

Abstract: The Place of Structural Arguments in Contemporary Constitutional Theory
Kenneth Ward

This essay illustrates how our interest in questions of constitutional doctrine makes it difficult to assess structural arguments about judicial authority. In the past forty years, we have witnessed a shift in American constitutional theory. Scholars once assessed judicial authority based on their expectations of how judges should decide cases. In time, many concluded that discretion is an inevitable consequence of constitutional interpretation and therefore sought to justify such authority.

This shift has led some scholars to give greater emphasis to structural arguments. They identify institutional virtues that explain the judiciary's role in a well ordered government. Although these scholars are less concerned than their predecessors with how judges should interpret the Constitution, many retain the doctrinal focus of the earlier generation. This essay identifies problems that follow from this focus.

Section I traces the evolution in Ronald Dworkin's approach to questions of judicial authority. Dworkin's work provides a notable example of how doctrinal claims become entangled with structural arguments and confuse our assessment of judicial authority. Section II contrasts Dworkin with scholars who have made claims in which the doctrinal and structural aspects are more readily distinguished. Section III examines the First Things Symposium, in which prominent conservative scholars attack the kind of judicial activism that Dworkin justifies. But the Symposiasts assess judicial authority from the same doctrinal perspective as Dworkin and provide a vivid illustration of how doctrinal controversies obscure structural arguments. Section IV concludes the essay by examining implications this analysis has for debates in constitutional theory.

The Place of Structural Arguments in Contemporary Constitutional Theory
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American constitutional theory encompasses at least three overlapping debates. First, scholars argue about what the Constitution means. They consider different theories of constitutional interpretation, theories that identify the values we seek to advance through the Constitution. These include the substantive values expressed in particular provisions, such as the First Amendment's commitments to freedom of expression and religion, as well as structural values that are reflected in the design of the Constitution itself, such as commitments to checking power, democratic elections and privacy.

Second, scholars argue about who has authority to say what the Constitution means, whether it be judges or elected officials or some combination of the two. This debate interlocks with the first. On the one hand, the question of who has authority to interpret the Constitution is itself a question of constitutional interpretation. On the other hand, our answer would to some extent depend on the institutional structure we thought best suited for interpreting the Constitution.

Finally, scholars argue about the values, both substantive and structural, that we should advance through constitutional law. This debate considers the Constitution from an external perspective. It overlaps with the other two in that scholars identify values that might be advanced through our interpretation of the Constitution. But the reasons to support these values do not follow from an understanding of the Constitution itself, and unlike the other debates, this one is not about how to interpret the Constitution. Indeed, it might indicate reforms necessary to strengthen our system of constitutional government.

The third debate includes structural claims that have become increasingly important in constitutional theory. They are different from the more familiar class of structural claims that speak to the values we should advance when we interpret Constitution.¹ These claims, by contrast, identify vices and virtues of different institutional arrangements.² They examine the consequences that follow from the way judicial and elected institutions go about resolving controversies. It is easy to underestimate the significance of these claims, however, because they are far removed from the questions of constitutional interpretation that are central to the other debates. This essay contends that constitutional theorists have tended to focus on those debates and thus have had difficulty identifying and assessing these structural claims.

The essay first examines the evolution in Ronald Dworkin's approach to questions of judicial authority. Dworkin's work exemplifies a shift in constitutional theory in which scholars give greater emphasis to structural claims. It also illustrates how easily these claims can become entangled with doctrinal arguments and thereby confuse our assessment of judicial authority.

The essay then turns to the First Things Symposium, which was subsequently published as The End of Democracy?³ The Symposium addresses a wide range of issues relating to how citizens should respond to Supreme Court decisions they believe outside of the Court's legitimate authority. In developing a strategy to overturn these holdings,

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¹ See CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); JOHN HART ELY, DEMOCRACY AND DISTRUST 102 (1980).

² See Kenneth D. Ward, *Bickel and the New Proceduralists*, in THE JUDICIARY AND AMERICAN DEMOCRACY, 158-59 (Kenneth D. Ward and Cecilia R. Castillo eds., 2005) (distinguishing structural values and structural virtues).

³ THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS, (Richard John Neuhaus ed. 1997).

the Symposiasts attack the kind of judicial activism that Dworkin justifies and, in the process, make claims concerning the appropriate scope of judicial power. Nonetheless, the Symposiasts assess judicial authority from the same doctrinal perspective as Dworkin and provide a particularly vivid illustration of how doctrinal controversies obscure structural arguments.

