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Institutional Virtues and Constitutional Theory: Bracketing Disagreements About Justice

*Kenneth D. Ward**

While constitutional theorists once assumed that judges derive authority by interpreting the Constitution correctly,[1] many now believe that disagreements about justice preclude consensus about how judges should interpret the Constitution.[2] Consequently, theorists increasingly focus on the best institutional arrangement for addressing the problem of disagreement itself rather than focusing on the justice of particular decisions that judges might make.[3]

Their arguments generally reflect two different traditions of liberal political thought. Some theorists, rooted in the tradition of Locke and Kant, seek to resolve social conflict based on principles that all citizens can affirm.[4] A second tradition, associated with Hobbes, claims that people should subordinate their interest in contesting justice in the name of social order or related values advanced by the institutions that settle divisive social conflicts.[5] This Essay distinguishes claims that reflect these traditions in order to identify how those from the second tradition—what I will call claims of institutional virtue—can overcome two criticisms that are often raised against liberal arguments and can point debates in constitutional theory in interesting directions.

In contrast to claims from the first tradition—what I will call structural claims—claims of institutional virtue do not depend on assumptions about judges' interpreting the Constitution in a manner that advances justice. Therefore, they are immune to the criticism that liberal institutions advance contested ethical views and thus cannot be fair arbiters of people's disagreements. Nonetheless, they are vulnerable to a second criticism: it is

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1. Kenneth D. Ward, *The Politics of Disagreement: Recent Works in Constitutional Theory*, 47 REV. POL. 425 (2003).

2. *See also* MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); *see generally* JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

3. *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992); NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2001); WALDRON, *supra* note 2; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

4. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 17 (1996) [hereinafter DWORKIN, FREEDOM'S LAW]; H.N. HIRSCH, A THEORY OF LIBERTY: THE CONSTITUTION AND MINORITIES (1992); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1990).

5. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); WALDRON, *supra* note 2; Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1996); Alexander & Schauer, *supra* note 3.

not clear why people would prefer an institutional arrangement that promotes social order over one that they believe will advance justice, namely whether people's interest in resolving conflicts provides sufficient reason to abide by political settlements of their disagreements.[6]

This second criticism frames the problem of justifying judicial authority in terms of people's obligation to defer to judicial interpretations of constitutional law. It suggests that one assesses any justification in relation to how judges might decide the salient issues of the day—issues such as abortion, affirmative action, or gay rights. Although considerations of justice would take on great importance if judges actually resolved such divisive issues, they often fail to do so. And claims of institutional virtue cannot be weighed against justice if ongoing contests about what the Constitution means prevent people from knowing whether an institutional arrangement characterized by greater judicial authority will advance justice more than one in which such authority is circumscribed.

This is not to say that the depth of disagreement provides reason to be uncertain about the meaning of justice. It is to say, instead, that contested disagreements about justice prevent people from knowing whether institutional decisions follow from attributes of the institutions that resolve questions of justice, such as the nature of the judicial process, or from shorter-term political variables, such as the relative strength of the religious right and women's movement or the current membership of the U.S. Supreme Court.

What is more, the second criticism reflects a tendency among constitutional theorists to treat disagreement like a disease in need of a cure. Political experience, however, suggests that a better simile would compare disagreement to a chronic condition in need of management. We will see that claims of institutional virtue are well suited to address problems associated with ongoing contests about what the Constitution means and point debates about judicial authority in what many might consider unexpected directions.

Section I of the Essay distinguishes claims of institutional virtue from structural claims. Section II illustrates how this distinction becomes significant with constitutional theory's recent focus on the institutional arrangements that resolve disagreements.

Section III considers the significance that claims of institutional virtue have for discussions of judicial authority. First, it disassociates claims of institutional virtue from structural claims in which contested claims about justice are obscured, because theorists either make ambiguous claims about institutions or combine claims of institutional virtue and structural claims.

6. *See* MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 17-18 (2007) (suggesting that we have reason to favor stability over justice). *See also* ROBERT COVER, JUSTICE ACCUSED (1975) (addressing the psychology of judges who thought they were sacrificing justice for stability or some other goal of law).

Second, it considers how claims of institutional virtue might come into conflict with justice, and contends that these conflicts assume that judges resolve with finality disagreements about the Constitution, a condition that does not seem to characterize American constitutional politics. Third, it contends that claims of institutional virtue gain significance in conditions in which contests about what the Constitution means survive institutional attempts at settlement and illuminates problems that follow when a society must manage such contests. It also considers why the judicial process might be less likely to address these problems if judges use their authority to advance justice. This possibility suggests institutional reforms to reduce the Judiciary's role in the process that defines constitutional values, even though some theorists have used claims of institutional virtue to defend broad conceptions of judicial authority.

I. THE DISTINCTION BETWEEN CLAIMS OF INSTITUTIONAL VIRTUE AND STRUCTURAL CLAIMS

Claims of institutional virtue bracket the disagreements about justice that tend to animate discussions of judicial authority, while structural claims implicate these disagreements. Structural claims are more familiar, because theorists have used them to answer questions of constitutional interpretation. Some have argued that judges enforce a good form of democratic constitutionalism by enforcing values reflected in the American system of government.[7] And judges have interpreted the Constitution in this way to defend, among other things, the right to privacy,[8] the legislative veto,[9] and even judicial review itself.[10]

Claims of institutional virtue, by contrast, identify consequences of different institutional arrangements that have nothing to do with whether those institutions will make decisions that advance justice.[11] Jeremy Waldron uses a claim of institutional virtue to argue against judicial review.[12] He contends that by its nature the legislative process treats people with equal respect in a way that is not true of judicial process, because the judicial process significantly limits both the number of people who have a say about a political decision and the arguments that receive a hearing before that decision is made.[13] His claim goes to the nature of the process that makes decisions, rather than the justice of those decisions.[14]

7. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); STEPHEN BREYER, ACTIVE LIBERTY (2006); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

8. *See* Griswold v. Connecticut, 381 U.S. 479, 483-86 (1965) (describing the right to privacy as a penumbral right under the Constitution).

9. *See* INS v. Chadha, 462 U.S. 919 (1983) (White, J., dissenting).

10. *See* Marbury v. Madison, 5 U.S. 137 (1803).

11. *See, e.g.*, WALDRON, *supra* note 2; *see also* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

12. WALDRON, *supra* note 2, at 3, 4, 7, 159-61.

13. WALDRON, *supra* note 2, at 3, 4, 7, 159-61.

14. WALDRON, *supra* note 2, at 3, 4, 7, 159-61.

While Waldron uses a claim of institutional virtue to argue against judicial review, Mark Graber employs a claim of institutional virtue to defend it.[15] He associates it with a form of constitutionalism that "prevents the politics of justice from destabilizing political regimes by providing unambiguous protections for some crucial interests likely to be insufficiently accommodated by ordinary politics and also by establishing institutions that privilege the policy choices that satisfy most powerful political actors."[16] Judicial review contributes to this form of constitutionalism, "because justices often reach centrist decisions on matters that badly divide national legislatures."[17] Although Graber cites decisions about slavery, abortion, and affirmative action to support this claim, the claim does not depend on the justice of those decisions.[18]

Nonetheless, as Graber's focus on *Dred Scott v. Sandford*[19] suggests, claims of institutional virtue can have implications for how judges decide cases, and this might lead people to confuse claims of institutional virtue and structural claims. Graber defends the decision as a reasonable interpretation of the legal sources that the Court applied in the case.[20] But Graber does not argue that the Taney Court should have decided *Dred Scott* the way that it did.[21] He, instead, attributes the decision to a constitutional design in which slavery was given special protections and in which questions about those protections were likely to be resolved through a judicial process that tends toward centrist decisions.[22] His central normative claim concerns the virtue of this design: there is reason to favor institutional arrangements that promote stability rather than justice, even when those institutions resolve issues as important as the question of slavery.[23]

The confusion is heightened, because judges can use claims of institutional virtue to explain their approach to questions of constitutional interpretation without addressing the justice of particular decisions. Justice Scalia, for example, defends an originalist theory of interpretation that he associates with the rule of law.[24] He contends that the Constitution cannot be an effective legal limit on ordinary politics if judges adapt it to fit changing times or an evolving popular morality.[25]

People might respond that Scalia favors originalist interpretation, because it allows him to advance a contested conception of justice,[26] or that

15. GRABER, *supra* note 6, at 249.
16. GRABER, *supra* note 6, at 249.
17. GRABER, *supra* note 6, at 249.
18. GRABER, *supra* note 6, at 249. This is not to say that people would believe that the stability of centrist decisions would give them reason to defer to judicial decisions that they consider unjust.
19. 60 U.S. 393 (1857).
20. GRABER, *supra* note 6, at 85.
21. GRABER, *supra* note 6, at 85.
22. GRABER, *supra* note 6, at 35-39, 249.
23. GRABER, *supra* note 6, at 35-39, 249.
24. *See* SCALIA, *supra* note 5, at 10-12, 17, 25, 43-44.
25. *See* SCALIA, *supra* note 5, at 40-41, 44-47.
26. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT WING COURTS ARE WRONG FOR AMERICA 133-42 (2005); *see also* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice*

originalist theories of interpretation do not constrain judicial discretion sufficiently for the Constitution to be an effective limit on politics.[27] These responses, however, do not challenge the point that Scalia's argument is a claim of institutional virtue, a claim that does not depend on considerations of justice.

