breach *prior* to the infringement, a hearing is also owed. The hearing in this case also consists of three components. First, the promisor

²³ It might be claimed that *only* the promisee has the power to release the promisor. See, e.g., T.M. Scanlon, *What We Owe to Each Other* 303–04 (1998). The case at hand, however, is one in which the promisor believes that because some other obligation overrides the obligation to perform, consent is not necessary.

must provide the promisee with the 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.

To understand the significance of the second component—the willingness to engage in meaningful moral deliberation—imagine that the promisor informs the promisee that, ten years ago, after thorough deliberation, she adopted a rule that clearly implies that she may, or must, attend the memorial and break her promise in situations like this one. When challenged by the promisee, the promisor recites the arguments used in her 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 provide a hearing. That duty requires a reconsideration of the justifiability of the decision in light of the particular claims and circumstances of the present case. This is not because the original deliberation leading to the rule was necessarily flawed. Perhaps the early deliberation was flawless, and perhaps such general, detached deliberation is more likely to yield sound decisions than deliberation addressed to the particular claims and circumstances.²⁴ The obligation to provide a hearing, however, is not founded on instrumental considerations of this sort. Instead, it is owed to the promisee as a matter of justice. Furthermore, the promisor must "hear" the promisee even if there is nothing unique about the particular case at hand—even if her previous deliberations addressed precisely the type of grievance the promisee is voicing. The promisee is still entitled to question and challenge the rule and its justification because *her* rights are being infringed.

Note also the significance of the third component—maintaining a principled willingness to respect the right to provide a hearing if it is found that the breach is unjustified. Suppose the promisor informs the promisee that her decision to miss lunch is final, irrespective of any arguments the promisee might provide. Such behavior is not only rude; it also fails to meet the obligation of the promisor to provide a hearing. Just as a genuine explanation of a past infringe-

²⁴ See Waldron, *supra* note 12, at 1376–86.

ment presupposes willingness to reconsider the justification for the decision to infringe, so too a genuine justification of a future infringement presupposes willingness to change one's mind. This willingness does not require the promisor to treat her earlier decision as if it never happened. Her earlier decision may be relevant to the justifiability of infringement, but it does not decide the matter in advance.²⁵

It might be argued that both the claim that individuals are entitled to a hearing and the example discussed above sidestep a crucial factor. 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 to . . ." belong to the interpersonal realm, that the intuitiveness of the right to a hearing is confined to such contexts, and that therefore the supposed right does not extend to authoritative relations. 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. If a commander issues a legitimate command, her subordinates are not in a position to demand a hearing. To grant them this right would be to undermine legitimate authority. Similarly, the state cannot be required to provide a hearing without compromising its legitimate authority.

This is not the way political theorists understand political authority, however. Legal and political theorists share the view that the state has a broad duty similar to what we label the right to a hearing, and that this duty applies to legislatures as a constitutional requirement.²⁶ Furthermore, this duty is defended for the very reasons that support the right to a hearing. In his classic treatise on constitutional law, Professor Laurence Tribe defended an even stronger view that the legislature owes a duty of explanation, which includes the right of citizens to be consulted about matters that affect their lives:

²⁵ A hearing serves not only the promisee's interest but also the promisor's interest in not breaking a promise unjustly. The promisor is made to confront some actual ramifications of her decisions.

²⁶ Professor Jerry Mashaw, a leading legal theorist, suggested that "[a] reason must be provided as a constitutional minimum," because otherwise an individual "is treated as a being for whom reasons are unimportant—an obvious affront to his self-respect." See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. Rev. 885, 928 (1981).

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 express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one.²⁷

In an earlier article, Professor Tribe asserted that “*laws*, unlike naked commands, must be understandable to those affected. A citizen whose basic liberty is subject to control is always entitled to some answer . . . when she asks *why the control is being enforced at all*, just as she is entitled to be told . . . *why the control applies to her*.”²⁸ Some legal theorists advocate an affirmative duty on legislators to explain statutes through means such as committee reports and floor management statements.²⁹

III. CAN THE RIGHT TO A HEARING JUSTIFY JUDICIAL REVIEW?

The previous Part claimed that granting the right to a hearing when rights are infringed is a worthy function. This Part contends that judicial review of legislative decisions fulfills this hearing function, while review by the legislature of its own decisions cannot.