The Symposiasts suggest an important structural claim against expansive judicial authority: that a Court empowered with judicial review will promote instability, because the exercise of judicial review tends to inflame political conflict. Judicial decisions sometimes create unfair presumptions in favor of disputed conceptions of constitutional values. These presumptions make it harder for citizens to advance opposing interpretations of the Constitution, even though disagreements about what the Constitution means remain political issues. Therefore, rather than helping the political community get past particularly divisive social controversies, judicial decisions lead people to pursue their disagreements with greater intensity. This claim, however, is not developed and lost in the glare of the Symposiasts' doctrinal arguments.

What is more, the Symposium illustrates how a concern to advance a conception of constitutional doctrine makes it easy to ignore structural arguments pertaining to the interests of actual litigants. The Judiciary's role in deciding particular cases is in tension with its role in resolving our disagreements about what the Constitution means. By focusing on how judges should resolve these disagreements, we risk ignoring the difficulties that an uncertain law imposes on those whose lives depend on how judges decide these cases. A judge who decides cases with an eye toward advancing a conception of constitutional law will disregard the interests of litigants whose legitimate claims interfere with that goal.

Section I illustrates how Dworkin assesses judicial authority in light of his understanding of what constitutional doctrine should be. Section II contends that Dworkin's doctrinal orientation informs different claims he makes about judicial authority. These include a structural claim that has doctrinal implications, and these implications make it impossible to disentangle the structural and doctrinal aspects of the claim. Although Dworkin's claims are typical of many arguments in constitutional theory, we will see that some scholars have made structural claims in which the doctrinal and structural aspects are more readily distinguished. Section III uses the Symposiasts' disagreement with Dworkin to explain why scholars with a doctrinal orientation are less likely to give adequate consideration to such structural claims. It contends that: (1) these scholars often use structural claims to advance a doctrinal agenda and consequently do not consider structural claims as having independent weight; (2) this problem is exacerbated because structural claims often have doctrinal aspects, and scholars with a doctrinal orientation are likely to focus on these aspects; and (3) scholars with this orientation tend to see the Court's role in resolving particular cases as only a component of its role in the process that identifies constitutional values. They do not consider that the Court's performance of one role might undercut its performance of the other and thus ignore structural claims that pertain to the former role. Section IV concludes the essay by examining implications this analysis has for debates in constitutional theory, in particular for the question of the appropriate extent of judicial authority.

I. Dworkin and Justification: Justice, Doctrine and Judicial Authority

This section examines Dworkin's justification of expansive judicial authority. He believes such authority increases the likelihood that constitutional doctrine will satisfy

norms of justice. Much of Dworkin's work flows from the notion that people ought to be treated with equal concern and respect.⁴ This understanding underlies the attack on legal positivism that made his early reputation⁵ and also the alternative conception of law that he defends, what Dworkin calls law as integrity.⁶ It leads Dworkin to assess political institutions based on the respect people are owed as individuals and thus explains why he focuses on the particular decisions political institutions should make. His work in constitutional theory extends this doctrinal orientation: he defends judicial review because he expects that judges will make better decisions than legislators regarding the conditions necessary to secure equal status for citizens.⁷

Consider first how the idea of equal concern and respect informs his attack on legal positivism and his association of law with the virtue of integrity. While positivists sought to distinguish law and morality by showing that we could conceptualize law without making any claims about morality, Dworkin sought to establish that morality was integral to law, because we advance a conception of fairness when we resolve social controversies based on pre-established standards.⁸ Law, according to Dworkin, justifies and limits the state's use of coercion by making its use contingent on—and consistent with—past political decisions that define people's rights and responsibilities.⁹ Dworkin believes that by separating law and morality the positivists cannot address adequately an important jurisprudential problem, namely people's obligation to obey judge made law.¹⁰ He explains our obligation to obey judicial decisions in "hard cases,"

⁴ STEPHEN GUEST, RONALD DWORKIN 9 (1991).

⁵ Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14-46 (1967).

⁶ RONALD DWORKIN, LAW'S EMPIRE 94-96 (1987).

⁷ RONALD DWORKIN, FREEDOM'S LAW 16,34 (1996).

⁸ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 5 (1977).

⁹ *Id.*; DWORKIN, *supra* note 6, at 93. *See also*, GUEST, *supra* note 4, at 33.

¹⁰ DWORKIN, *supra* note 8, at 14-80.

cases in which existing legal sources provide no clear standard to ground a decision.¹¹

Dworkin contends that judicial decisions should extend and clarify the principles of justice manifest in the political community's past practices. Such decisions treat citizens with the concern and respect necessary to make their compliance obligatory.¹²

The notion that we use law to justify the exercise of political authority also underlies Dworkin's conception of law as integrity.¹³ He defends law as integrity as an account of judicial practice. He contends that it fits our understanding of what judges do and that it presents the practice in its best light.¹⁴ Dworkin believes that a state strengthens its claim to legitimacy when judicial decisions exhibit the virtue of integrity. Integrity “. . . requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some.”¹⁵ 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.¹⁶

Dworkin contrasts this conception of law with rivals that fail to generate mutual concern, because they either ignore past decisions or are bound too rigidly to them.¹⁷ His defense of integrity, thus, extends the doctrinal focus of his earlier work. Indeed, Dworkin dedicates nearly a third of Law's Empire to illustrations of how judges should

¹¹ *Id.* at 81-130.