The first response questions the sincerity of Scalia's originalism: it suggests that he appeals to the rule of law as a pretext to decide cases based on his own view of justice. Even if it were true that (1) Scalia is an originalist because he wants to advance a conception of justice that he associates with the original understanding of the Constitution, and (2) many people disagree with the conception of justice that Scalia seeks to advance, it could also be true that originalist judging would promote the rule of law, a system of government in which people would know in advance the rules that would govern them and in which those rules would be applied in a non-arbitrary manner.[28]

The second response assumes that Scalia argues in good faith and views originalism as a means to promote the rule of law.[29] But it questions whether originalist judging is up to the task, suggesting that the discretion enjoyed by originalist judges would make the law uncertain and increase the likelihood of arbitrary application. One would expect Scalia to abandon originalism if this were true and originalism worked against the rule of law. Otherwise, one must conclude that his claim of institutional virtue is only a pretext used to advance a contested view of justice. But again, this conclusion does not change the fact that Scalia makes a claim of institutional virtue; it only challenges the sincerity of the claim.[30]

Scalia, the Ten Commandments, and the Future of the Establishment Clause, 100 NW. U. L. REV. 1097-1139 (2009).

27. *See* David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J. L. & PUB. POL'Y 969, 970 (2008).

28. *See* Scalia, *supra* note 5.

29. *See* Strauss, *supra* note 27, at 970.

30. This Essay addresses whether claims of institutional virtue, as a general form of argument, have significance for constitutional theory, and not the narrower question of whether particular claims of institutional virtue justify judicial authority. Therefore, I do not address whether Scalia's record as a judge or the judiciary's record as a whole supports the possibility that judges could decide cases in a manner that would advance Scalia's particular conception of the rule of law or any other conception of institutional virtue. Indeed, I avoid questions of whether judges can decide cases in a manner that manifests the virtues that theorists have associated with judicial review, because discussions of this kind tend to obscure the significance claims of institutional virtue have. For example, Scalia's dissents in cases such as *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 123 (2003); and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), are sensitive to a problem I raise later in the Essay, namely judicial decisions as a source of political instability. He also suggests that when judges insert themselves into political contests about issues as hotly contested as these, people will apply political pressure to the judiciary that will make judges less able to enforce constitutional rights in contexts where they are clearly applicable. But by focusing on decisions such as these, the salience of the underlying issues makes people focus on justice. They ask whether Scalia means what he says: whether he is deciding these cases to advance the rule of law or whether he is using originalism as a pretext to advance a competing view of justice. As a consequence, the question of whether one should favor his conception of the rule of law is lost in the discussion, as is consideration of institutional reforms that might address the problem of excessive judicial discretion that animates Scalia's criticism of the majority opinions in these cases and also animates those who question the sincerity of Scalia's originalism. Indeed, it seems likely that the judiciary would have sufficient authority to enforce clear

It is easy to mistake claims of institutional virtue for structural claims when they are part of an argument that, like Graber's[31] or Scalia's[32], has implications for how judges should decide cases. Similarly, it is easy to mistake structural claims for claims of institutional virtue when structural claims discuss the process that resolves disagreements about justice. These claims tend to be pitched at a level of abstraction that leads people to miss implications about how judges should interpret the Constitution, implications that follow from controversial assumptions about justice. These structural claims, then, advance contested ethical views in a manner that is not true of claims of institutional virtue.

Ronald Dworkin's defense of judicial review,[33] for example, seems to be a claim of institutional virtue. He contends that judicial review can be justified as consistent with norms of democratic government if it increases the likelihood that a political community would treat citizens with equal concern and respect.[34] It would do so by securing for citizens genuine membership in the political community.[35] This notion of genuine membership connects Dworkin's justification of judicial review to his view that judges promote integrity, a virtue he associates with the rule of law.[36]

Dworkin claims that by applying its principles with integrity, a community exhibits mutual concern, what he considers the hallmark of a community in which citizens have an obligation to obey political authority.[37] Judicial decisions, according to this view, should reflect the best interpretation of the political community's principles of justice, and judges should extend these principles to all applicable contexts.[38]

Although Dworkin's argument does not depend on how judges will decide particular cases, it is impossible to assess his claim without assessing

constitutional provisions and thus promote the rule of law values Scalia favors, even if the legislature had authority to override judicial decisions as they apply to future cases. One would expect overrides to be more likely in relation to hotly contested issues in which the Constitution is unclear or ambiguous, but less likely when judicial decisions are unpopular but follow from clear constitutional provisions. In those circumstances, the clarity of the law that judges enforce should strengthen the political forces supporting the Constitution.

31. *See* GRABER, *supra* note 6, at 20.

32. *See* Scalia, *supra* note 5.

33. *See* Dworkin, Freedom's Law, *supra* note 4, at 17.

34. DWORKIN, FREEDOM'S LAW, *supra* note 4, at 17 (taking the "defining aim of democracy to be . . . that collective decisions be made by political institutions whose, structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect").

35. DWORKIN, FREEDOM'S LAW, *supra* note 4, at 23, 25-26 (stating his belief that the political community must satisfy three conditions to secure genuine membership: (1) each citizen must have an opportunity to influence collective decisions; (2) the interests of each citizen must be considered equally in assessing the consequences of any collective decision; and (3) the political community respects the moral independence of citizens—its authority to resolve moral disputes among citizens does not entail the authority to force citizens to embrace particular moral views).

36. *See* DWORKIN, FREEDOM'S LAW, *supra* note 4, at 17; RONALD DWORKIN, LAW'S EMPIRE 176-224 (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

37. *See* DWORKIN, LAW'S EMPIRE, *supra* note 36, at 191-92, 98-202, 211, 213-14 (resting his argument on the assumption that political legitimacy depends on citizens having a general obligation "to obey political decisions that purport to impose duties on them" and concluding that "a state that accepts integrity as a political ideal has a better case for legitimacy than one that does not").

38. DWORKIN, LAW'S EMPIRE, *supra* note 36, at 191-92, 98-202, 211, 213-14.

the justice of judicial decisions. Dworkin makes this clear when he states that "[t]he 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."[39] And people would reject his argument if they found that judicial decisions did not increase the likelihood that citizens would be treated with equal concern and respect.

Claims of institutional virtue, by contrast, assign no weight to the justice of judicial decisions.[40] Consider, again, Waldron's conclusion that the legislative process advances the value of equality in a way that is not true of adjudication.[41] His claim that adjudication systematically excludes people and interests from the process of decision making would survive, even if one were to think that judges would always decide cases correctly.[42] And Graber's claim that judicial decisions tend to be more centrist than legislative decisions does not depend on whether judges favor abortion rights, affirmative action, or even slavery.[43]

II. Debates in Constitutional Theory: From Judicial Interpretation to Constitutional Politics

Dworkin belongs to a generation of American legal scholars who came to maturity during the ascendance of the Warren Court.[44] Many of these scholars sought to reconcile the Court's activism on behalf of individual rights with the preceding generation's commitment to legislation as the primary vehicle for social progress, and as a consequence, their work tends to focus on questions of constitutional interpretation.[45] Indeed, Dworkin frames his defense of expansive judicial authority as a response to his mentor Learned Hand, a giant of the earlier generation whose Holmes Lecture criticizing *Brown v. Board of Education*[46] is an important statement of that generation's skepticism about such activism.[47] Dworkin clerked for Hand and helped prepare that lecture.[48] He responded to Hand forty years later. But it seems that the earlier foray into the controversy surrounding *Brown*

39. *See* Dworkin, Freedom's Law, *supra* note 4, at 17, 34 (linking his understandings of democratic conditions and integrity; "democratic conditions" in the quoted language referring to an earlier statement that "democracy means government subject to conditions—we might call these 'democratic' conditions—of equal status for all citizens").

40. *See* WALDRON, *supra* note 2.

41. *See* WALDRON, *supra* note 2.

