Why Constitutionalism Matters: The Case for Robust Constitutionalism

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Abstract

This article is founded on disillusionment with a dominant approach to justifying the legitimacy of constitutions and of judicial review. In the prevailing tradition, constitutionalism is justified by its desirable consequences, e.g., the promotion of justice or democracy. This article disputes this methodological starting point and defends robust constitutionalism. Robust constitutionalism refers to a mode of justification that does not rest on contingent facts. Instead robust constitutionalism defends constitutionalism on the basis of values that are embedded in the very concept of a constitution and in the very essence of judicial review. Constitutional entrenchment of rights is valuable because it constitutes public recognition that the protection of rights is the state’s duty, rather than a mere discretionary gesture on its part. Judicial review is valuable not because it is likely to result in “better” or just decisions, but because judicial review is nothing but a hearing to which individuals are entitled.

I. Introduction

This article is founded on disillusionment with a dominant approach used by political philosophers to justify the legitimacy of constitutions and of judicial review. It is fashionable among political and legal theorists to justify establishing a constitution and granting courts powers to review statutes in terms of the contingent desirable effects of such institutions. Under this view, to assert that constitutions are desirable, it is necessary (and perhaps also sufficient) to point out that the entrenchment of constitutional provisions results in better decisions than those that would have been rendered in the absence of such provisions. Similarly, to assert that judicial review is desirable requires establishing that judicial review results in better decisions than those that would have been rendered in the absence of judicial review. Thus, for instance, one of the most influential justifications of constitutions and of judicial review rests on a conjecture that constitutions and judicial review are desirable because they are conducive to the protection of human rights or to the protection of democracy.

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This article disputes this prevailing methodological starting point and defends robust constitutionalism. What characterizes robust constitutionalism are the types of justifications that are provided for constitutionalism. Under robust constitutionalism the value of binding constitutional directives and the value of the institutional mechanism designed to protect such directives (namely, judicial review) do not hinge merely on their contingent contribution to the substantive merit of the political or legal decisions. In contrast to the prevalent view, constitutions as well as judicial review are not mere instruments to guarantee good, just, or coherent decisions. Binding constitutional provisions and judicial review are valuable because they transform and restructure relations between the state and its citizens in various ways. Constitutional directives highlight the fact that certain decisions made by the legislature are not discretionary; they are owed as a matter of duty to its citizens. It is the binding nature of constitutional directives which differentiate them from mere legislative decisions. Judicial review is important and valuable because it constitutes a hearing to which citizens are entitled when they claim (rightly or wrongly) that their rights are violated.

I label this view robust constitutionalism because in contrast to the traditional justifications, robust constitutionalism does not rest on factual contingencies and does not depend on any empirical generalizations (e.g., judges are better at protecting rights than legislatures). While traditional advocates of constitutionalism are vulnerable to the risk that contingent facts would demonstrate that constitutions are undesirable, robust constitutionalism is not subject to this risk. Under robust constitutionalism, the desirability of constitutions and of judicial review is embedded in these institutions in a way that is inseparable from them.

This article inverts the order of the reasoning characterizing constitutional theory. Most typically, constitutional theory starts with a project or an enterprise: protecting human rights, promoting democracy, defending justice, bringing about settlement, stability, coherence, etc. Then the theorist turns to identify the procedure or the entity that is most capable of performing this enterprise. Instead, under the view proposed here, it is not that how it ought to be done and who ought to perform the task, e.g., protect rights, depends on who can succeed in performing it; rather, it is that who can succeed in performing it depends on how it ought to be done and who ought to do it. Constitutional directives are desirable not because they are likely to result in better decisions but simply because they embody a recognition of the binding force of rights. Similarly judicial review is desirable not because courts are superior to legislatures or are likely to make better decisions than those made by legislatures but because judicial review constitutes a hearing to which citizens are entitled. Furthermore, I argue that the traditional justifications of legal and political theorists are often mere rationalizations that do not reflect the convictions of those who cherish the institutions or support them. In reality, often the passion for constitutionalism is not grounded in contingent facts concerning the foresight and the accountability of founders of constitutions or of courts. It is founded instead on more foundational principles of political legitimacy.
This view may seem strange. It deviates radically from the prevailing view of legal and political theorists under which constitutions and courts are instruments whose desirability hinges on their prospects in improving in some way or another the quality of decisions. How could constitutions be justified if not by pointing out their desirable effects, namely, the effects that they may have on the quality of the resulting decisions? A view that regards constitutions or courts as valuable independently of the resulting decisions could be characterized as a view that fetishizes the constitution or courts, a view that unjustifiably glorifies these institutions. I believe nevertheless that this view can be defended. To illustrate the type of justificatory method I use in this paper, consider the justification provided by theorists for democratic governance and, in particular, arguments concerning the authoritativeness of democratic decisions. It is evident to many that decisions that are made democratically are authoritative at least partly because they result from democratic procedures. It is not the correctness (or the likelihood of correctness) of the resulting democratic decision that justifies its authoritativeness. Instead, its authoritativeness is the byproduct of the agent to whom the decision is attributable—the people. I wish to argue that the authority of constitutions can be explained in similar terms. Their authority does not rest upon speculating about the question of whether constitutions or judicial review are conducive to the quality of decisions or are effective protectors of human rights or improve decisions in any other ways.