Opponents of judicial review can argue that the democratic procedures and deliberations of the legislature provide all the hearing that is needed. Since the law is the product of a fair decisionmaking mechanism, judicial review is thus redundant. The appeal of this claim lies in the assumption that the legislative procedure is a fair one. This assumption, however, is unavailable to the objector at this point, because the issue at hand is whether a procedure that does involve judicial review is superior (more fair, more just) to an arrangement without review. Section III.A, below, shows that the right to voice a grievance is distinct from both the right to voice an opinion and the right to have an equal vote. These distinctions are crucial because they establish that focusing on the right to voice an

²⁷ Laurence H. Tribe, *American Constitutional Law* 503 (1st ed. 1978).

²⁸ Laurence H. Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269, 302 (1975).

²⁹ See Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 Ohio St. L.J. 1, 8–33 (1999). Under this view, the vote on the statute would represent a vote on the text plus certain documents comprising the “public justification” of the statute. *Id.* at 79–82.

opinion and the right to an equal vote does not guarantee, and may in fact conflict with, a distinct right—the right to a hearing. A fair procedure must respect all of these rights. Therefore, a procedure that does not address the particular grievances of an individual is not a fair procedure.³⁰

Although the scope and nature of rights are the stuff of legitimate political controversy, the grievances of someone whose rights are infringed, and the type of reasoning involved, are unique. Furthermore, bodies that provide general reasoning and deliberation, and representatives that stand for common interests or views about the general good cannot, *as such*, engage in the type of deliberation required by a hearing, which demands an individualized consideration and response.

A. The Uniqueness of the Right to a Hearing

To illustrate the distinctive nature of the right to voice a grievance, consider a small and self-governing polis that does not have a constitution or bill of rights. In this polis, each and every citizen may present or 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 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. The arrangement in this polis seems perfectly democratic: there is no procedural distinction between the claim of a citizen whose rights are infringed and a claim of any other citizen with a grievance. Is this arrangement fair and just, or should it be improved, and if so, how?

Let us suppose that this happy arrangement must be amended because it is too costly and cumbersome. As time passes, the assembly is faced with a growing number of issues of ever-increasing complexity. The sessions of the assembly increase in number and in

³⁰ More accurately, such a procedure is less fair than a procedure that does address particular grievances.

length. Citizens find that access to the floor is becoming harder and harder—there is a waiting list. Finally, the assembly decides that the participatory rights of citizens must be compromised in order to allow the assembly to fulfill its function. Citizens now must acquire a certain number of signatures before they may introduce a bill, and the right to speak in the assembly on any issue (and, in particular, to demand review) is granted on the basis of the popularity of the presented view, or perhaps by a lottery.

These changes are necessary, but they come at a cost. Someone who reasonably believes that her rights are being infringed might not get a chance to present her case before the assembly. Similarly, someone who holds the unpopular opinion that a war in which the polis is involved is being mishandled might not get a chance to voice her misgivings, either because she cannot rally sufficient support or because her name was not chosen in the lottery. Both individual citizens are denied something of significance, albeit justifiably. But are their injuries the same injury? Are both being denied the same thing?

Suppose the assembly decides that the new limitations on access should not apply to cases in which an individual reasonably claims that her rights were infringed. At this point, the citizen who believes the war is being mishandled might protest that she is being discriminated against and that the arrangement is unfair; staunch advocates of equal democratic participation would likely support this claim.³¹ Although the arrangement does not violate an equal right for participation—any citizen who has a rights-related grievance may appeal—it does violate the right for equal participation, because citizens who wish to voice their opinion for other reasons cannot.³² Arguably, it is unjust to discriminate between those who wish to protest against the war on policy-based grounds and those who have a rights-based grievance.