42. *See* WALDRON, *supra* note 2.

43. *See* GRABER, *supra* note 6, at 18-19.

44. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 159-61 (2002).

45. Friedman, *supra* note 44, at 159-61.

46. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

47. *See* Learned Hand, The Bill of Rights (1960); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 46-47 (2d ed. 1986).

48. *See* Dworkin, Freedom's Law, *supra* note 4, at 347.

would help explain the focus on judicial interpretation that permeates so much of his work.

Constitutional theorists of Dworkin's generation share this focus. To a significant extent, debates in constitutional theory have been animated by the need to defend *Brown*.[49] Alexander Bickel, for example, framed *The Least Dangerous Branch* as a response to Hand and Herbert Wechsler,[50] who also used the occasion of a Holmes Lecture to question *Brown*.[51] Bickel introduces the term "counter-majoritarian difficulty" to describe the problem of justifying judicial review, why a non-elected judiciary should have authority to invalidate actions of elected institutions of government.[52] The countermajoritarian difficulty became the touchstone for two generations of constitutional theorists, and they tended to view the problem as one of establishing the democratic legitimacy of *Brown* and other controversial Supreme Court decisions.[53]

A. Judicial Interpretation and the Countermajoritarian Difficulty

The countermajoritarian difficulty assumes that judicial authority depends on judges' interpreting the Constitution correctly. More particularly, theorists believe that judicial review undercuts two bases of democratic legitimacy. Elected institutions (1) define values that better reflect the will of citizens, and (2) allow citizens more control over their government. Constitutional theorists sought to ground judicial authority in legal principles that could overcome these concerns. Judges, according to this view, derive authority when they interpret legal principles in a manner that advances values that the community endorses, or should endorse, and that at the same time limit judicial discretion. It is thought that judges are constrained by the principles they interpret, and this constraint subjects them to something like democratic control.[54]

The quest to solve the countermajoritarian difficulty failed, however. Disagreements about justice made it impossible for theorists to identify principles that had broad normative appeal and that retained this appeal when defined at a level of abstraction necessary to constrain judicial discretion. Principles that have broad appeal in the abstract lose that appeal when applied to concrete legal issues. People, for example, do not agree whether principles of equality justify or work counter to affirmative action programs, or how to resolve conflicts among these principles, such as

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49. *See* LAURA KALMAN, THE STRANGE CAREER of LEGAL LIBERALISM 41, 59 (1998).

50. BICKEL, *supra* note 47, at 46-65.

51. Hebert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 26-35 (1959).

52. BICKEL, *supra* note 47, at 16-18.

53. *See* Keith E. Whittington, *Constitutional Theory and the Faces of Power*, *in* THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY 163-88 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005); Friedman, *supra* note 44, at 158.

54. *See generally* ELY, *supra* note 7. Although there are different understandings of the countermajoritarian difficulty, Ely's view has become the conventional view.

whether principles of free speech extend to communications that subordinate others.

Consider John Hart Ely's critique of non-originalist[55]—what he calls non-interpretivist—theories of judicial review.[56] He uses the play between abstract principles and their concrete application to illustrate that these theories do not identify an acceptable source of values that will limit judicial discretion.[57] His book became a model for criticizing arguments that claimed to solve the countermajoritarian difficulty, a model that is subsequently used against Ely's own argument, that judges should enforce certain core procedural principles that define American democracy.[58]

More significantly, Ely's work stoked two powerful trends in constitutional theory, both of which focus on limiting judicial discretion, and thus assess judicial authority based on how judges interpret the Constitution. First, theorists associated with the revival of civic republicanism extend Ely's idea that judges should enforce principles that define the operation of American democracy.[59] They argue that judges can discover these principles within the wider social context in which citizens debate and define the political community's values.[60] The second trend is the rise of originalism. Originalists contend that judicial review is only legitimate if judges enforce values they have derived from the ordinary meaning of the Constitution.[61]

B. *Claims of Institutional Virtue, Structural Claims, and Process of Constitutional Politics*

Both originalists and civic republicans, however, fail to identify principles that limit judicial discretion to the extent necessary to resolve the countermajoritarian difficulty. As evidence of an unconstrained judiciary has mounted, many theorists have sought to move beyond the countermajoritarian difficulty. Some theorists continue to assess judicial review based

55. I follow Paul Brest in using the term "non-originalist" in order to avoid the mistaken impression that non-interpretivists do not interpret the text of the Constitution and to achieve clarity given that the primary critics of non-originalist judicial review call themselves originalists. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1979).

56. *See* ELY, *supra* note 7.

57. ELY, *supra* note 7, at 11-42.

58. ELY, *supra* note 7, at 101-04. Ely's critics note that Ely does not define his conception of democracy at a level of abstraction necessary to limit judicial discretion, and that judges' concern for doctrinal outcomes will inevitably determine the principles that they believe constitute American democracy. *See generally* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 160 (1996); PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 149-50 (1992); SMITH, *supra* note 4, at 173-74; TUSHNET, *supra* note 2, at 94-107; Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

59. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1525-27 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988).

60. Ackerman, *supra* note 59; Michelman, *supra* note 59, at 1525-27; Sunstein, *supra* note 59.

61. *See* BORK, *supra* note 5; *see also* Scalia, *supra* note 5.

on the values they expect judicial decisions to advance. Consider the surprising convergence in the work of Mark Tushnet and Robert Bork–theorists who are on opposite sides of the political spectrum and who have been associated with republicanism and originalism, respectively.[62] Both conclude that legal principles are too indeterminate to limit judicial discretion. And each has argued that judicial review should be significantly curtailed, because judges will not advance good values.[63]

Other theorists take a different tact.[64] They give greater emphasis to the process that expresses the community's values and less to the particular values that legal decisions might advance.[65] In other words, they attempt to justify the discretion that judges exercise, rather than identify principles that would constrain such discretion. They claim that political legitimacy attaches to the broader political process that expresses values, and that judges derive authority by contributing to a good process.[66] In so doing, they have made both structural claims and claims of institutional virtue to identify benefits of a constitutional structure that includes judicial review.

There has recently been a deluge of such arguments; theorists claim that judicial review makes the political process more deliberative, representative, just, free or that it advances some other important goal.[67] Republicans, for example, now emphasize the role judges play within the political system, rather than the values that judges should advance.[68] Bruce Ackerman and Cass Sunstein contend that judicial review is consistent with democratic government, when that idea is properly understood, and explain how judges might contribute to deliberation about constitutional values.[69]

Originalists have also veered from the view that judges legitimize their power by enforcing legal principles that constrain their discretion. Instead, they give greater emphasis to how originalist interpretation follows from the institutional design of the Constitution. Scalia's association of originalist interpretation and the rule of law provides an example.[70] Consider, as

62. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 96-119 (1996); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

63. BORK, *supra* note 62, at 96-119; TUSHNET, *supra* note 62.

64. SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990); TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999); SEIDMAN, *supra* note 3; and Gerald F. Gaus, *Public Reason and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXXVI (Ian Shapiro ed., 1994).

65. BARBER, *supra* note 64; EISGRUBER, *supra* note 64; FALLON, *supra* note 64; MACEDO, *supra* note 64; PERETTI, *supra* note 64; SEIDMAN, *supra* note 3; Gaus, *supra* note 64.

66. BARBER, *supra* note 64; EISGRUBER, *supra* note 64; FALLON, *supra* note 64; MACEDO, *supra* note 64; PERETTI, *supra* note 64; SEIDMAN, *supra* note 3; Gaus, *supra* note 64.

67. BARBER, *supra* note 64; EISGRUBER, *supra* note 64; FALLON, *supra* note 64; MACEDO, *supra* note 64; PERETTI, *supra* note 64; SEIDMAN, *supra* note 3; Gaus, *supra* note 64.

68. *See* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991); *see also* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

69. BARBER, *supra* note 64; EISGRUBER, *supra* note 64; FALLON, *supra* note 64; MACEDO, *supra* note 64; PERETTI, *supra* note 64; SEIDMAN, *supra* note 3; Gaus, *supra* note 64.