Section II exposes some of the difficulties in the traditional approach. Section III provides an alternative justification for constitutionalism. Section III first shows that constitutional directives are desirable irrespective of their effects on the quality of the resulting decisions; it then establishes that judicial review is desirable on moral grounds independently of the effects that it may have on the quality of decisions. My conclusion is that constitutionalism matters as such, not merely as a contingent instrument to bring about desirable outcomes. In establishing this claim, I show that robust constitutionalism is not merely a sound way to justify constitutionalism but also that it is more attentive to the sentiments of politicians, citizens and activists. It is the wish to capture as much as possible the concerns that are cherished by these groups which has been the impetus for developing this theme.

II. The Failure of Instrumentalism in Constitutional Theory

For many years the dominant position in constitutional theory has been instrumentalism. Under instrumentalist theories, constitutions and judicial review are justified to the extent that they are likely to bring about contingent desirable consequences.

There are of course major differences among constitutional instrumentalists. In particular, instrumentalists differ in what they perceive to be the desirable consequences that the constitution is designed to bring about. The constitution is understood to be designed to protect rights, to protect democracy, to guarantee settlement, coordination and stability, to protect constitutional politics or even to bring about the best
consequences overall. While these examples reveal that there are important differences among different constitutional theorists, 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 or goal 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 or procedures best capable of realizing the “point” of the constitution. Instrumentalist theories of constitutions or of judicial review perceive this second step, namely, identifying the process of constitution-making or the institutions in charge of interpreting the constitution, as subservient to the findings in the first stage. Both the establishment of the constitution and its interpretation are contingent means to better the decisions rendered by the polity.

The dominance of instrumentalist explanations has been taken for granted by constitutional theorists. Adrian Vermeule, a proponent of constitutional instrumentalism, believes that “judges should interpret legal texts in accordance with rules whose observance produces the best consequences overall.” Rule consequentialism requires the theorist to look not at any particular decision that courts or legislatures are likely to generate, but at the broader and more foundational institutional characteristics of courts and legislatures. In justifying his methodological starting point, Vermeule maintains that: “In principle, these consequentialist premises exclude a domain of (wholly or partially) non-consequentialist approaches to interpretation. It turns out, however, that this is not a very large loss of generality, because very few people hold views of that sort. Interpretative consequentialism is an extremely broad rubric.” In his criticism of judicial review, Jeremy Waldron also argues that the primary concern of advocates of judicial review is that “legislative procedures may give expression to the tyranny of the majority” and that legislative majorities are “endemically and constitutionally in danger of encroaching upon the rights of individuals or minorities.” It is therefore the contingent consequences of judicial review, namely the fact that courts are more likely to protect rights, that justify the institution of judicial review. Numerous examples of instrumentalist explanations can be found in the literature. Let me mention only the most prominent ones as I have examined this question previously in greater detail.

Many theorists believe that judges are superior to other officials in their ability to identify the scope of rights and assign them proper weight. Some theorists believe that the superiority of judges is attributable to their expertise; judges, under this view, form a

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1 For a survey of the different positions, see Alon Harel & Tsvi Kahana, The Easy Core Case for Judicial Review, 1 J. Legal Analysis 227, 231-34 (2010); Alon Harel, Why Law Matters ch. 6 (forthcoming 2014).
3 Id. at 6.
5 Harel & Kahana, supra note 1, at 231-34.
class of experts on rights. 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. 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. This view is perhaps the most popular and well entrenched in American legal thought. John Hart Ely famously developed an alternative view. In his view, the “pursuit of participational goals of broadened access to the processes and bounty of representative government” ought to replace “the more traditional and academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental.” 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 it should favor a “participation-oriented, representation-reinforcing approach to judicial review.” Settlement theories of judicial review maintain that judicial supremacy is justified on the grounds that it is conducive to settlement, coordination, and stability. 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.