The initial appeal of this assertion lies in the claim that the arrangement is unjust: two citizens who are similar in the relevant respect—for example, in strongly opposing a popular law—are treated differently. But this claim is not as straightforward as it

³¹ See Waldron, *supra* note 12, at 1386–89.

³² The distinction between the equal right for participation and the right for equal participation, and the significance of this distinction, are addressed in Part IV, *infra*.

might seem. Imagine a different arrangement that caters to the plea of the citizen whose rights are infringed: suppose the assembly decides that once a month, it will hold a special “hearing session” dedicated to the grievances of individuals who reasonably claim that their rights are being infringed. Clearly, the citizen who wants to complain about the war does not have a valid complaint about not being allowed to voice her opinion in that session. At most, she can argue that an *additional* session should be set up for those whose opinions are unpopular or who fail to win the right to speak in the lottery. This suggestion, however, is simply a proposal to revise the rules that govern the amended speaking arrangement. Whereas a “hearing session” seems like a just addition to proceedings, allowing the second citizen to speak simply means a return, in one form or another, to the original arrangement in which every citizen can stand up and speak.

For the reasons that follow, the idea of holding a separate hearing session is superior to the original arrangement in which every citizen is allowed to speak. First, distinguishing the grievances of citizens whose rights were infringed from general claims about the value of certain legislation presents the clear advantage of separating grievances of individuals from individual grievances. Second, this approach also permits a distinction to be made between the two types of considerations or modes of reasoning required: one general and public in nature, the other particular and directed towards the claims and circumstances of an injured party. Finally, a special hearing session is appealing because even if the assembly-as-legislature’s directives are grounded in reasons that are carefully articulated, disseminated, and debated prior to adoption as legislation,³³ legislative deliberation is too general in nature and thus is not the type of deliberation required.

To illustrate this point, let us return to the example of the promise. Earlier we examined the case in which a promisor informs the promisee that, ten years ago, after thorough deliberation, she adopted a rule that clearly implies she may, or must, attend a memorial service and fail to keep her promise. When challenged by the promisee, the promisor recites the arguments used in her past

³³ Some would argue that rights are better protected under such a system. See Waldron, *supra* note 10, at 88–118.

deliberations. Such behavior violates the promisor's duty to provide a hearing, however, which requires reconsideration of the decision in light of the particular claims and circumstances of the present case. The promisor's obligation arises not because the original deliberation leading to the rule was necessarily flawed, but because the promisee is entitled to individualized reconsideration. Similarly, the right to a hearing in the constitutional context is owed to citizens regardless of whether the legislature deliberated on the matter successfully, and even if the legislature's deliberations addressed precisely the type of grievance the promisee is voicing. The victim whose right has been infringed is still entitled to question and challenge the rule and its justification because *her* rights have been infringed.

B. The Need for Review by the Judiciary

In the previous Section, the example of the polis served to highlight the distinction between the right to voice an opinion and the right to voice a grievance (the right to a hearing). The example also emphasized the significance of the right to voice a grievance and the corresponding importance of institutions that protect this right. The previous Section also established that the assembly should amend its procedures in order to provide the unique type of deliberation required by the right to voice a grievance. Significantly, the amended procedure is not intended to limit the power of the assembly, nor does it actually do so; the assembly still retains the power to make independent decisions. In this respect, labeling this new procedure "judicial review" is a misnomer—"legislative review" is more apt. The crucial point, however, is that the assembly addresses the particular grievances of individuals: every individual has access and can present her case before the deciding body, which is required to review the legislation at issue in light of the particular grievance asserted.