70. *See* Scalia, *supra* note 5.

well, Keith Whittington's argument that judicial review contributes to a system of government that makes self-government possible. He contends that judges undermine this system when they enforce constitutional principles that do not reflect the Constitution's original meaning.[71] These approaches are emblematic of theorists who tether originalist interpretation to considerations of why the political community governs itself through a written constitution.[72]

These claims appeal to virtues that characterize governments with judicial review, as opposed to the particular values that judges are likely to advance through their interpretations of constitutional principles.[73] Steven Macedo, for example, contends that the judiciary, as an institution, respects citizens as reasonable beings, because judges must justify the exercise of government authority in terms that litigants can grasp.[74] His contention depends on judges' exercising their authority in a certain manner—they have to justify their decisions in certain terms—but it does not demand that they decide cases in a particular way.[75] Judges, according to this view, can in some circumstances decide cases for either party or for opposing reasons so long as their decisions are properly justified.[76]

While Macedo associates the rule of law with public justification, and thus the virtue of reasonability, others have emphasized virtues such as constancy, stability, finality, and fairness.[77] They contend that characteristics of the judicial process explain why an institutional system that includes judicial review will manifest the particular virtue they identify. Their arguments justify judicial authority based on considerations that do not depend on the outcomes of particular cases. As with Macedo's appeal to reasonability, theorists can gauge whether judicial holdings are predictable, whether constitutional doctrine is stable, or whether judicial holdings resolve controversies with finality—without any preconceived notion of the correct way to interpret the Constitution. And although the structural emphasis of these theories lends itself to claims about the rule of law, one sees similar arguments from people who view the Court from a more political

71. *See* Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original intent, and Judicial Review 111 (1999).

72. *See* Michael J. Perry, We the People, the Fourteenth Amendment and the Supreme Court (Oxford Univ. Press 1999) (2001); Richard S. Kay, *American Constitutionalism, in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS (Larry Alexander ed., 1998); Jed Rubenfeld, *Legitimacy and Interpretation in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS (Larry Alexander ed., 1998).

73. PERRY, *supra* note 72, at 99; Kay, *supra* note 72, at 16; Rubenfeld, *supra* note 72, at 194.

74. *See* MACEDO, *supra* note 64, at 159-62.

75. This is only true in cases where judges can provide adequate reasons to support both sides of an issue. This assumption, however, appears to describe the controversial Supreme Court decisions that tend to be the focus of debates among constitutional theorists.

76. *See* MACEDO, *supra* note 64.

77. *See* Kay, *supra* note 72. *See also* Alexander & Schauer, *supra* note 3; Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) (describing the virtues of judges by using virtue in its classical sense, such that the virtues described are associated with what is generally called an Aristotelian conception of justice).

perspective. Terri Peretti, for example, has claimed that a judiciary contributes to an institutional structure by expanding the range of interests it represents,[78] and Barry Friedman has claimed that a judiciary provides an outlet for perspectives that contribute to public dialogue about constitutional values.[79] Although there is a marked trend by which constitutional theorists appeal to qualities that would lead us to favor some institutional arrangements over others, it is not always clear whether they are making structural claims, claims that depend on the justice of the decisions likely to follow from a certain institutional structure; or claims of institutional virtue, claims that do not depend on such considerations.

Macedo's argument, for example, resembles Dworkin's: Macedo contends that the judiciary is well suited to perform the reason-giving function and one must look at judicial decisions to gauge how well the judiciary performs this function.[80] But it is possible to determine that decisions are reasoned—one does not have to say that they are well reasoned or better reasoned then potential competitors—without considering whether they are just. Although it is necessary to look across opinions to see whether judges give reasons for their decisions, such analysis does not implicate considerations of justice that would be necessary to determine whether judicial decisions have promoted Dworkin's conception of integrity.

Nonetheless, such assessments are not completely free from considerations of how judges decide cases. It is necessary, for example, to consider whether judges give these reasons in good faith—whether they actually explain decisions as opposed to only being *ex post* justifications of values that judges advance for other reasons. But these assessments do not require the judgments about justice that were necessary to assess Dworkin's claim.

Consider, as well, Alexander's and Schauer's argument that a Court empowered with judicial review is well suited to serve as a "single authoritative interpreter" of the Constitution, thus increasing the likelihood of stable constitutional doctrine.[81] The Court, in Alexander's and Schauer's view, performs a "settlement function," relating to disagreements as to what the law requires; in performing this function, the Court promotes social coordination.[82] While it is true that one would assess this argument by measuring the stability of judicial decisions, it is possible to compare the stability of judicial decisions to decisions made through other institutional arrangements without considering the justice of the decisions themselves.[83]

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78. *See* PERETTI, *supra* note 64.

79. Barry Friedman, *William Howard Taft Lecture: The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1291, 1297-98 (2004).

80. *See* MACEDO, *supra* note 64.

81. Alexander & Schauer, *supra* note 3.

82. Alexander & Schauer, *supra* note 3.

83. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 234 (2004); TUSHNET, *supra* note 62, at 27-28.

III. Claims of Institutional Virtue and Debates in Constitutional Theory

The last section noted a shift in constitutional theory towards arguments that include claims of institutional virtue. This section illustrates the significance claims of institutional virtue have for debates about judicial authority. First, it considers abstract claims about institutions that seem to be claims of institutional virtue, until closer examination reveals assumptions about justice that make them structural claims. Second, it contends that the problem of whether to sacrifice justice to advance values identified by claims of institutional virtue is premature in the context of American constitutional politics, a context in which ongoing contests about what the Constitution means create uncertainty about whether any institutional arrangement will advance justice in the way that its proponents claim. Finally, it considers how claims of institutional virtue help clarify issues related to judicial authority and the problem of managing these contests.

A. *Mistaking Structural Claims for Claims of Institutional Virtue*

To grasp the significance of claims of institutional virtue, it helps to consider them across two dimensions. First, some claims are litigant-centered, while others identify more general benefits that flow from judicial authority.[84] Second, claims of institutional virtue vary in their distance from the subject of adjudication: although arguments like Waldron's assign no weight to the correctness of judicial decisions, there are also claims of institutional virtue that make assumptions about non-doctrinal consequences of judicial decisions, such as Macedo's claim that judges advance the virtue of reasonability.[85] These assumptions sometimes make it difficult to know whether a theorist is making a claim of institutional virtue or a structural claim.

Litigant-centered claims do not defend the expansive scope of judicial authority that constitutional theorists seem to prize. Theorists, for example, have claimed that judges ensure that law applies to ordinary citizen and government official alike, justify unequal treatment based on public reasons,[86] or honor a person's right to "an individualized explanation" by justifying the exercise of coercive power to those who feel its pinch.[87] Because these arguments consider how the law is applied, they do not require judges to have influence on constitutional doctrine beyond its application to the limited set of circumstances that are litigated. Note that judges would be able to advance the interests of litigants, even if elected officials were to have authority to determine whether judicial holdings would have precedential value.[88] These claims, therefore, do not engage the question

84. *See infra* text accompanying notes 86-93.

85. Macedo, *supra* note 64; Waldron, *supra* note 2.

86. Gaus, *supra* note 64, at 352; *see also* Scalia, *supra* note 5.

87. *See* Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 Va. L. Rev. 991 (2006).

88. Judges, on the other hand, must have the final say about the outcome of particular cases if they are to perform these roles. In addition, an acceptable override procedure would have to make

at the center of recent debates: judicial authority to define constitutional values that will be applied prospectively.

By contrast, arguments that identify general benefits that flow from judicial authority have a broader scope. Theorists, for example, have contended that judges play a role in maintaining political or legal stability. Some have found virtue in institutional arrangements that promote greater public participation in the process that ultimately resolves disagreements about what the Constitution means.[89] Others have claimed that judges perform a valuable settlement function and promote social coordination.[90] These arguments seem to engage the problem of judicial authority to define constitutional values prospectively. For example, it is likely that judges must have the final say about what the Constitution means if judges are to perform the settlement function that Alexander and Schauer envision.[91] But it is a mistake to assume that an argument engages the problem of judicial legislation simply because it associates judicial authority with social goods that extend beyond the parties to litigation. Theorists, for example, have claimed that judges represent the interests of unpopular minorities, advance perspectives that tend to be underrepresented in the legislative process, or ensure that the government considers diverse interests.[92] These claims treat litigants as proxies for similarly situated people, and suggest that the judiciary is well suited to advance the interests of those people. It would seem, however, that judges should be able to perform these functions, even if they were without authority to define constitutional values prospectively.[93]

On the other hand, one would assign judges such authority if it were assumed that these interests should prevail—that judges correct for deficiencies in the legislative process by insisting that political outcomes be consistent with the interests those judges represent. This is a stronger claim, one that entails a view of justice that associates adequate representation with specific doctrinal outcomes.

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clear what principles would be applied to future cases, or should indicate when it is uncertain which principles would be applied.