¹² DWORKIN, *supra* note 6, at 93.

¹³ *Id.* at 96-98.

¹⁴ *Id.* at 176-224.

¹⁵ *Id.* at 165. Dworkin considers integrity a virtue that is distinct from justice and fairness.

¹⁶ *Id.* at 191-2, 98-202, 211, 213-14. His argument rests on the assumption that political legitimacy depends on citizens having a general obligation “to obey political decisions that purport to impose duties on them.” He concludes that “. . . a state that accepts integrity as a political ideal has a better case for legitimacy than one that does not.”

¹⁷ *Id.* at 198-202, 211, 213-14.

interpret legal principles to advance integrity and promote the conditions necessary to sustain their authority.¹⁸

In Freedom's Law, Dworkin builds from the argument in Law's Empire to defend an expansive conception of judicial authority. 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.¹⁹ It would do so by securing for citizens genuine membership in the political community.²⁰ This notion of genuine membership connects Dworkin's justification of judicial review to his conception of law as integrity. Judicial authority is justified if judges reach decisions that promote integrity.

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.²¹ It is not surprising, therefore, that he again spends considerable time describing how judges should decide cases. He presents Freedom's Law as an exercise in interpreting principles of American constitutional law in light of the virtue of integrity.²²

Throughout his career, Dworkin's belief that citizens should be treated with equal concern and respect leads him to focus on constitutional doctrine. We can identify at

¹⁸*Id.* at 167, 276-399.

¹⁹ DWORKIN, *supra* note 7, at 17. Dworkin takes 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.”

²⁰*Id.* at 23, 25-26 Dworkin believes 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.

²¹*Id.* at 10-11, 83.

²²*Id.* at 2, 10-11, 34-35, 37-38.

least three distinct claims that assess judicial authority based on whether judicial decisions advance equality. To sharpen the distinction, we frame the claims in terms of Brown v. Board of Education of Education²³, a case that Dworkin believes integral to an account of American judicial authority.²⁴

- (1) The decision in Brown v. Board is legitimate, because it advanced the Constitution's conception of equality by interpreting the Fourteenth Amendment as forbidding school segregation.
- (2) The decision in Brown v. Board illustrates how the Judiciary as an institution contributes to American government by promoting integrity. The Court ensured equal concern and respect for African American citizens by extending an important principle of American government, equality, to a context in which it was applicable.
- (3) The decision in Brown v. Board suggests that an institutional structure that includes judicial review by an independent Court increases the likelihood that political institutions will exhibit the virtue of integrity and promote the equality among citizens suggested thereby.

Moreover, we can identify a fourth claim, one that Dworkin would reject, that would circumscribe judicial authority notwithstanding the decision in Brown. This claim assesses judicial authority in light of an understanding of equality that has no bearing on how judges should decide cases.

- (4) The decision in Brown v. Board advanced a compelling conception of equality. But the judicial process itself cannot be characterized as equal, especially in comparison to the legislative process. The judicial process limits the number of people who have a say about a political outcome and the arguments that receive a hearing before a final decision is made as to that outcome.

The next section uses these claims to consider Dworkin's relationship with American constitutional theory. It illustrates how debates in constitutional theory have tended to

²³347 U.S. 486 (1954).

²⁴DWORKIN, *supra* note 7, at 93, 268.

share Dworkin's doctrinal focus. The following section then identifies negative consequences that follow from this focus.

II. The Doctrinal Orientation of American Constitutional Theory

Dworkin belongs to a generation of American legal scholars who came to maturity during the ascendance of the Warren Court. 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.²⁵ 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 is an important statement of that generation's skepticism about such activism.²⁶ Dworkin clerked for Hand and helped prepare that lecture.²⁷ He responds to Hand forty years later. But it seems that the earlier foray into the controversy surrounding Brown would help explain the doctrinal orientation that permeates so much of his work.

Constitutional theorists of Dworkin's generation share this orientation. To a significant extent, debates in constitutional theory have been animated by the need to defend Brown v. Board.²⁸ Alexander Bickel, for example, framed The Least Dangerous Branch as a response to Hand and Herbert Wechsler²⁹—who also used the occasion of a Holmes Lecture to question Brown.³⁰ 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

²⁵ See Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five* 112 YALE L. L. 153, 159-161 (2002).