As the possibility of creating a separate session for hearing such complaints implies, we can distinguish between the assembly-as-legislature (that is, as sovereign) and the assembly-as-judiciary. This distinction points to a problem inherent in the proposed arrangements. Ideally, the assembly-as-judiciary would address individual grievances and would not be bound by the deliberations made and decisions taken by the assembly-as-legislature. This ideal

is problematic, however. Legislators may be inherently unable or unwilling, because of political reasons, to try to provide a fair hearing. Moreover, even if the legislators all earnestly endeavor to provide a fair hearing, it is problematic that the very same members may have committed themselves to a view on the legislation, expended considerable effort, and made careful compromises in passing the legislation. After all of this work, many members will be naturally predisposed to uphold the legislation when they conduct a hearing in the role of assembly-as-judiciary. Even more importantly, members have incurred various commitments during the process of legislation and may have previous commitments to other members. The process of abstracting oneself from these commitments so as to provide a fair hearing may create a genuine conflict between competing demands. Clearly, if citizens who believe their rights were infringed have a right to a hearing, then this hearing should be fair. Thus, the assembly-as-judiciary should detach itself from the proceedings of the assembly-as-legislature.

It is important to stress that the tension between the function of the assembly-as-legislature and the need to grant a fair hearing is even greater in a representative democracy than it would be in a pure democracy. 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. Inasmuch as representation is dependent on legislative deliberation, it cannot be squared with the requirements of a fair hearing.³⁴ Modern representatives are not the advocates of each of their constituents; rather, they represent various common (though partial) views about norms and policies. Perhaps they represent some local interests, and they sometimes act as the advocates of a particular constituent. But as representatives who participate in general public debates and are elected on the basis of their views in these debates, they cannot provide a fair hearing. In order to provide one, they would need to abstract themselves from their role and commitments as representatives.

³⁴ For a recent presentation of this relationship, see Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 *Pol. Theory* 758, 775–76 (2000) (defining representatives as advocates and noting that “[u]nlike a judge . . . their job is not to apply the rule but to define how the facts fit or contradict the rule or to decide whether the existing rule conforms to principles that society shares”).

Put differently, representatives, as representatives, cannot provide a hearing at all; their fiduciary obligations bar them from doing so. At most, they can ignore these obligations, but by doing so, they also cease to represent in any meaningful sense. An individual can either take her role as representative seriously or provide a fair hearing.³⁵

Could our polis address this concern and provide a hearing to those who claim that their rights were infringed? The solution that suggests itself would be to divide the assembly. Some members of the assembly could be chosen or drawn to sit in the hearing session (for example, for ten years). These members would be barred from participating in the regular legislative or policy-making sessions of the assembly. This proposed division of the assembly would cater to concerns about realizing the right to a hearing, but it would not be cost-free. The new body would have the power to overturn the decisions of the assembly from which it was derived. It would no longer be the assembly itself, but a sub-part of the assembly, which we will refer to as the “review committee,” that would exercise the power of review.

The proposed arrangement seems to represent a sharp departure from the previous arrangements (those relying on active members of the legislature to provide the hearings). Unlike these previous arrangements, this last proposal can be effective in protecting such a right. However, this departure is neither motivated by the need to curb the legislature nor by the belief that the review committee provides superior overall protection of rights. Instead, the new arrangement is intended solely to realize the right of individuals to voice their grievances. Put differently, the creation of an independent body that is detached from the legislative process expresses a commitment to the right to a hearing, and to the required separation—not only nominally, but in practice—of the considerations that are necessary to a fair hearing from those of a deliberative legislature. Therefore, even if judicial review compromises the right to equal democratic participation, the conflict is between two rights

³⁵ Perhaps some of the appeal of the idea that the legislature provides all the review required is the belief that this body reflects diversity. Reflecting the diversity inherent in the population is not identical to representation. Courts could, and perhaps should, reflect diversity, but they ought not represent. Reflecting diversity is important but is different than providing a hearing.

(the right to a hearing provided through judicial review and the right to equal democratic participation), and not between a right and consequences (the right to equal democratic participation and the greater protection against potential violations resulting from judicial review) as suggested by the watchdog hypothesis.