89. DEVINS & FISHER, *supra* note 3; MACEDO, *supra* note 64, at 159-61.

90. Alexander & Schauer, *supra* note 3, at 1371-77.

91. I should add that final say is defined in relation to Congress and the President. Article V identifies the process that ultimately settles constitutional meaning. Moreover, I am not claiming that their argument is sufficient to justify judicial authority to define law prospectively, only that it engages the problem. Indeed, later I will argue that by focusing on institutional authority to *resolve* disagreements about what the Constitution means, Alexander and Schauer do not consider adequately whether law would remain reasonably settled under an alternative institutional structure. *See* Alexander & Schauer, *supra* note 3, at 1371-77.

92. BREYER, *supra* note 7; BURT, *supra* note 3; DEVINS & FISHER, *supra* note 3; PERETTI, *supra* note 64; SEIDMAN, *supra* note 3; Friedman, *supra* note 44, at 159-61.

93. For example, judges would be able to perform these functions even if Congress could pass legislation to overturn judicial precedents. Given that such legislation is often difficult to pass, the interests that judges represent would be well represented indeed. *See* Kenneth D. Ward, *Legislative Supremacy*, WASH. U. JURISPRUDENCE REV. (forthcoming 2011). And even if this were not the case and it were easy to overturn judicial decisions, those interests would still gain an audience they might not have received in the absence of judicial review.

And this introduces the second dimension by which to consider claims of institutional virtue. Claims of institutional virtue sometimes make assumptions about the consequences of judicial decisions,[94] and it is not always easy to distinguish these claims from structural claims. The problem is exacerbated when theorists make arguments that are not sufficiently developed to know which type of claim they are, or make arguments that combine both types of claims but fail to address the tension that arises between the different claims.

Recall Dworkin's claim that judges promote integrity: a structural claim that looks like a claim of institutional virtue.[95] One cannot know that judges advance integrity without knowing what it means to show someone equal concern and respect.[96] Dworkin suggests otherwise when he contends that judicial decisions show someone equal concern and respect simply by enforcing the community's legal principles in all contexts in which they apply.[97] And while it is possible that Dworkin's argument is a litigant-centered claim of institutional virtue, it would be surprising if this were true, given that litigant-centered claims do not engage the breadth of judicial authority that he seeks to defend.

More significantly, Dworkin is primarily concerned that people resolve disagreements in accordance with the best conception of the community's principles of justice.[98] Judges, in Dworkin's view, show citizens equal concern and respect when their decisions extend and clarify the principles of justice manifest in the political community's past practices.[99] This would suggest that in some circumstances, such as when judges articulate a novel understanding of governing principles, people will lose cases even though they have conformed to what they had reason to believe were the legal practices of the community. Dworkin discounts the burdens on litigants when institutional arrangements leave the law unsettled.

He would respond that judges do not make the law less settled when their decisions manifest integrity.[100] Integrity characterizes the political community's response to an already unsettled law.[101] But this response does not address the criticism: concern for those who must bear the burden of an unsettled law might lead one to favor institutional arrangements that make the law more settled over alternatives that manifest the virtue of integrity. What matters for Dworkin is how an unsettled law can come to reflect a coherent vision of justice. This is not to say that he is wrong in

94. *See supra* text accompanying notes 22-24.

95. *See* Dworkin, Freedom's Law, *supra* note 4, at 32-38.

96. *See* Dworkin, Freedom's Law, *supra* note 4, at 32-38. Recall that Dworkin is explicit in assigning his substantive argument priority over structural considerations, even though his discussion of integrity sometimes suggests otherwise.

97. *See supra* text accompanying notes 33-37.

98. *See supra* text accompanying note 39.

99. *See supra* text accompanying note 38.

100. *See* Dworkin, Law's Empire, *supra* note 36, at 134, 142-43, 214-15, 373-89.

101. *See* Dworkin, Law's Empire, *supra* note 36, at 134, 142-43, 214-15, 373-89.

assigning priority to justice; it is to illustrate how distinguishing the different aspects of Dworkin's argument makes his normative claim clearer and suggests potential objections he must overcome to sustain it.

The distinction between structural claims and claims of institutional virtue becomes particularly important, given the recent spate of theories that, like Dworkin, contend that judicial review promotes democratic government. But many constitutional theorists are less clear than Dworkin.[102] Because their conceptions of democracy are abstract, it is hard to identify the normative stakes of these arguments and to what extent they rest on contested assumptions about justice.

In some instances, it is difficult to distinguish whether a theorist is making a structural claim or a claim of institutional virtue. Friedman and Peretti, for example, both contend that judicial review contributes to democratic government; Friedman claims that judicial review improves democratic deliberation by representing particular types of interests,[103] while Peretti claims it expands the range of interests a government represents.[104] To determine whether these are claims of institutional virtue, one would have to know what it means for a government to represent interests adequately.

Because all legislation will benefit some interests and work against others, it is necessary to distinguish an interest that fails because legislators did not give it requisite attention from an interest that fails after it received such attention.[105] Ely, for example, identifies conditions that make it reasonable to infer that legislation reflects prejudice rather than serious consideration of people's interests.[106] His argument depends on an unstated view of justice in that it assumes that certain outcomes would not have occurred if minorities had received adequate representation. Ely justifies judicial authority to invalidate legislative outcomes that could not have resulted from a well-ordered political process.

Claims of institutional virtue, by contrast, indicate a weaker understanding of representation. Judicial review would have to increase the number or diversity of interests represented, regardless of what those interests happened to be or whether they succeeded in influencing constitutional doctrine. To sustain these claims would require agreement as to formal criteria that could be used to count the number of distinct interests that participate in the process that makes the decision. For example, one might count the number of distinct ideological positions found in a bill's

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102. *See infra* text accompanying notes 103-06.

103. *See* Friedman, *supra* note 79, at 1291, 1297-98.

104. *See* PERETTI, *supra* note 64.

105. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965); William H. Riker, The Theory of Political Coalitions (1962); Gordon Tullock, The Economics of Special Privilege and Rent Seeking (1989).

106. ELY, *supra* note 7, at 135-70.

legislative history or in the arguments made in a related set of legal briefs.[107]

A different problem arises when theorists combine structural claims and claims of institutional virtue without addressing the tension between the different claims. These arguments not only depend on contested assumptions of justice that underlie the structural claim; those assumptions suggest that the values associated with the claim of institutional virtue should be subordinated in the name of justice.

Devins and Fisher, for example, contend that the interaction between judges and elected officials will lead to a constitutional law that better reflects people's views.[108] They defend judicial review, in part, because it increases the likelihood that such views will be represented.[109] But Devins and Fisher also reject judicial supremacy in favor of an institutional arrangement that promotes greater political stability, contending that people's participation in the process that defines constitutional values increases the likelihood that they will accept the authority of the Court and even of the Constitution itself.[110]

In order to ensure that constitutional doctrine reflects people's views, however, Devins and Fisher move beyond the claim that judges represent these views and suggest these views enjoy a presumption of authority.[111] This presumption can lead to instability that would bring the structural claim in conflict with its institutional counterpart.

To understand why, first consider a weaker version of the structural claim that judges represent particular views. Rather than insist that constitutional doctrine reflect those views, one might favor institutional arrangements that provide sufficient avenues to have them considered. A court with judicial review provides such an avenue; judges can overturn decisions of elected officials that seem to ignore important viewpoints. But once a court represents these interests, and thus brings them to the attention of elected officials, the question remains of how to resolve the conflict between the judges' interpretation of the Constitution and the opposing interpretation of elected officials.

If it were thought that judges represent views that should be *reflected* in constitutional doctrine, one would favor a system that makes it difficult to overturn judicial interpretations of constitutional law, such as the current system in which judicial decisions can be overturned by an Article V Amendment or through the informal political process by which judicial appointments change the ideological make-up of the Court. If, on the other

107. Although claims of institutional virtue lend themselves to empirical study, they are like structural claims in that they can be contested on normative grounds. One might establish that certain institutional arrangements tend to represent a greater number or a variety of interests, but to endorse Friedman's or Peretti's argument, one must conclude that representing a greater number or variety of interests is a mark of a well ordered government.

108. DEVINS & FISHER, *supra* note 3, at 228-30, 234.

109. DEVINS & FISHER, *supra* note 3, at 228-30, 234.

110. DEVINS & FISHER, *supra* note 3, at 228-30, 234.

111. DEVINS & FISHER, *supra* note 3, at 228-30, 234.

hand, those views need only be *considered*, then one might favor an institutional arrangement that makes it easier for elected officials to overturn judicial decisions.

Devins and Fisher seem to favor the stronger notion of representation.[112] Consider their discussion of *Planned Parenthood of Pennsylvania v. Casey* in which they contend that *Casey* reaches the only viable compromise among competing views of abortion.[113] It is odd to think of *Casey* as a compromise, given that the holding does not reflect the pro-life position that abortions be significantly curtailed. To do so, one must accept the doctrinal conclusion that the pro-choice position should prevail over some range of cases.