²⁶ LEARNED HAND, *THE BILL OF RIGHTS* (1958).

²⁷ See DWORKIN, *supra* note 7, at 347.

²⁸ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 41, 59 (1996).

²⁹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

government.³¹ The counter-majoritarian 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.³²

In their quest to solve the counter-majoritarian difficulty, constitutional theorists have often made claims similar to those we associated with Dworkin. Theorists originally sought to identify principles that could constrain judicial discretion, and consequently their work shares the doctrinal focus that characterized Dworkin's criticism of positivist understandings of law and his defense of law as integrity. This focus is captured by claims (1) and (2). In time, theorists moved beyond the counter-majoritarian difficulty and sought to justify the discretion that judges exercised. In so doing, their arguments parallel Dworkin's appeal to the virtue of integrity to justify an expansive conception of judicial authority, claim (3). After examining Dworkin's claims, we will identify analogs that have emerged in American constitutional theory.

A. Constitutional Values versus Institutional Virtues

The first two claims focus on how judges should decide cases.

- (1) The decision in Brown v. Board is legitimate, because it advanced the Constitution's conception of equality by interpreting the Fourteenth Amendment as forbidding school segregation.
- (2) The decision in Brown v. Board illustrates how the Judiciary as an institution contributes to American government by promoting integrity. The Court ensured equal concern and respect for African

³⁰ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 46-65 (1962).

³¹ *Id.* at 16-18

³² See Friedman, *supra* note 25, at 159; Keith Whittington, *Constitutional Theory and the Faces of Power*, in *THE JUDICIARY AND AMERICAN DEMOCRACY*, 163-65 (Kenneth D. Ward and Cecilia R. Castillo eds., 2005)

American citizens by extending an important principle of American government, equality, to a context in which it was applicable.

Both (1) and (2) appeal to equality as a value that judges should seek to advance as they formulate constitutional doctrine. I refer to such values as constitutional values. (1) reflects Dworkin's notion that legal decisions are authoritative when they treat people with equal concern and respect. And, in this particular case, plaintiffs won a case they had a right to win based on the principle of equality defined by the Fourteenth Amendment to the Constitution.³³ The Court, according to Dworkin, would have undercut its authority, if it had allowed segregation to continue in violation of this right.³⁴

(2) also addresses the Court's exercise of authority, though it appeals to a more abstract understanding of equality than does (1). More significantly, (2) adds a new dimension: it considers whether this particular outcome is consistent with the Court's other decisions about equality. This second dimension is also a claim about equality. It reflects Dworkin's contention that judges derive authority because they promote equal concern and respect for citizens by extending constitutional principles to all applicable cases. (2), in contrast to (1), appeals to a value that is not the immediate subject of adjudication. This second dimension of equality is also captured in the Fourteenth Amendment's commitment to equal protection.³⁵ But analogs of (2) need not be and usually are not given explicit constitutional expression.

Nonetheless, (2) is like (1) in that judicial authority seems to depend on how judges decide particular cases. This is why I characterize both claims as appealing to constitutional values. (3) and (4), by contrast, appeal to equality as an institutional virtue.

³³DWORKIN, *supra* note 6, at 389.

³⁴*Id.* at 392.

- (3) The decision in Brown v. Board suggests that an institutional structure that includes judicial review by an independent Court increases the likelihood that political institutions will exhibit the virtue of integrity and promote the equality among citizens suggested thereby.
- (4) The decision in Brown v. Board advanced a compelling conception of equality. But the judicial process itself cannot be characterized as equal, especially in comparison to the legislative process. The judicial process limits the number of people who have a say about a political decision and the arguments that receive a hearing before that decision is made.

(3) is similar to (2) in that it considers judicial authority based on a higher order norm—it asks whether the Court increases the likelihood that our system of constitutional government will exhibit the virtue of integrity. But we should answer this question without reference to how well judges interpret the Constitution in any particular case.

(3) is a structural claim: it emphasizes institutional features of the Judiciary that make it more likely to advance integrity than a system that does not subject its legislature to as robust a judicial check.

Nonetheless, (3) has a doctrinal aspect as well. We must look at judicial decisions to test whether a Judiciary with the authority of judicial review increases the chances that our principles of government will be applied with integrity. 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.”³⁶ And we would reject (3), if we found that judicial decisions did not exhibit the integrity Dworkin believes underlies the Judiciary’s contribution to such a structure.³⁷

³⁵*Id.* at 185.

³⁶DWORKIN, *supra* note 7, at 34.