The distinction between the type of deliberation undertaken by the assembly-as-legislature and the assembly-as-judiciary (or the review committee) suggests an inherent tension between deliberative democracy—representative or not—and the right to a hearing. The tension is not between the elected and the appointed, the populist and the responsible, or the legislature and its watchdog. Instead, the tension is between two modes of reasoning and deliberation, and, consequently, between the institutions or arrangements designed to exercise those two modes. The institutional divide between the legislative body that determines norms and policy and the body that realizes a right to a hearing is required because the two modes of reasoning differ. Since various issues and decisions may pertain to both approaches,³⁶ the institutional arrangements should embody a balance, or a mechanism of weighing, between the different types of considerations attendant to both equal democratic participation and the right to a hearing. This balance can only be reached by recognizing some form of judicial review.

Our claim is that the institution of a review committee fulfils the function of judicial review in the imaginary polis. Every individual has access to and may present her case before the deciding body, and that body is required to review legislation in light of the particular case. This body is not a representative body.

C. Actual Judicial Review and the Proposed Model

So far, we have established that the right to voice a grievance can justify the need for judicial review in the imaginary polis. The practice of this polis, however, differs in many respects from the conventional practice of judicial review. Let us therefore examine whether the right to a hearing can justify not simply a hypothetical practice of judicial review but whether it can justify our existing, conventional practice of judicial review, or an institution closely resembling it.

³⁶ We will return to this issue in Section III.C below.

Before we examine this question, let us make two initial observations. First, this Essay is not committed to defending any particular form of judicial review. In the United States, judicial review is performed by courts after a law has passed and a person (typically the person who was adversely affected by the law) raises a grievance against the law. In France, by contrast, judicial review is performed by a court (the French Constitutional Council) before a law is passed and prior to the existence of any particular grievance. The examination of the validity of the statute is therefore an abstract examination based on the text of the law, rather than an examination anchored in any particular grievance.³⁷ Only the American system can be understood as realizing the right to a hearing.

Second, it would be pretentious to argue that facilitation of a hearing (which the American system provides and the French system does not) is the only consideration that determines (or ought to determine) the institutional structure of judicial review. In designing a system of judicial review, one should take into account institutional concerns and other factors that may limit the scope of a hearing. Furthermore, an institution designed to facilitate hearings can also serve other purposes. Once establishing that an institution of judicial review is justified on the grounds that it facilitates hearings, the specific design of that institution should be sensitive to other considerations, including the degree to which judicial review can serve as a watchdog. Thus, even if it is conceded that judicial review as it is currently practiced (or ought to be practiced) is also designed to serve the watchdog function, this concession does not undermine the claim that facilitation of a hearing remains one of judicial review's main justifications.

Bearing these observations in mind, we turn now to examine the degree to which actual institutions of American judicial review guarantee respect for the right to a hearing. In particular, we address three important characteristics of judicial review.

First, according to the right-to-voice-a-grievance conception of judicial review, it might seem that only the person whose rights are infringed is entitled to judicial review. In practice, however, the role of non-governmental organizations ("NGOs") and large or-

³⁷ See Tim Koopmans, *Courts and Political Institutions: A Comparative View* 72 (2003).

ganizations is central in constitutional litigation, and the role of the rights-holder is often marginal.³⁸ This observation does not undermine the proposed view. For a variety of reasons, the fact that judicial review is designed primarily to address individual grievances does not disallow broadening the class of potential plaintiffs. In some cases, the standing of an NGO is similar to that of an advocate—the organization represents a particular set of grievances and speaks for a concern common to many individuals.³⁹ Thus, the role accorded to NGOs stems directly from the need to better realize the individual's right to a hearing. In other cases, the role of NGOs reflects realities that are not specifically part of the constitutional design (that is, the legal framework of the constitutional system). For example, increasing litigation costs force individuals to employ the services of NGOs, whose political and ideological agendas may not perfectly align with their own.