In all of these cases, the justificatory method meets the general structure described above. First the theorist identifies the goods that constitutions or judicial review are designed to bring about: the protection of rights, the promotion of democracy or

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9 It has most famously been argued by Alexander Hamilton. See The Federalist No. 78, at 544-45 (Henry B. Dawson ed., 1891).
11 Id. at 87.
12 Larry Alexander & Fredrick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359 (1997); Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 Const. Comment. 455 (2000) [hereinafter Defending Judicial Supremacy]. This argument was first made by Daniel Webster, 6 Cong. Deb. 78 (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. See Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 12 (2d ed. 1986).
13 In purporting to establish the Supreme Court’s special virtues in realizing these goals, Alexander & Schauer rely on the relative insulation of the Court from political winds, on the “established and constraining procedures through which constitutional issues are brought before the court,” on the small number of members of the Supreme Court, the life term they serve, and the fact that the Court cannot pick its own agenda. Defending Judicial Supremacy, supra note 12, at 477.
some other value. Then the theorist establishes that constitutions and/or judicial review are effective means to bring it about. This latter judgment is a factual claim; it is based on contingent conjectures concerning the effectiveness of constitutions and/or judicial review in bringing about the desirable outcomes, e.g., the protection of rights, the promotion of democracy or settlement, coordination and political stability.

I believe that this approach raises serious difficulties. More specifically, the critical flaw underlying the debate concerning constitutionalism is the conviction that the authoritativeness of constitutions must be instrumentally justified, i.e., that it should be grounded in contingent desirable features of constitutions or of courts which are assigned with the task of interpreting them (for example, the superior quality of constitutional texts, the superior 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). Further, the desirability or justifiability of the decision is deemed independent of the institution making it or the procedure by which it was brought about. Let me point out two main defects in this view.

First, the task of establishing that an institution or a procedure is conducive to a worthy goal often requires empirical or quantitative social science skills. Can social science establish that courts are typically more attentive to minority concerns than legislatures? Are constitutional norms that bind the legislature more or less conducive to justice than legislative supremacy? Is judicial supremacy more or less conducive to constitutional values than legislative supremacy? Given the breadth and generality of such sweeping statements, even social science is sometimes impotent in substantiating such claims. The question of whether judicial review is conducive or not to justice or to the protection of rights depends upon the quality of the judges, the methods of nominating them, and other contextual parameters. The soundness of such claims differs from one society to another, one generation to another, while the claims of political theorists often transcend both place and time. To the extent that the political theorist wants to provide an argument that extends beyond a specific place and time, she needs to provide a more solid foundation for its conclusions.

Of course the theorist could give up this ambition and argue in favor of constitutional schemes that are specific to a particular place and time. But the long duration of constitutions makes this a very unappealing strategy. Constitutions are typically stable and are designed to last for long periods. As a matter of fact, it is often considered to be inappropriate for a constitutional theorist to rest her arguments on contingent grounds, for instance, that “currently judges are more or less capable than legislatures to decide correctly or justly.” The support or opposition to constitutional schemes must be principled, rather than contingent on the virtues or vices of particular judges or legislators at a particular time or place.

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14 These difficulties have been identified in Harel, supra note 1, Introduction.
Second, the traditional structure of justifications often suffers from insincerity or inauthenticity; it fails at times to capture the real sentiments underlying the urge to sustain or design political institutions and procedures. The sentiments underlying and sustaining the passions of legislators, the public, and even the theorists themselves are grounded in different normative considerations than those officially used to defend the relevant institutions or procedures. There is a sense of incongruity between the official (allegedly rational) justifications of political institutions or procedures (in terms of the quality of resulting decisions) and the underlying sentiments triggering the interests and passions of those who sustain these institutions, establish them, design them, or simply cherish them. To use an analogy, a theorist may provide a perfectly sound utilitarian justification for a categorical prohibition of slavery, or for an absolute prohibition of torture and other inhumane practices. But such justifications seem to miss the point and fail to explain the sentiments underlying the resistance to such practices, as the revulsion triggered by such practices is not attributable to utilitarian considerations. Similarly, even perfectly sound contingent arguments for or against certain entrenched political institutions or procedures may miss the point as they purport to rationalize political institutions and procedures in terms that do not capture what makes these institutions or procedures politically and morally attractive.