³⁷*Id.* at 15. Dworkin links his understandings of democratic conditions and integrity. Democratic conditions in the quoted language above refers to an earlier statement that “[D]emocracy means

On the other hand, (3) does not require any particular adjudicative outcome. We need not consider whether judges interpreted the Constitution correctly, whether they advanced the proper substantive understanding of equality or an understanding that is consistent with a higher order value. Instead, we must determine whether the universe of judicial decisions increase the likelihood that our political institutions exhibit integrity.

Our discussion of American constitutional theory will identify claims like (3) that are more removed from questions of constitutional doctrine. While it is impossible to divorce Dworkin's claim from an understanding of how judges should decide cases, other scholars associate judicial authority with virtues that depend more on how judges go about making decisions than on the particular decisions they make. We will see that these theories fall on a continuum ranging from claims like Dworkin's, claims in which it is difficult to separate their structural and doctrinal aspects, to those more similar to (4), a claim that is completely divorced from considerations of constitutional doctrine. More significantly, Section III will illustrate how our concern for constitutional doctrine can obscure the structural aspects of claims like (3).

While (4) stands out as a criticism of judicial review, we consider it in order to highlight the structural aspects of claims like (3). Both (3) and (4) assess the Court's authority in light of structural features of the judicial process, and consequently they do not depend on how judges decide particular cases. But claims like (3) make assumptions about how judges actually go about deciding cases in a way that is not true of (4), which assigns no weight to the outcome of adjudications or even to the manner in which cases are adjudicated. Indeed, (4)'s claim that adjudication systematically excludes people and

government subject to conditions—we might call these 'democratic' conditions—of equal status for all citizens.”.

interests from the process of decision-making would survive, even if we were to think that the Judiciary would always decide cases correctly. Jeremy Waldron employs a claim like (4) to argue against judicial review.³⁸ But we will see that scholars also defend judicial review based on considerations that are divorced from the cases judges must resolve.

This introduces a final consideration. Although theorists can appeal to claims of each of these types when assessing judicial authority, the claims cannot always be weighed against each other. The notion of equality advanced when we make decisions through particular procedures is different than the notion of equality we use to assess the decisions that are made. And while it seems likely if not obvious that sometimes it is more important to get a decision right than it is to go about the decision in the right way, it is not clear when this is the case.

B. The Shift from Constitutional Values to Institutional Virtues in Constitutional Theory

We also see analogs of each of these claims in constitutional theory. After Brown, many theorists sought to solve the conventional view of the counter-majoritarian difficulty.³⁹ The conventional view assumes that judicial review undercuts two bases of democratic legitimacy. Elected institutions: (a) define values that better reflect the will of citizens, and (b) allow citizens to control their government. Constitutional theorists, then, must ground judicial authority in values that can overcome these concerns. Judges, according to this view, derive authority when they interpret legal principles in a manner

³⁸ See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999.)

³⁹ See Kenneth Ward, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law in Contemporary Constitutional Theory*, XVII J. LAW & POLITICS 854-60 (2002) . The

that advances values that the community endorses or should endorse and that at the same time limit judicial discretion. It is thought that such principles subject judges to something like democratic control.

These theories resemble Dworkin's in that judicial authority seems to follow when judges interpret constitutional principles correctly, and thus, judges must enforce the right values in order to sustain their authority. It is this doctrinal focus that explains why the debate surrounding the counter-majoritarian difficulty originally gravitated toward claims like (1) and (2).

Consider John Hart Ely's Democracy and Distrust.⁴⁰ Ely criticizes various attempts to solve the counter-majoritarian difficulty and then joins the quest by offering his own solution. Ely rejects non-originalist—what he calls non-interpretivist⁴¹--theories of judicial review. These theories assign judges a lawmaking function, the power to enforce values not found in the text of the Constitution.⁴² His criticisms suggest a pattern. Theorists make a claim like (3), that the judiciary has the independence, expertise or other structural feature necessary to advance values that elected institutions are ill suited to respect, and then claim judicial decisions might advance or actually have advanced these values, a claim analogous to (1) or (2).

The weight of their arguments fall on the doctrinal claim, as Ely illustrates when he shows that non-originalists do not identify an acceptable source of values that will

article distinguishes the conventional view of the counter-majoritarian difficulty from the view Bickel actually held.

⁴⁰ See ELY, *supra* note 1.

⁴¹ 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).