Devins and Fisher believe that any tolerable legal regime would ensure some access to abortion, and this conclusion suggests why they assign judicial interpretations of constitutional law some priority over competing decisions of elected officials, namely that constitutional doctrine is insufficiently representative if it fails to reflect certain views.[114] Note that judges would have been able to represent the pro-choice position in a regime that allowed elected officials to overturn their precedents, though it would have been more difficult to sustain abortion rights in such a regime.

This priority is a potential source of instability, given that some opponents of the Court believe that its decisions enjoy too great a presumption in an ongoing discussion of what the Constitution means. Although they might agree with Devins and Fisher that our institutional arrangements create avenues that allow people to challenge judicial interpretations of constitutional law,[115] they would take exception with the claim that these avenues are sufficient for people to believe themselves adequately represented in the process that defines constitutional values.[116]

This is not to say that Devins and Fisher are wrong to assign this priority to judicial decisions or even that this priority has in fact introduced instability into the political community. But they do not address this possibility,[117] and one reason they fail to do so is that it is difficult to identify the tension without disentangling the structural claim from the claim of institutional virtue.

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112. DEVINS & FISHER, *supra* note 3, at 137-39, 235-37.

113. DEVINS & FISHER, *supra* note 3, at 137-39, 235-37 (contrasting the conception of abortion rights articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), with the original decision in *Roe v. Wade*, 410 U.S. 113 (1973), and stating that *Casey* reaffirmed abortion rights but allowed abortion to be regulated; contending that *Casey* is a better reflection of citizens' attitudes about abortion and that the decision is the fruit of political challenges to *Roe*).

114. DEVINS & FISHER, *supra* note 3, at 137-39, 235-37.

115. DEVINS & FISHER, *supra* note 3, at 137-39, 235-37.

116. THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION (Christopher Wolfe ed., 2004) [hereinafter THAT EMINENT TRIBUNAL]; RICHARD JOHN NEUHAUS, THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS – THE CELEBRATED FIRST THINGS DEBATE WITH ARGUMENTS PRO AND CON AND THE ANATOMY OF A CONTROVERSY (1997).

117. *See generally* DEVINS & FISHER, *supra* note 3.

B. Conflicts Between Claims of Institutional Virtue and Justice

The question remains whether claims of institutional virtue identify values of sufficient weight to lead people to favor an institutional arrangement that manifests such virtues over one that they believe more likely to advance justice. It is easy, however, to exaggerate the significance of these conflicts in conditions in which institutions do not really resolve contests about justice.

Consider, again, Waldron's claim of institutional virtue. He suggests that people's interest in having a disagreement resolved respectfully in a way that does not prejudge the disagreement outweighs any particular person's interest in having the disagreement resolved in accordance with his or her own view of justice.[118] His argument comes into conflict with justice in at least two ways. First, people might believe that judicial review is necessary to invalidate legislative decisions that promote particularly egregious injustices.[119] Second, they might believe that an institutional arrangement that includes judicial review increases the likelihood that a political community will achieve justice.[120]

The first conflict does not force one to weigh justice against the virtue of equal respect that in Waldron's view characterizes legislation. The fact that people have reason to challenge unjust legislation does not speak to Waldron's contention that the legislative process resolves disagreements about justice without prejudging those disagreements. Waldron also recognizes that such injustice might be indicative of deeper problems that would render his argument moot; there is little reason to be interested in how a society might resolve disagreements about conceptions of justice that are fundamentally flawed.[121]

Waldron cannot escape the second conflict, however. He must explain why the conception of political association he favors gives people a reason to reject an institutional arrangement they believe will advance justice over a legislative process that does not prejudge people's disagreements about justice. The same conflict arises for theorists who use claims of institutional virtue to defend greater judicial authority. Why, for example, should people favor institutional arrangements manifesting the virtues that Macedo, Graber, as well as Alexander and Schauer associate with judicial review, reasonability, settlement, and stability, respectively,[122] over arrangements they believe more likely to advance justice?

118. WALDRON, *supra* note 2, at 101-03, 204-08.

119. *See, e.g.*, DEVINS & FISHER, *supra* note 3, at 234; MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 135-36 (1982); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 291-92 (1986); ROBERT A. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 16 (1971); Thomas I. Emerson, *The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill*, 77 NW. U. L. REV. 129, 142 (1982).

120. *See* Dworkin, Freedom's Law, *supra* note 4, at 17.

121. *See* Waldron, *supra* note 2, at 280-81.

122. *See generally* GRABER, *supra* note 6; MACEDO, *supra* note 64; Alexander & Schauer, *supra* note 3.

It is important that these claims find virtue in institutional arrangements that *resolve* disagreements about justice. As a consequence, the virtues they associate with judicial review—or in the case of Waldron, virtues associated with the legislative process[123]—must be weighed against the conception of justice that might be advanced by other arrangements. But this focus on how to resolve disagreements obscures an important aspect of American political practice: disagreements about hotly contested issues of justice—issues such as abortion, gay rights, and affirmative action are often settled without finality; disagreements about justice do not evaporate once the Supreme Court purports to tell people what the Constitution means.

These extended disagreements make it uncertain whether claims of institutional virtue actually conflict with claims about justice. The uncertainty follows because constitutional theory's debate about the best institutional arrangement is also part of a broader contest about what the Constitution means. Consider, for example, the dual nature of Dworkin's argument.[124] He combines abstract claims about institutional qualities that would explain why the judicial process is more likely to promote integrity than would the legislative process[125] with concrete examples of how judges must interpret the Constitution for that process to work properly. Because his examples contribute directly to the broader contest about the Constitution, they tend to overwhelm discussion of the abstract claim.

This is not surprising given that Dworkin, like many constitutional theorists, is interested in questions of constitutional interpretation, and is particularly interested in the problem of how the Constitution pertains to the political questions of the day.[126] This would explain why Dworkin discusses issues of constitutional interpretation relating to abortion, free speech, and affirmative action, among others, without engaging seriously the question of whether the institutional arrangement he favors is the best one for securing integrity.[127]

Consider, as well, recent discussion of judicial supremacy.[128] The discussion has focused on the relative authority of different institutions when they assert competing interpretations of constitutional law; therefore, it, too, has gravitated to divisive issues such as abortion, integration, and slavery. As a consequence, the question of judicial supremacy is conflated with contests about what the Constitution means, and theorists seem more interested in defending correct constitutional interpretations than in identifying

123. WALDRON, *supra* note 2.

124. *See* Dworkin, Freedom's Law, *supra* note 4, at 32-38.

125. DWORKIN, FREEDOM'S LAW, *supra* note 4, at 30-31, 344-46 (discussing how judicial review might promote deliberation about constitutional values—deliberation that, in comparison to legislative decision making, is less likely to compromise important principles).

126. *See* DWORKIN, FREEDOM'S LAW, *supra* note 4, among others; DWORKIN, LAW'S EMPIRE, *supra* note 36; RONALD DWORKIN, A MATTER OF PRINCIPLE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). *See also* BICKEL, *supra* note 53, at 163-68; BORK, *supra* note 5; ELY, *supra* note 6.

127. *See* Dworkin, Freedom's Law, *supra* note 4.

128. *See generally* DEVINS & FISHER, *supra* note 3; NEUHAUS, *supra* note 116; THAT EMINENT TRIBUNAL, *supra* note 116.

institutional qualities that would explain whether judges or elected officials were more likely to reach the correct conclusion.[129]

While it is a problem that constitutional theorists tend not to focus on longer-term consequences of different institutional arrangements, uncertainty about whether institutional virtues would conflict with justice would remain even if theorists actually focused on such consequences. Uncertainty follows from difficulty in determining whether to attribute just decisions to the nature of the institutional process that makes a decision or the political forces that act on that process.[130] It is made worse when one considers that constitutional theory's debate about judicial authority compares institutional arrangements that do not vary by very much; a legislative process checked by broad judicial authority is compared to one in which such authority is circumscribed.

Devins and Fisher, for example, suggest that the current arrangement advances justice, because judges represent views that would otherwise go unrepresented.[131] Even if they are right that views such as the pro-choice position must be vindicated in order to be represented adequately,[132] it is not clear that it was the judicial process that ensured their vindication in *Casey*. To establish that, they would have to control for the political forces that (1) determined the make-up of the Court and legislature, (2) led the case to be brought and heard at that time, (3) influenced the justices who made the decision, and (4) influenced how other institutions responded to the decision. Moreover, they would have to do so for a range of cases decided over a long period of time.