One of the byproducts of such instrumentalist arguments is the existence of an unbridgeable gap between political theory (aiming at rationalizing political institutions and legal procedures) and civic practice and discourse (resting on unarticulated and under-theorized beliefs and sensibilities). In contrast, my attempt is not merely to justify certain institutions and procedures but also to provide justifications that echo the sentiments and passions of those who support, sustain and even challenge the political and legal institutional order.15

III. The Case for Robust Constitutionalism

A. Introduction

This section develops two distinct arguments: 1) Binding constitutional directives are necessary to protect republican freedom. 2) Individuals have a right to a hearing and judicial review is required to protect this right. These justifications are not grounded in contingent conjectures such as the merit of the decisions likely to result from constitutionalism. Instead, it is argued that constitutionalism as such is desirable independently of the question of whether it results in desirable decisions. This is the core of what I label robust constitutionalism.

15 There is a lot more to say here concerning the virtues and vices of sincere or authentic justifications. I discuss those in Harel, supra note 1, Conclusion. See also the conclusion of this article.
B. Why Constitutions Matter

The Talmud tells a story of a Gentile who missed a great business opportunity because he did not want to disturb his father by taking a key that was under his father’s pillow. The red cow that was his reward for honoring his parents was of immense value at the time. Rabbi Ulla inferred from this story the lesson that, if a Gentile, who is not commanded by God to honor his parents, was rewarded so profoundly, then a Jew, who is subject to the commandment to honor his parents, would be rewarded even more richly. Rabbi Ulla based this conclusion on a statement by Rabbi Hanina that “he who is commanded and fulfills [the command] is greater than he who fulfills it though not commanded.” This sub-section applies this lesson to the legislature, and argues that a society in which the legislature honors rights but is not “commanded to do so,” i.e., is not constitutionally bound to do so, is inferior to a society in which the legislature “is commanded to do so,” i.e., is bound by constitutional duties protecting individual rights (and complies with them). The latter society is superior for the reason that in such a society individuals do not live “at the mercy” of the legislature; their rights do not depend on the legislature’s judgments or inclinations concerning the public good.

Individuals have political rights, and the normative force of these rights is (at least sometimes) independent of the constitutional entrenchment of these rights. The state ought to protect freedoms and guarantee equality independently of whether these are constitutionally entrenched. Some jurisdictions choose to constitutionally entrench rights while others do not. Compare state A, in which a benevolent legislature refrains from violating the rights of individuals or even protects these rights vigorously, with state B in which rights are protected to the same extent as in state A, but they are also enshrined in a constitution or bill of rights. Given that there are no other differences between the two states, which scheme (if any) is superior? Is it valuable to constitutionally entrench pre-existing moral/political rights even when such an entrenchment is not conducive to the protection of these rights? Do constitutional rights as such matter, and, if so, why?

This section defends the view that constitutional rights matter, as the constitutional entrenchment of pre-existing moral/political rights is valuable (independently of whether such an entrenchment is conducive to the protection of these

16 See Talmud, Avoda Zara 3a. The Tosefot, one of the important Talmudic commentaries, explains the rationale underlying this surprising claim. It argues that one who is commanded is anxious to obey the commandment. Someone who is not commanded obeys because of his own will to do so, and consequently, should not be rewarded in the same way. The Ritba (another influential Talmudic commentary) argues that: “it is the devil who argues when he is commanded, and the devil does not argue when he is not commanded.” A natural understanding of the reference to the “devil” is the evil residing in every individual, which tempts people to resist what they have been commanded to do. A person’s reward is greater when a greater effort is necessary to overcome one’s natural inclinations.

17 Yet constitutional entrenchment of moral or political rights may change the scope and weight of the pre-existing moral and political rights. Constitutional entrenchment changes the expectations of citizens; it may transform the surrounding circumstances in morally relevant ways; etc. See Joseph Raz, On the Authority and Interpretations of Constitutions, in Constitutionalism: Philosophical Foundations 152, 173 (Larry Alexander ed., 1998).
I defend what I label “binding constitutionalism,” namely a scheme of constitutional directives binding the legislature. Binding constitutionalism is characterized by the constitutional entrenchment of pre-existing moral and political rights-based duties (constitutional directives). Such an entrenchment need not be accompanied by an effective institutional system of enforcement such as judicial review and, further, it need not be conducive to the greater or more efficacious protection of the rights enshrined in the constitution. Its value derives from the importance of constitutional entrenchment of moral or political rights in itself as a form of public recognition that the protection of rights is the state’s duty rather than merely a discretionary gesture on its part, or contingent upon its own judgments concerning the public good. The entrenchment of a constitutional right-based duty is essential to the protection of freedom. Citizens are freer in a society in which such rights are recognized as duties of the state rather than as resulting from the mere judgments or inclinations of legislatures. This is because in such a society citizens do not live at the mercy of their legislature and are not subject to its judgments or preferences.