⁴² ELY, *supra* note 1 at 1.

limit judicial discretion.⁴³ Ely also defends judicial review. He contends that judges should enforce certain core procedural principles that define American democracy, and that these principles will limit judicial discretion.⁴⁴ But Ely's critics note that his structural claim masks a series of doctrinal claims; Ely's approach does not in fact limit judicial discretion, because judges' concern for the outcome of cases will inevitably determine which values they try to advance.⁴⁵

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 claims like (1) and (2). 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. They argue that judges can discover these principles within the wider social context in which citizens debate and define the political community's values.⁴⁶ The second trend is the rise of originalism. Originalists contend that judicial review is only legitimate if judges enforce principles they derive from the ordinary meaning of the Constitution.⁴⁷

Both originalists and civic republicans, however, fail to identify principles that limit judicial discretion to the extent necessary to resolve the counter-majoritarian difficulty. As evidence of an unconstrained judiciary has mounted, many theorists have

⁴³*Id.* at 11-42.

⁴⁴*Id.* at 101-04.

⁴⁵See generally Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW, 173-74 (1985); MARK V. TUSHNET, RED WHITE AND BLUE, 94-107 (1988); PAUL W. KAHN, LEGITIMACY AND HISTORY, 149-50 (1992); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM, 160 (1996).

⁴⁶See generally 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 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

⁴⁷See e.g. ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION (Amy Gutmann ed. 1986)

sought to move beyond the counter-majoritarian difficulty. Some theorists continue to make claims like (1) and (2) and reject judicial review based on the values they expect judges 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.⁴⁸ 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.⁴⁹

Other theorists take a different tact. They give greater emphasis to the process that expresses the community's values and less to the particular values that legal decisions might advance. 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. In so doing, they make claims like (3) to assert virtue in a constitutional structure that includes judicial review.

We have recently been deluged by such arguments; theorists claim that judicial review makes the political process more deliberative, representative, just, free or that it advances some other important goal.⁵⁰ Republicans, for example, now emphasize the

⁴⁸ See BORK, *supra* note 47; TUSHNET, *supra* note 45.

⁴⁹ ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 96-119 (1996); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999.)

⁵⁰ See *e.g.*, SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS 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 PERETTI, IN DEFENSE OF A POLITICAL COURT (1999); MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND

role judges play within the political system, rather than the values that judges should advance. 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.⁵¹

Originalists have also veered from the view that judges legitimate 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. Keith Whittington has argued that judicial review contributes to a system of government that makes self-government possible.⁵² He argues that judges undermine this system when they enforce constitutional principles that do not reflect the Constitution's original meaning.⁵³ His approach is emblematic of theorists who tether originalist interpretation to considerations of why the political community governs itself through a written constitution.⁵⁴

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 principle. Steven Macedo, for example, contends that the judiciary, as an institution, respects citizens as reasonable beings, because judges must

THE SUPREME COURT (1999); LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* (2001); Gerald F. Gaus, *Public Reason and the Rule of Law*, in *NOMOS: THE RULE OF LAW* 328 (Ian Shapiro ed., 1994)

⁵¹ See BRUCE A. ACKERMAN, *WE THE PEOPLE--FOUNDATIONS* (1991); CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

⁵² See KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW* (1999).

⁵³ *Id.* at 111.

⁵⁴ See Richard S. Kay, *American Constitutionalism*; (defending originalism as advancing the value of constancy and thus promoting order); Michael J. Perry, *What is "the Constitution"?* (*and Other Fundamental Questions*), (defending originalism as necessary to advance the Constitution's aim of coordinating social interaction); Jed Rubenfeld, *Legitimacy and Interpretation*, in *Constitutionalism: Philosophical Foundations* (linking originalist interpretation to the value of freedom) all in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* (Larry Alexander ed. 1998).

justify the exercise of government authority in terms that litigants can grasp.⁵⁵ 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.⁵⁶ 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.

Macedo's argument follows a path taken by scholars who tie the justification of judicial authority to virtues associated with the rule of law. 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.⁵⁷ They contend that structural characteristics of Courts 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 while the structural emphasis of these theories lend themselves to claims about the rule of law, we see similar arguments from people who view the Court from a more political perspective. Terri Peretti, for example, has claimed that the Judiciary contributes to an institutional structure by expanding the

⁵⁵ See MACEDO, *supra* note 50, at 159-62.

⁵⁶ 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.

⁵⁷ See Kay, *supra* note 54; Perry, *supra* note 54, "American Constitutionalism;" Larry Alexander and Frederick Schauer, *On Extra Judicial Constitutional Interpretation* 110 HARV. L. REV. 1359 (1997).

range of interests it represents,⁵⁸ and Barry Friedman believes it provides an outlet for perspectives that contribute to public dialogue about constitutional values.⁵⁹

Recall our discussion suggesting that claims like (3) can bear a close relationship to claims like (2). We saw that it was impossible to know that an institutional structure promotes integrity without also knowing what it would mean for judges to extend applicable principles to all cases in which they apply. Although (3) is a structural claim, it is so closely related to the doctrinal claim in (2) that it is impossible to disentangle one from the other. (3) seems to depend on a prior understanding of how judges should interpret the Constitution, in much the same way as Ely's procedural argument masked substantive claims. But scholars have defended judicial review based on arguments that suggest we can sustain the distinction between structural and doctrinal claims, including some whose claims approach (4) in their distance from the subject of adjudication.