The second characteristic of actual judicial review that must be addressed is that constitutional litigation is often detached from the particularities of the case; the case brought to court is often a “test case” used to challenge a general norm rather than to address the grievance of an individual whose rights are infringed. The petitioner in a test case may be specially selected by an NGO from a group of potential petitioners, for example, to increase the chances of success or to invoke the empathy of the court.⁴⁰ The objective of an NGO may not be to win the case for the sake of protecting the rights of any particular litigant or providing her an opportunity to be heard; rather, the organization's goal may be to see a statute de-

³⁸ For a collection examining the effectiveness of NGOs in challenging human rights violations, see *NGOs and Human Rights: Promise and Performance* (Claude E. Welch, Jr. ed., 2001). The methods used by NGOs in litigation are diverse. Some organizations use test cases or sponsor cases. The most common method of interest group involvement in the American Supreme Court is the amicus curiae brief. Amicus curiae participation in litigation increases litigation success. See Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *Law & Soc'y Rev.* 807, 808, 822 (2004).

³⁹ This orientation is in contrast to representatives who represent common concerns of individuals, rather than concerns common to many individuals. The two can sometimes coincide, of course.

⁴⁰ Test cases are used by many NGOs and are often crucial to the success of their litigation efforts. Thus, for instance, the success of the NAACP was based on its careful use of test case strategy. See, e.g., Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 *Law & Hist. Rev.* 97, 100–01 (2002).

clared invalid because it is unjust. Scenarios such as these seem to support the watchdog conception of judicial review, as they appear to rest on the conviction that constitutional litigation is designed to examine the justifiability of general norms rather than to express concern for individual claims.

This observation concerning constitutional litigation, however, does not undermine the conception of judicial review as facilitating a right to a hearing. To understand why, recall the promisor who is challenged by the promisee. Assume now that the promisor (being a very popular person who is invited to many lunches and memorial services) is frequently challenged on similar grounds. It is not unreasonable, under such circumstances, for the promisor to provide a justification for general norms, such as the norm that memorials are more important than lunch appointments, and use this justification on a regular basis. The generality of the proposed justification does not conflict with the right to a hearing. If, but only if, a grievance is sufficiently similar to past grievances, then the reasoning and deliberation used to address those past grievances can be used again. The decision that the current grievance is similar to a past grievance, however, is itself part of the hearing; it follows, rather than precedes, the voicing of a grievance. Thus, the observations concerning the generality of constitutional deliberation do not undermine the right that individuals have in many legal systems to initiate constitutional litigation, to attempt to distinguish cases from prior similar cases, and to demand that courts reconsider their prior decisions. In principle, courts provide the opportunity for a victim of an infringement to challenge the infringement and to demand an explanation that addresses her own particular grievance.

Third, one could argue that while the right-to-voice-a-grievance conception of judicial review portrays the judiciary as an ally of the legislature, in fact the two branches are often in conflict. How could an institution whose existence is in part justified on the ground that it facilitates an opportunity to voice a grievance regarding a legislative action develop the independence that courts often manifest in their decisions?

Admittedly, the proposed right-to-a-hearing conception involves a corporate understanding of the relationship between the legislature and the judiciary. Such an understanding perceives both courts

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and legislatures as entities within one large organization: the state. Yet this understanding is not based on an idyllic view of that relationship. On the contrary, conflicts between the legislature and the judiciary do not necessarily reflect institutional imperfections; rather, these conflicts arise naturally from the fact that the right to a hearing may require courts to overturn the legislature's decision.

This Part has established that individuals have a right to judicial review—a right that is derivative of the right to a hearing. In particular, we have claimed that respecting the right to a hearing requires establishing a special institution designed to address particular grievances, provide particularized explanations, and, in appropriate circumstances, overturn legislative decisions. Furthermore, we have argued not merely that a theoretical institution ought to be established to satisfy this right, but that existing institutions, in fact, protect this right. The next Part examines the relationship between the right to judicial review and the seemingly conflicting right to equal democratic participation.