To justify binding constitutionalism, examine the difference between state A and state B. In state A the legislature generally refrains from violating rights. But given the absence of any constitutionally entrenched rights, there are no publicly recognized limitations on the powers of the legislature. The legislature’s decision not to violate rights does not depend upon its publicly recognized duties; instead it is publicly understood to be contingent on the legislature’s judgments (or inclinations). The citizens of A are “at the mercy” of the legislature’s inclinations (or judgments); they live under the shadow of the legislature’s whims. In contrast, in state B, the legislature is publicly bound to conform to the constitutionally entrenched duties and, consequently, citizens’ rights do not depend upon the legislature’s inclinations; they are publicly understood to be duties to which the legislature ought to conform rather than discretionary decisions on its part.

The rationale underlying binding rights-based constitutionalism is grounded in the significance of the public recognition of rights-based duties binding the legislature. In particular, the rationale is grounded in the publicly-salient differentiation between discretionary legislative decisions, (namely those decisions that are grounded in the legislatures’ inclinations/preferences/tastes/judgments), and those decisions that are grounded in the legislature’s rights-based duties. While in both state A and state B the fundamental freedoms are protected to the same degree, only in state B are they honored.

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18 To be sure, I do not claim that all constitutional rights entrench pre-existing moral/political rights. Larry Alexander distinguishes between three ways of conceptualizing constitutional rights. My concern in this paper is merely with Alexander’s second category, namely, those rights that incorporate in the constitution real moral rights. See Larry Alexander, Of Living Trees and Dead Hands, 22 Can. J.L. & Jurisprudence 227, 230 (2009).

19 Arguably moral/political rights can also be publicly recognized without constitutional entrenchment. Citizens as well as individual legislators can publicly profess their commitment to protect rights and act accordingly. Yet, such public recognition is insufficient, because at most it constitutes recognition on the part of individuals or individual legislators and not of the legislature as such.
i.e., protected as rights that bind the state rather than being viewed as discretionary measures the protection of which is at the mercy of the state.

Why is the publicly-salient differentiation between legislative decisions grounded in rights-based duties and those grounded in mere judgments or inclinations significant? Is it not sufficient to guarantee that rights are adequately protected? As long as the legislature’s decision is rights-protecting, why should it matter what the grounds for the legislative decision are?

I believe that the public recognition of rights-based duties by means of constitutional entrenchment is essential for the protection of freedom (understood as non-domination), because freedom requires not merely that the legislature refrain from violating rights but also that it is bound to do so. This implies that the decision to refrain from violating rights should not be based merely on the legislature’s judgments or inclinations. While it is possible that (given their existing judgments or inclinations) the legislature in state A refrains from violating rights (and also will refrain from violating rights in the future), individuals in state A are subject to “domination,” namely to the risk of a potential shift in the legislature’s judgments or inclinations. Individuals “are subject to arbitrary sway: being subject to potential capricious will or the potentially idiosyncratic judgment of another.”

A real life example taken from the abortion debate in Germany could help to illustrate the significance of constitutional entrenchment.

In 1975 the German Constitutional Court declared that the law which allowed abortion on demand during the first trimester of pregnancy was unconstitutional as it violated Article 2 section 2 of the German Basic Law protecting the right to life. The Constitutional Court emphasized that abortion is an act of killing which the law is obligated to condemn. As one commentator put it, the state had not only the right but also the duty to protect developing life in the womb.
As a result of reunification, the Constitutional Court had to address the matter again, and in its later 1993 decision, the Court reiterated its commitment to the view that abortion is indeed a violation of the right to life and that the state has the obligation to protect life, including the life of the fetus. Yet the Court also declared that while abortion ought to remain criminal, the state could substitute “normative counseling” for criminal punishment as a way of fulfilling its obligations to protect fetuses. The Court asserted that the mandated counseling ought to protect life and that the future provisions of any law would have to be specifically crafted so as to preserve the life of the unborn child and to convince the pregnant woman not to have an abortion. As one noted commentator remarked, “[T]he statutory scheme may include … compulsory counseling (i.e., plans that would leave the final decision to the pregnant woman) so long as the regulatory scheme as a whole ‘effectively and sufficiently’ protects unborn life.”

I do not wish to strictly scrutinize the reasoning of the German Court; nor do I want to discuss the issue of whether fetuses have or do not have a right to life. I shall assume (contrary to my view) that fetuses indeed have such a right. I will argue that the insistence of the German Court that abortion remain criminal (though unpunishable) can be justified on the ground that in the absence of a criminal prohibition, the life of the fetus is “at the mercy of” the pregnant woman. Further, it is not only that the decision to abort ought not to be “at the mercy of” the mother; the decision whether to criminalize abortion ought not to be “at the mercy of” the legislature. The right to life requires therefore not merely to protect life (by reducing as much as possible the number of abortions or the likelihood that abortion takes place) but also to protect the right to life by criminalizing abortion (even when such criminalization is not conducive as an empirical matter to the protection of life).