Macedo's argument, for example, resembles Dworkin's; Macedo contends that the judiciary is well suited to perform the reason-giving function, and we must look at judicial decisions to gauge how well it performs this function. But we can determine that decisions are reasoned—we do not have to say that they are well reasoned or better reasoned than potential competitors—while making very few judgments about their substance. Although we would have to look across opinions to see whether judges give reasons for their decisions, such analysis does not require the substantive judgments that would be necessary to determine whether judicial decisions advance Dworkin's understanding of integrity or Ely's understanding of democracy. Similarly, we could

⁵⁸ See PERETTI, *supra* note 50,

⁵⁹ Barry Friedman, *William Howard Taft Lecture: The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. University of Cincinnati Law Review 1257, 1291, 1297-98 (2004).

assess Peretti's claim that judicial review increases the range of interests our system of government represents or Barry Friedman's claim that it promotes political dialogue without a prior understanding of how to interpret the Constitution.

Nonetheless, we cannot sever completely such assessments from considerations of constitutional doctrine. We would have 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. And we cannot assess Peretti's and Friedman's arguments without considering what it would mean to represent diverse interests or without some ideal of what political discourse should be. These considerations would no doubt implicate substantive questions about whether certain decisions are reasoned, advance interests or perspectives that are underrepresented, or advance an ideal of political discourse.

They do not require judgments as closely related to doctrine as those necessary to assess Dworkin's claim of integrity, however. Indeed, some approach (4) in their distance from the subject of adjudication. Alexander and Schauer, for example, have argued that a Court empowered with judicial review is well suited to serve as a "single authoritative interpreter" of the Constitution and thus increases the likelihood of stable constitutional doctrine.⁶⁰ The Court, in their view, performs a "settlement function," relating to our disagreements as to what the law requires, and in performing this function, the Court promotes social coordination.⁶¹ While it is true that we would assess this argument by measuring the stability of constitutional doctrine, we would not need to

⁶⁰ See Alexander and Schauer, *supra* note 57.

⁶¹ *Id.*

assess judicial decisions beyond a determination of how their stability compares to the decisions made through other institutional arrangements.⁶²

III. Institutional Virtues and the Distinction Between Structural and Doctrinal Claims

This section illustrates how we clarify debates in constitutional theory by distinguishing the structural and doctrinal aspects of claims like (3). Although constitutional theorists have relied increasingly on structural claims to justify judicial review, they are often secondary claims used to support important doctrinal arguments that remain at the center of debates in constitutional politics. Structural claims tend to be obscured in the glare of debates about constitutional doctrine and therefore not given adequate consideration. This problem is exacerbated because of the different aspects of claims like (3). These claims magnify the doctrinal glare that already distracts our attention from structural considerations, and in so doing, they draw attention not only from the structural aspect of their claim but also from other structural claims.

The First Things Symposia attacking judicial activism illustrates these problems. The Symposiasts attack Supreme Court decisions that they believe undercut the citizenship of religious people by delegitimizing the moral positions they assert.⁶³ We will see that the idea of delegitimization suggests at least two structural claims that are analogous to (3), but that these claims are obscured by the Symposiasts doctrinal arguments. We will also see that this problem is magnified by the doctrinal aspect of these structural claims.

⁶² See TUSHNET, *supra* note 49, at 27-28; LARRY KRAMER, THE PEOPLE THEMSELVES 234 (2004).

⁶³ See *infra*, note 67.

Finally, the Symposium helps us to identify a tension that arises between structural arguments that assess the Court's role in resolving actual controversies—applying constitutional principles to particular contexts—and structural arguments that assess the Court's role in the ongoing process that identifies constitutional values. Constitutional theorists tend to be more concerned about the Court's role in identifying constitutional values, given the extent that debates in constitutional theory have been framed in terms of the counter-majoritarian difficulty. Recall that the failure to identify principles that could limit judicial discretion leads theorists to justify the discretion judges have in the process that identifies constitutional values. In identifying virtues that justify this authority, they treat the authority to resolve controversies as only a step in the broader process that identifies constitutional values. In so doing, they ignore tension between the Court's two roles.