C. *Claims of Institutional Virtue and the Justification of Judicial Authority*

It would seem that claims of institutional virtue should take on added significance when there is uncertainty about whether competing institutional arrangements will advance justice. What is more, claims of institutional virtue lend themselves to problems that follow in societies that must manage disagreements about what the Constitution means.[133] These claims, however, suggest a less ambitious conception of judicial authority, given that they are not associated with a general interest in living in a just

129. *See generally* DEVINS & FISHER, *supra* note 3; NEUHAUS, *supra* note 116; THAT EMINENT TRIBUNAL *supra* note 116.

130. Although related, this is not the claim that Gerald N. Rosenberg makes in *The Hollow Hope: Can Courts Bring About Social Change?* (1991). While I am claiming that political forces make it impossible to know whether the substance of judicial decisions should be attributable to the nature of the judicial process or to political forces that act on that process, Rosenberg contends that judicial holdings do not have the efficacy that proponents of broad judicial authority claim for them. He argues that political forces provide a better explanation for social changes relating to equality for African Americans and women than do landmark holdings.

131. DEVINS & FISHER, *supra* note 3, at 37-39, 235-37.

132. DEVINS & FISHER, *supra* note 3, at 37-39, 235-37.

133. *See* BURT, *supra* note 3; COVER, *supra* note 6; GRABER, *supra* note 6, at 17-18; SEIDMAN, *supra* note 3.

society. This is obscured, because claims of institutional virtue are considered in the context of a debate about authority to resolve highly charged disagreements about the Constitution. By viewing constitutional politics as an ongoing contest about justice, rather than a series of isolated disagreements that institutions resolve in turn, one can see that claims of institutional virtue have significant implications for constitutional theory's discussion of judicial authority.

Consider, again, the question of judicial supremacy. For the most part, theorists have focused on who sets the short-term status quo, rather than consequences that follow because that status quo is contested. Some theorists describe the process that resolves questions of constitutional meaning and identify whose view of the Constitution triumphs.[134] Others argue about whose views should triumph and appeal to considerations related to who is most likely to decide cases correctly or promote other ends related to settlement.[135] Much of this discussion occurs within a paradigm defined by the question of people's obligation to defer to judicial interpretations of constitutional law, a paradigm that rests on the assumption that judges or other institutional actors put to rest disagreements about what the Constitution means.[136]

This assumption underlies Devins's and Fisher's claim that judicial decisions should enjoy some presumption of authority, because judges ensure that disagreements about what the Constitution means are settled through a process that represents a broad range of views. But as was seen earlier, Devins's and Fisher's focus on stable settlement obscures the possibility

134. DEVINS & FISHER, *supra* note 3, at 112-16; KRAMER, *supra* note 83, at 234; J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 3-5 (2004); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986). Keith E. Whittington takes a different but related approach. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 293-96 (2007) (rather than focusing on who resolves disagreements about what the Constitution means or who should have authority to do so, describing the political conditions that determine the likelihood of whether political actors will defer to judicial interpretations of constitutional law). Whittington also finds virtue in the American system of politics, contending that the weakness of the judiciary during certain periods creates an opportunity for political actors to redefine fundamental values while reaffirming a commitment to the Constitution, and during other periods, judges' interactions with political actors allow authority to shift among different institutions, such that the government as a whole can pursue policies that might be unattainable in governments in which responsibility for constitutional interpretation rested solely with an easily identifiable institution. WHITTINGTON, *supra*, at 293-96. Because Whittington's purpose is for the most part descriptive, however, he never develops his argument or compares the virtues of this arrangement to one with greater accountability.

135. BORK, *supra* note 62, at 96-119; NEUHAUS, *supra* note 116; TUSHNET, *supra* note 2; Alexander & Schauer, *supra* note 3.

136. There are theorists who assess judicial authority in relation to an ongoing contest about what the Constitution means and find virtue in qualities of the judiciary that allow judges to advance people's deliberation about constitutional values. These arguments, however, focus on how judges should decide particular cases, rather than the question of what is the best institutional arrangement for managing ongoing contests about what the Constitution means. Moreover, these arguments seem to be structural claims in that they suggest a model of deliberation that depends on contested assumptions about justice. *See* BURT, *supra* note 3; SEIDMAN, *supra* note 3; SUNSTEIN, *supra* note 68.

that a presumption in favor of judicial decisions introduces instability of a different kind.[137]

It is odd that Devins and Fisher use *Casey* as an example of an institutional arrangement's promoting stability. Although they recognize that *Roe* unleashed forces that brought political upheaval and that abortion is a permanent part of a political landscape, they do not see that the abortion controversy has continued to be heated after *Casey* and, perhaps, became inflamed with the plurality opinion's claim of judicial supremacy.

For many, *Casey* places the Constitution on the wrong side of a culture war.[138] Although one might dispute the origins and the significance of the conflict, it is clear that citizens on both sides assume that the Judiciary is the central battleground. This assumption has ramifications for political discourse at all levels of government and for policy decisions that are far removed from the conflict itself. These issues would be divisive, no doubt, under any institutional arrangement, but it seems that the stakes of the abortion debate are raised because of the presumption of authority that characterizes judicial interpretations of constitutional law.

Instability of this kind suggests the need for institutional reforms that that would weaken the authority of judicial holdings.[139] But the debate about judicial supremacy tends to venture away from such institutional reforms, because theorists focus on how institutions resolve contests about what the Constitution means rather than the field on which these disagreements are contested.[140]

Moreover, this focus on putting disagreement to rest makes it easy to overstate the significance that claims of institutional virtue have for discussions of judicial authority to define constitutional values. Many claims respond to problems that arise because disagreements about justice force people to live with a law that is often in flux.[141] They associate judicial review with various virtues that speak to the problems of citizens who feel the force of law.[142] Judges, theorists have claimed, justify legal holdings, make the law more predictable, ensure its general applicability, resolve

137. The same is true of Graber's suggestion that judges promote stability. While it might be true that judicial settlements are likely to be more centrist than decisions of other institutions, these settlements also influence a wide range of political issues that intersect with the question of abortion and do so in conditions in which abortion's opponents believe that the status quo enjoys an unfair presumption of authority.

138. NEUHAUS, *supra* note 116.

139. *See* Ward, *supra* note 93.

140. *See, e.g.*, BORK, *supra* note 62, at 96-119; TUSHNET, *supra* note 62. Reforms of the kind proposed by Tushnet and Bork seek to limit judicial authority for reasons related to how controversies are resolved and not related to the stickiness of the status quo.

141. *See, e.g.*, PAUL O. CARRESE, THE CLOAKING OF POWER: MONTESQUIEU, BLACKSTONE, AND THE RISE OF JUDICIAL ACTIVISM 259-63 (2003); MACEDO, *supra* note 64; Alexander & Schauer, *supra* note 3; Eylon & Harel, *supra* note 87; Gaus, *supra* note 64; Scalia, *supra* note 5.

142. *See, e.g.*, CARRESE, *supra* note 141, at 259-63; MACEDO, *supra* note 64; Alexander & Schauer, *supra* note 3; Eylon & Harel, *supra* note 87; Gaus, *supra* note 64; Scalia, *supra* note 5.

particular controversies with finality, and respond to the particular conditions in which law is applied in a manner that masks or softens its coercive force.[143]

People might favor institutions that manifest these virtues if they are uncertain of which institutional arrangement is best suited to advance justice. Virtue, in this sense, is a consolation prize. This would suggest that while claims of institutional virtue gain significance because they respond to problems that follow from ongoing disagreements about justice, they would justify a narrower range of authority than structural claims that tie judicial authority to judges' advancing a contested view of justice. Indeed, many claims of institutional virtue seem to be derived from litigant-centered claims, claims that do not even address the question of judicial authority to define values prospectively.

But debates in constitutional theory continue to focus on the justification of such prospective authority.[144] In this context, claims of institutional virtue often claim more authority for judges than is warranted by the justifications they offer.[145] For example, in arguing that judges should have final authority to resolve disagreements about the Constitution, Alexander and Schauer fail to consider the likelihood that judges would perform the settlement function that is the basis of their claim within an institutional arrangement that is not characterized by judicial supremacy.[146]

Moreover, the need to justify a more ambitious conception of judicial authority would explain why some theorists combine structural claims defending greater judicial authority with supplementary claims of institutional virtue. But they do so without considering the tension between the claims and the possibility that judicial authority to advance justice makes it less likely that the judicial process will manifest other virtues that they have associated with it. Dworkin, for example, discounts the burdens on litigants who must live with an unsettled law when judges have authority to make law reflect a coherent view of justice.[147] And Devins and Fisher do not consider the potential for instability that follows when judges have authority to vindicate interests that they believe essential to a discussion of what the Constitution means.[148]

143. *See, e.g.*, CARRESE, *supra* note 141, at 259-63; MACEDO, *supra* note 43; Alexander & Schauer, *supra* note 3; Eylon & Harel, *supra* note 87; Gaus, *supra* note 64; Scalia, *supra* note 5.