Assume that reliable evidence is provided to the Bundestag convincing it that decriminalizing abortion would, in fact, reduce the rate of abortions in society and, consequently, more lives would be saved if abortions were decriminalized. Assume that the Bundestag concludes therefore that while fetuses have a right to life, criminalizing abortions is detrimental to the protection of life and, consequently, it declares that decriminalizing abortion is constitutional.

Under my analysis, such a decision on the part of the Bundestag is unjustifiable, as it subjects fetuses’ lives “to the mercy” of their mothers. When a pregnant woman decides not to abort, her decision is based on her inclinations (or even her judgment that it is permissible), not on a publicly recognized right of the fetus. Further, under my

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25 88 BVerfGE 203 (1993); Kammers, supra note 22, at 19.
27 In a discussion with Arthur Ripstein, Ripstein raised the conjecture that perhaps criminalization is not sufficient and that to effectively protect the right to life it is also necessary to inflict criminal sanctions. I do not disagree with this conjecture, and it is possible that the Court has been more lenient than it should have been when it recognized normative counseling given its commitment to the view that abortion is a violation of the right to life.
interpretation of the Court’s reasoning, it is not only that the decision to abort ought not to be left to the discretion of the pregnant woman, but the decision to criminalize abortions ought not to be left “to the mercy of” the Bundestag. If the decision to criminalize is at the mercy of the Bundestag, it follows that the life of the fetus is ultimately contingent upon the inclinations of the Bundestag. The insistence of the German Constitutional Court to maintain that abortion is a crime (though not punishable if normative counseling is conducted), can be rationalized precisely on the ground that protecting the fetus’s right to life is to be left neither to the mercy of the pregnant woman nor to the inclinations of the Bundestag.

The abortion debate in Germany has much deeper significance than is often recognized. It is not merely about the right to life, or whether the fetus is a human being whose life ought to be protected. More specifically, this debate highlights the sharp difference between protecting life and protecting a right to life. Life can be protected in a state without protecting a right to life. Further, protecting a right to life may even be detrimental to the protection of life when criminalization of killings leads to more killings. Under the interpretation provided here, the abortion case can be justified on the ground that life as well as basic freedoms ought not merely to be protected; they ought to be protected as rights.

Constitutional directives are justified not merely on the basis of the conjecture that they are likely to be followed by legislatures and thereby improve the quality of their decisions. Instead, constitutional entrenchment is a form of public acknowledgement by the legislature itself and by the community at large that the legislature is duty-bound. In the absence of a constitutional duty, legislative decisions could always be attributed to the legislature’s judgments or inclinations rather than to its duties and, consequently, rights are now “at the mercy of” the legislature.

One implication of this analysis is the oppressive potential of democracies which do not have a constitution. In pointing out the oppressive nature of democracy, theorists often point out that democracy may prioritize the interests of majorities over those of minorities (and, at times, the interests of well-organized powerful minorities over those of dispersed and unorganized majorities). Yet the analysis here exposes an additional concern: the rights of individuals in a democracy are contingent on the judgments and inclinations of the legislature. Even if the legislature protects these rights vigorously (and is likely to do so in the future), it is still the case that individuals’ rights are byproducts of choice or discretion rather than of duty. This is a non-contingent deficiency of democratic institutions. Even if the legislature is highly enlightened and is devoted to the protection of rights and justice, the mere fact that our rights are “at its mercy” is a deficiency that needs to be addressed. Binding constitutional directives address this concern.
C. Why Judicial Review Matters

This sub-section defends the view that judicial review is designed to facilitate the voicing of grievances by protecting the right to a hearing. I argue that individuals have a right to a hearing which is correlative to a deliberative duty on the part of the state to attend to their grievances. I also argue that judicial review is nothing but a hearing. Judicial review is indispensable because it grants individuals opportunities to challenge decisions that impinge (or may have impinged) upon 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.28

When and why do individuals have a right to a hearing? The right to a hearing, I argue, depends on the right-bearer’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. The first type of controversy occurs when the right-holder challenges the justifiability of an infringement of a right. The second type of controversy occurs when there is a dispute concerning the very existence of a prima facie right. I shall focus in this article on the first type of dispute but the argument could be extended to the second type.