IV. JUDICIAL REVIEW AND DEMOCRATIC PARTICIPATION

An opponent of judicial review may concede the existence of the right to voice a grievance but protest that it is overridden by the right to equal democratic participation, which holds that all should have an equal say in matters that concern all, and that the most neutral and fair decision procedure is majority rule. Under equal democratic participation, the decisions reached by deliberative and accountable representatives best realize the values of self-rule and equal respect for individuals. Even if, in principle, the legislature has no power to (unjustifiably) infringe rights and should be committed to the protection and advancement of those rights, the question of whether, in fact, rights are unjustly infringed is a matter that concerns all because it addresses the scope and nature of individual rights. Consequently, the duty to answer this question should be entrusted to the legislature. Thus, an opponent of judicial review might argue that, since judicial review grants a greater share of power to judges and interferes with the principle of majority rule, it

undermines democratic participation and the values that give rise to equal democratic participation.⁴¹

In response, we claim that the right to a hearing is, in fact, a participatory right. Both the right to a hearing and the right to equal democratic participation further similar values and enhance meaningful participation. A position that opposes judicial review in the name of equal democratic participation treats equality of participation too simplistically. Put differently, both judicial review and equal democratic participation serve the equal right to participation. This right differs from the right to equal democratic participation—that is, an equal right to some good differs from a right to an equal share of the designated good.⁴² Furthermore, it is not always the case that the equal right to a good is best served by equally sharing the good. Consider, for example, an equal right to medical treatment.⁴³ Plausibly, this right is not ideally respected by allocating an equal amount of treatment to every person, regardless of her condition. One could object, however, that this example makes the case too easy and that the equal right to medical treatment is a right to “treatment when needed,” not to treatment *simpliciter*. This objection only highlights the real question: how best to respect the equal right for participation, without presuming in advance that equal democratic participation is all that matters. Our claim is that the right to a hearing is participatory, judicial review enhances participation, and thus a system with judicial review respects the equal right for participation, despite its infringement of equal democratic participation.

Consider the values that underlie equal democratic participation in the first place—for example, equal representation to all and majority rule, which embody the interest of individuals in self-rule, the ideal of a political community of equals, and the importance of

⁴¹ That these values seem to lie at the heart of our differing conceptions of rights in general highlights the asymmetry mentioned above: opponents of judicial review are concerned with the infringement of a particular right, while proponents of judicial review advocate rights-consequentialism. Under the rights-consequentialism view, it is optimal to structure society so as to best protect rights in general, even at the cost of actually infringing the right to equal democratic participation and depriving people of the power to rule themselves.

⁴² See Dworkin, *supra* note 8, at 227 (distinguishing between the right to equal treatment and the right to treatment as an equal).

⁴³ *Id.*

demonstrating similar respect to individuals. Similar values ground the right to a hearing. The relationship between judicial review and participation was identified by Professor Lawrence Sager:

The second way that a member of a political community can participate as an equal in the process of rights contestation is to have her rights and interests—as an equal member of the political community and as an equal rights-holder—seriously considered and taken account of by those in deliberative authority. Any member of the community is entitled, on this account, to have each deliberator assess her claims on its merits, notwithstanding the number of votes that stand behind her, notwithstanding how many dollars she is able to deploy on her behalf, and notwithstanding what influence she has in the community.⁴⁴

The right to a hearing grants a victim of an infringement an opportunity to participate in deliberation concerning that infringement. Even in a system that respects equal democratic participation, rights may be infringed. If an infringement occurs, respect for the rights-bearer requires the type of access and participation provided by judicial review. As in the case of equal democratic participation, this form of participation is worthy in itself, not merely as an instrument for achieving some further end. Thus, the right to a hearing rests on the same type of considerations justifying equal democratic participation or the right to a fair trial.

The problem with equal democratic participation is that it treats equal participation literally. Generally speaking, equal democratic participation matters because it grants all an equal say on issues that matter to all. In other words, the right to equal participation expresses a commitment to the equality of individuals—it realizes the equal right for participation. It is perhaps inevitable that, in most matters, most citizens can only participate as spectators, cheering (voting) for their preferred representatives. At most, when one finds an issue, such as how to fight a war, deeply troubling, there is the possibility—open to all—of protesting or trying to convince as many people as possible of the validity of that perspective. Judicial review adds a guarantee of meaningful participa-

⁴⁴ Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* 202–03 (2004).

tion in matters that one holds to be profoundly important. The question of which matters we should recognize as sufficiently important that they are worthy of a hearing has a straightforward answer: those that implicate individual rights.