144. *See, e.g.*, CARRESE, *supra* note 141, at 259-63; MACEDO, *supra* note 64; Alexander & Schauer, *supra* note 3; Eylon & Harel, *supra* note 87; Gaus, *supra* note 64; Scalia, *supra* note 5.

145. *See, e.g.*, CARRESE, *supra* note 141, at 259-63; MACEDO, *supra* note 64; Alexander & Schauer, *supra* note 3; Eylon & Harel, *supra* note 87; Gaus, *supra* note 64; Scalia, *supra* note 5.

146. *See, e.g.*, CARRESE, *supra* note 141, at 259-63; MACEDO, *supra* note 64; Alexander & Schauer, *supra* note 3; Eylon & Harel, *supra* note 87; Gaus, *supra* note 64; Scalia, *supra* note 5. It is not clear, for example, why judges would not perform this function in a system in which legislators could overturn judicial holdings as they apply to future cases. People would continue to know what the law is, when to be alert to the possibility of doctrinal change, and where to look to determine whether change has occurred. And judges will be in a position to shape the broader discussion of unsettled doctrinal questions, because legislators would have to decide the issues framed by the judiciary.

147. *See* Dworkin, Freedom's Law, *supra* note 4, at 17.

148. *See* DEVINS & FISHER, *supra* note 3. In these examples, a claim of institutional virtue is subordinated in favor of a structural claim. Graber's analysis suggests that one institutional virtue can

This is indicative of a broader problem. Many claims of institutional virtue speak to the problems of particular people who experience law, litigants in actual cases and potential litigants in future cases.[149] And it is not a coincidence that these claims find virtue in the Judiciary, an institution which traditionally has mediated between generally applicable legal principles and the particular contexts in which they are enforced. There is a problem, however, if broadening the scope of judicial authority would make it so that judges are more likely to favor the general over the particular. One would expect that judges who view themselves in a long-term fight to advance justice will be less sensitive to the interests of those most immediately affected by litigation. In other words, reducing the Judiciary's role in the process that defines constitutional values might create conditions in which the judicial process would manifest the virtues that many believe justify judicial authority. And the argument to do so becomes more compelling the greater the uncertainty about the correlation between judicial authority and justice.

IV. Conclusion

This is only a sketch of an argument, one intended to illustrate that claims of institutional virtue have significance for constitutional theory's discussion of judicial authority. The question of whether claims of institutional virtue support reforms to reduce the scope of judicial authority is best left for another essay. Moreover, it would be premature to answer that question until one has a better sense of how claims of institutional virtue fit within a broader discussion of judicial authority. Theorists who assert claims of institutional virtue face at least three challenges.

The first is political: it is not clear that claims of institutional virtue should lead people to support institutional reforms, even if people are uncertain about whether one institutional arrangement is more likely to advance justice than another. Someone might favor an institutional arrangement that is less "virtuous" in order to support a status quo they believe just. A person who believes that a woman's right to choose is integral to justice, for example, is not likely to favor institutional reforms that

be subordinated in favor of another. The centrism that Graber believes characterizes American judicial politics might promote stability in two different ways. People might find virtue in a centrist judiciary resolving ambiguities related to questions that have already been settled, such as the Taney Court's attempt to enforce the Constitution's settlement of the slavery issue. The Court's centrism also would provide reason to favor judicial resolution of controversies related to questions that are unsettled, as seemed to be the case in *Roe v. Wade*, 410 U.S. 113 (1973). It is not clear, however, that judges should have the same authority to perform each of these functions. People might want judicial decisions to carry greater weight when those decisions enforce prior political settlements, even if there are political forces that challenge those settlements. But people might not want to give the same authority to judicial decisions that purport to settle controversies that have yet to be settled. Indeed, I have contended that such an institutional arrangement might be a source of instability when issues are unusually volatile and people believe that the decisions that resolve those issues enjoy too great a presumption of authority.

149. *See, e.g.*, Carrese, *supra* note 141, at 259-63; Macedo, *supra* note 64; Alexander & Schauer, *supra* note 3; Eylon & Harel, *supra* note 87; Gaus, *supra* note 64; Scalia, *supra* note 5.

weaken the Judiciary, even if they knew that those reforms would yield an institutional arrangement that would manifest important virtues.

This problem, however, does not go to the question of whether claims of institutional virtue can justify a conception of judicial authority. It suggests a problem of politics, how to secure needed reforms in conditions in which people resist them in the name of a short-term interest in justice. It also suggests problems of political theory, whether people have reason to favor an institutional arrangement that manifests important virtues over one that advances justice in the short run or whether such an arrangement should be imposed on people who resist it in the name of justice.

The second challenge is epistemological: it questions whether claims of institutional virtue are any more certain than structural claims that associate particular institutional arrangements with just outcomes. But people should be more confident about claims of institutional virtue. By their nature, these claims allow one to distinguish the effects of institutional arrangements from the effects of political forces that act on those arrangements, because they depend on consequences of institutions that have nothing to do with the disagreements of justice that people seek to resolve. As a consequence, while political forces might attempt to direct institutions to favorable decisions—whether measured by justice or other interests—they do not act with the aim of making institutions manifest their virtues.

Nonetheless, these forces might lead institutions to work in a manner contrary to their design and thus prevent them from manifesting virtues. Originalist judges might not be sufficiently constrained to promote rule of law values, or political circumstances might make stability impossible, notwithstanding the centrism of a decision such as *Dred Scott*.[150] But these examples either reveal design flaws that explain why institutional arrangements fail to manifest the virtues that their proponents expect, or could be counted anomalies if seen in relation to a record in which the institutions act as predicted.

There is, however, another source of uncertainty, namely uncertainty about the meaning of virtues associated with institutional arrangements. People might disagree about what it means to represent people adequately or about the conditions that would make one institutional arrangement more stable than another. Disagreements of this kind are indicative of a third challenge, one that is normative: people might disagree about the virtues that political institutions should manifest, just as they disagree about the conceptions of justice that those institutions should advance.

These disagreements do not have the same consequences for politics as do disagreements about justice. People do not contest disagreements about the best institutional arrangement with the same vigor that they do contests about justice, because the stakes are less. Indeed, most contests

150. GRABER, *supra* note 6, at 38-39, 85-89.

about institutional reform tend to involve structural claims acting as surrogates in a fight about what the Constitution means, rather than claims of institutional virtue. One would not expect the debate about judicial supremacy to have much salience, for example, if it were not associated with Supreme Court decisions about abortion and civil rights.

This is not to say that disagreements about claims of institutional virtue are unimportant—only that many people treat them that way. What is more, because the stakes of these disagreements are less, there is no political imperative to choose the most virtuous institutional arrangement the way there is to choose an arrangement that will come closest to satisfying particular conceptions of justice. And it seems possible that a plurality of arrangements would bring virtue to the job of managing ongoing disagreements about what the Constitution means and, if so, the set of acceptable alternatives would contain arrangements that offer different complements of virtue. Choosing institutional arrangements, then, might be analogous to choosing a car or other device in which the appropriate mix of qualities—such as reliability, performance, safety, and environmental friendliness—will depend on the particular buyer.

This suggests a different orientation for debates in constitutional theory. Rather than making arguments about the institutional arrangement most likely to advance justice, theorists would frame choices about different institutional possibilities with an eye to ruling out options of insufficient virtue. They would consider problems that institutions might address, how well competing institutional arrangements would address those problems, and the extent of authority necessary for those arrangements to be effective.

The distinction between claims of institutional virtue and structural claims points to such an orientation by questioning the perspective from which constitutional theory has traditionally viewed questions of judicial authority. It helps people to see that a discussion of the best institutional arrangement for resolving disagreements about justice might not be relevant for a society that must manage ongoing contests about what the Constitution means, especially if those contests render uncertain arguments that associate particular institutional arrangements with justice.

Moreover, claims of institutional virtue illuminate problems related to the management of such contests and, in so doing, shine a critical light on arguments that theorists make on behalf of institutions. This exposes weaknesses of structural claims that associate expansive judicial authority with contested assumptions about justice, vague claims that fail to clarify the functions judges serve in constitutional politics and thus the authority necessary to perform those functions, mixed claims that fail to resolve tensions among the different functions that judges are expected to perform, and claims of institutional virtue that justify a broader scope of judicial authority than is necessary to perform the functions that underlie their justifications.