A right is justifiably infringed when it is overridden by conflicting interests or rights.29 If, in the course of walking to a lunch appointment, I have to stop to save a child and, consequently I miss my appointment, the right of the person who expects to meet me is being (justifiably) infringed.

Infringements of rights can give rise to two distinct complaints on the part of the right-holder. One complaint is 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 right-holder is provided with an opportunity to raise a grievance and to challenge the infringement. The complaints elicited by a disappointed promisee may illustrate the force of such a grievance. The 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

28 The analysis is based mainly on two previous papers: Yuval Eylon & Alon Harel, The Right to Judicial Review, 92 Va. L. Rev. 991 (2006); Harel & Kahana, supra note 1. See also Harel, supra note 1, ch. 6.

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 a hearing were to take place, the promisee should be provided with an opportunity to challenge the promisor’s decision.

What does the right to a hearing triggered by an infringement of a prior right consist of? There are 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 the infringement that addresses her grievance, and a principled willingness to honor the right if the infringement turns out to be unjustified.

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, disrupts 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.

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 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 sometime in the past, after thorough deliberation, she adopted a rule that in cases of conflicts between lunches and memorials, she always ought to attend the memorials. When challenged by the promisee, the promisor recites the arguments used in past deliberations without demonstrating that those arguments justify infringing this promise in the specific circumstances at hand, and without taking the present promisee into consideration in any way. Such behavior violates the promisor’s duty to engage in meaningful moral deliberation. The duty to provide a hearing 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 or even likely to be 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 justifiability of the infringement in 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 the hearing is more likely to generate a better decision. The obligation to engage in moral deliberation is owed to the purported right-holder as a matter of justice. The promisee is
entitled to question and challenge the decision because it is her rights that are being infringed.

Lastly, 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.

So far I 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 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: judges ought to be assigned with the task of reviewing legislation because they are instrumental to the protection of the right to a hearing.

Such an instrumentalist approach to the right to a hearing would maintain that the constitution is designed to protect or promote hearings 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 to be a court in our system, it does not necessarily have to be a court. Thus, judicial review is always subject to the instrumentalist challenge, namely to the challenge that it is not the best institutional mechanism to facilitate a hearing. If this is true, there is no fundamental structural difference between the instrumentalist justifications described and criticized above (maintaining that constitutions or judicial review are 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 prospects of hearing grievances).

To establish the claim that the right to a hearing provides a non-instrumentalist justification for judicial review, I 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 judicial deliberation is tantamount to protecting the right to a hearing. To defend this claim, I will 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 and thereby functionally become courts. 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, then 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.

The first task, i.e., establishing that courts are especially suited to facilitate a hearing, requires looking at the procedures that characterize courts. It seems uncontroversial (to the extent that anything can be uncontroversial) that courts are designed to investigate individual grievances. This is not a feature that is unique to constitutional litigation. It characterizes both criminal and civil litigation, and it is widely regarded as a characteristic feature of the judicial process as such. The judicial way of assessing individual grievances is comprised of three components. First, the judicial process provides an opportunity for an individual to form a grievance and challenge a decision. Second, it imposes a duty on the part of the state (or other entities) to provide a reasoned justification for the decision giving rise to the challenge. Lastly, the judicial process involves, ideally at least, a genuine reconsideration of the decision giving rise to the challenge, which may ultimately lead to overriding the initial decision giving rise to the grievance. If judicial review of legislation can be shown to be normatively grounded in these procedural features, it follows that courts are particularly appropriate to perform such a review.

To support the claim that courts are designed to facilitate a hearing, 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 only the obvious, namely, that courts like all institutions are fallible; but it does not challenge their status as courts. In contrast, the former failure, namely a failure to protect the right to a 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 especially suited to protect the right to a hearing.

The second task requires establishing that, as a conceptual matter, other institutions conduct a hearing only to the extent that they operate in a judicial manner. The right-to-a-hearing justification for judicial review requires guaranteeing that grievances be examined in certain ways and by using certain procedures and modes of reasoning, but it tells us nothing about 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.

It is common to believe that what is crucial about courts and what sets them apart from other institutions is the mode of reasoning that characterizes them. Whatever institution performs the hearing, it would inevitably use procedures that are indistinguishable from those used by courts; it will in other ways operate like a court and effectively become a court. The suitability of courts to providing a hearing is not accidental; it is an essential characteristic of the judicial process. Courts provide individuals with an opportunity to raise their grievances and challenge what individuals perceive (justifiably or unjustifiably) as a violation of their rights. Courts also engage in reasoned deliberation and provide an explanation for the alleged violation. Finally, courts reconsider the presumed violation in light of the deliberation. Institutions that operate in this way 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 to establish some institution designed to honor this right but also establishes the claim that the institution conducting a hearing necessarily operates in a court-like manner and effectively becomes a court. After all, “if it walks like a duck, quacks like a duck, and looks like a duck, it must be a duck.” Similarly, if it provides an opportunity to raise grievances, examines these grievances and reconsiders the decision giving rise to the grievance, it is nothing but a court, irrespective of what its title happens to be. Judicial review is not designed to improve the quality of decisions; instead it is nothing but an embodiment of the right to a hearing.