Singling out those whose rights have been infringed and granting those individuals a hearing is justifiable and should satisfy anyone who proclaims to take rights seriously, opponents of judicial review included. Not every decision bears equally on the lives of all individuals. At one end of the spectrum, we have the private sphere, where self-rule is precisely that—rule by the self. At this end, the decisionmaker is an individual and her decision is a manifestation of self-rule. At the other end of the spectrum, we have the public sphere, containing issues that relate to the populace as a whole, and consequently the decisionmaker ought to be the society as a whole. In the middle of the spectrum are local matters, issues that pertain only to particular groups. The right to voice a grievance enhances the right to participation by involving individuals in determinations that concern them. Our conceptions of rights determine which issues actually concern individuals, rather than particular groups or the populace as a whole. Meaningful participation in the case of a purported infringement requires protecting the right to voice a grievance. A system of equal democratic participation of the type suggested by the opponents of judicial review fails to meet the required desiderata—namely meaningful participation for all—except in the empty sense that none can participate meaningfully when the question of an infringement of their rights arises.

Viewed from this perspective, judicial review realizes the right to voice a grievance and, consequently, also the equal right of participation, because it allows for meaningful participation when an individual's rights have been infringed. The right to voice a grievance is granted to all, but it can be exercised only by those who can reasonably claim that a statute infringes their individual rights. Judicial review therefore enhances the participation of those whose individual rights are at stake.

The fact that the right to voice a grievance and equal democratic participation serve similar values (or, more broadly, serve the same general right to meaningful participation) means that if we are committed to these values, we should strive to accommodate both. That is, we should adopt a scheme of judicial review and not, for

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example, a scheme in which the courts infringe on the legislative sphere. In other words, judicial review and equal democratic participation can peacefully co-exist, and the precise balance between them should be sensitive to particular contingencies. In practical terms, this means that instead of focusing on whether judicial review should exist, debates should instead focus on the particular form an institution of judicial review should take, the type of presumptions and considerations it must involve, and how public officials are to be held accountable.

CONCLUSION

This Essay's defense of judicial review highlights the traditional asymmetry inherent in the debate concerning the issue. Whereas judicial review supporters have usually relied on instrumental grounds, we have argued that judicial review can be viewed primarily as a rights-based institution, not in the sense that it facilitates the effective protection of rights, but in the sense that citizens have a right to judicial review—a right derivative of the right to voice a grievance. This right to an individualized hearing, we have argued, cannot be fulfilled by the legislature given the abstract and the general nature of legislative deliberation. Rather, it must be fulfilled by a body that is attuned to the particular claims made by individuals and to the particularities of cases involving alleged rights violations. In order to honor the right to a hearing, the state is obliged to provide an "individualized explanation." It must justify, and reconsider, any alleged infringement in light of an individual's particular claims and circumstances. Finally, we have argued that the right to a hearing is a participatory right, in that it furthers the equal right of participation, and should be regarded as complementing the right to equal democratic participation. There is no inherent conflict between equal democratic participation and the right to judicial review, because the right to a hearing provides a fair opportunity for any victim of an infringement to participate in the deliberation leading to the infringement of her rights.

The function performed by the judiciary is an integral part of the ongoing process of deliberation and legislation. Judicial review allows injured parties to have their say and allows for the particularities of actual cases to enter into the state's deliberative process. If one accepts that the exercise of authority involves supplying expla-

nations and allowing for meaningful participation, then the role of the judiciary is a necessary complement to that of the legislature. An equal right to democratic participation, when the notion of participation is construed broadly, requires judicial review. Judges, like elected representatives, fulfill an official role in a legitimate process of legislation. The supposed privilege judges enjoy at the expense of the participation of the citizens is the byproduct of a system designed to ensure a meaningful equal right to democratic participation, rather than the result of a system that compromises or detracts from equal democratic participation. The right to voice a grievance furthers, rather than inhibits, the values of participatory democracy.