IV. Conclusion

This article defended robust constitutionalism. The term constitutionalism refers to two distinct phenomena: constitutional directives that bind the legislature and rights-based judicial review. Robust constitutionalism refers to a mode of justification that does not rest upon contingent facts. Instead, robust constitutionalism defends constitutionalism on the basis of values that are embedded in the institutional structure itself.

31 This view was also eloquently described by Lon Fuller: “What distinguishes [judges at an agricultural fair or an art exhibition or baseball umpires] from courts, administrative tribunals, and boards of arbitration is that their decisions are not reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments. The judge of livestock may or may not permit such a presentation; it is not an integral part of his office to permit and to attend to it.” The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 365 (1978).
I argued that the constitutional entrenchment of pre-existing political rights is valuable not merely because such entrenchment contributes to the substantive merit of the resulting norms or decisions. Constitutional entrenchment of rights constitutes public recognition that the protection of rights is the state’s duty, rather than a mere discretionary gesture on its part. I then defended judicial review on non-instrumentalist grounds. I argued that whenever a person argues (justifiably or unjustifiably) that her rights are violated, the state ought to provide a hearing. The duty to provide a hearing requires the state (a) to provide individuals with the opportunity to challenge decisions that they believe (rightly or wrongly) violate their rights, (b) to justify its decisions and (c) to reconsider its decisions on the basis of the deliberation and act in accordance with the conclusions of this deliberation. Judicial review is valuable not because it is likely to result in “better” decisions or to better promote or protect rights or minorities, but because judicial review is nothing but a hearing to which individuals have a right.

I mentioned earlier that one of the characteristics of robust constitutionalism is that it is more faithful to the reasons motivating citizens, political activists and politicians. In *Why Law Matters* I defend this view in great detail. I also defend the view that at times it is valuable to provide justifications that echo in some ways the popular or prevailing justifications. Let me briefly defend this view here as it has ramifications that extend much beyond the scope of constitutional theory.

The appeal of justifications that are sincere or authentic, namely justifications that echo popular sentiments, rests on the fact that some institutions and procedures gain normative meaning from the ways they are understood, from the significance attributed to them and the values associated with them. In other words, such institutions and procedures are valuable because and to the extent that they are inextricably linked with certain values of the political community. The link between the institutions and the values is a by-product of our understandings and perceptions and, consequently, without being faithful to these public perceptions we may fail to detect an important normative dimension embodied in these institutions and procedures.

Such a link between institutional and procedural practices on the one hand and values on the other hand is a prevailing feature of our political and legal culture. Parliaments in our culture signify commitments to majoritarian sentiments; courts on the other hand signify commitments to individualism. The goods that maintaining such institutions provides hinge on the values they represent or embody. This observation is a methodological observation which has relevance in other areas of political theory. For instance Dorfman and I argued that the reason for the opposition to privatization of punishment is not instrumental; instead it is grounded in specific features of public entities and the special relations between public entities and moral condemnation. We also argued that this explanation is more faithful to the intuitions underlying the resistance to

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32 See Harel, supra note 1.
privatization. It is at times desirable to justify institutions and procedures in ways that echo the reasons motivating citizens and political activists to uphold these institutions.

Most importantly, I wish to emphasize the contribution of robust constitutionalism to a leveling of the playing field in constitutional theory. Advocates of instrumentalist constitutionalism fight with one hand tied behind their back because they start with the premise that opposition to constitutionalism must rest exclusively on instrumental grounds. Democratic or majoritarian principles are the natural starting point grounded in principled considerations—the right to participation—and constitutionalism is the exception and is based on the concern that democratic participation may result in bad decisions. Under this view, principled or legitimacy-based considerations can serve only opponents of constitutionalism. Robust constitutionalism remedies this defect; it provides principled legitimacy-based arguments to the arsenal of arguments favoring constitutionalism.

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34 Yet I also emphasized that there are limitations to the use of such a strategy. At times we want to provide explanations that deviate radically from popular or conventional understandings. See Harel, supra note 1, ch. 7.