A. Structural Claims Obscured by Doctrinal Claims

The distinction between doctrinal and structural claims is necessary if only to properly assess structural claims. Consider the First Things Symposia attacking activist judicial decisions relating to abortion, homosexuality, and the place of religion in society, decisions that Dworkin would no doubt defend in the name of integrity.⁶⁴ By comparing the Symposiasts to Dworkin, we can see that their disagreement is mainly about constitutional doctrine and substantive justice more generally.

⁶⁴ See DWORKIN, *supra* note 7.

The Symposiasts contend that the Court's decisions: (a) introduce great injustice that undermines the legitimacy of the regime;⁶⁵ and (b) thwart the will of the people by substituting the Justices views for those of elected representatives.⁶⁶ But they have a third line of attack, one we have already mentioned: that these decisions (c) undercut the citizenship of religious people by delegitimizing the moral positions they assert.⁶⁷

While all three claims focus on the substance of the Court's decisions, the third claim also suggests a structural argument against judicial review. Their sense of delegitimization follows because the judicial process need not and, apparently, has not considered their views—I will sometimes use the term disenfranchisement instead of delegitimization, in order to emphasize an important implication of the Symposiasts' argument, that the legislative process is more respectful of citizens' views.⁶⁸

But their frustration indicates a deeper problem than a non-accountable institution making a decision that disrespects a view they hold intensely. After all, there are political avenues to challenge judicial decisions; the Symposium itself aims to change constitutional doctrine—to “relegitimize” the views disfavored by the Court. The problem is that the Court's exercise of authority creates a presumption in favor of a certain conception of constitutional values that makes the success of such an act extremely unlikely.

⁶⁵ Russell Hittinger, *A Crisis of Legitimacy*; Robert P. George, *The Tyrant State*, in *THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS*) 27-28, and 57 (Richard John Neuhaus ed., 1997).

⁶⁶ Robert H. Bork, *Our Judicial Oligarchy*; Hadley Arkes, *A Culture Corrupted*; and The Editors of *FIRST THINGS*, *Introduction*, in *THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS* 14-16, 32, 5 and 117 (Richard John Neuhaus ed., 1997).

⁶⁷ Charles W. Colson, *Kingdom in Conflict*, in *THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS* 42 (Richard John Neuhaus ed., 1997). *See also* Hittinger, *supra* note 63, at 29; Arkes, *supra* note 66, at 39.

⁶⁸ *See* WALDRON, *supra* note 38.

The presumption could arise for many reasons. It might follow from how citizens view the Court. Many citizens seem to accept the Court's determination of constitutional values as authoritative, because they believe the Court has special insight into the Constitution or simply because they are predisposed to respect what they are told are judgments of law. The presumption might also follow from difficulties in using the legislative process to promote the views the Court delegitimizes or in navigating the political process available to challenge judicial interpretations of constitutional values. The point, however, is not to explain the presumption or even to determine whether it poses greater difficulties than would arise if a legislature had made similar decisions. The point is that we might attribute the Symposiasts' feeling of disenfranchisement to an institutional structure that creates too great a presumption in favor of values endorsed by the Court and that such a presumption would not follow if a legislature had made the same decision. We thus can view the Symposiasts' third claim as structural.

This structural claim is obscured by the two other arguments whose overriding concern is to change constitutional doctrine. Moreover, this is a claim that has doctrinal and structural aspects, and it is not clear that the Symposiasts assign any weight to the structural aspect of the claim. The Symposiasts might think that because the judiciary is an elitist institution, it is less likely to represent the interests of religious people. This would suggest that we remedy the problem by either making judges respect religious views or, in the alternative, defer to legislatures that do. This interpretation, like (3) that we associated with Dworkin, assesses the judicial institution in light of its decisions. It

seems to emphasize the doctrinal aspect of the claim and thus dove-tails nicely with the Symposiasts' other arguments.⁶⁹

Nonetheless, the structural aspect of this claim would survive, even if the Court were to reverse its decisions on these issues. Although the Symposiasts concerns would be alleviated by the Court's reversals, it is not clear that the reversals would signal that the institution of the judiciary is sufficiently representative. There remains a question of whether the judiciary, as an institution, is well suited to represent religious views, whether they are the views of the Symposiasts or of those religious people who embrace the Supreme Court's activism and reject the Symposiasts' criticisms. We should not allow the Symposiasts' substantive agenda to interfere with our assessment of this structural aspect of their claim.

More significantly, the idea of disenfranchisement can be interpreted to reveal a related structural claim, namely that judicial authority promotes political instability by giving people the sense that their views will not carry much weight in future deliberations about what the Constitution means. Disagreements about constitutional values survive judicial attempts at resolution.⁷⁰ Given that these disagreements extend in time, we have an interest in how our institutional structure manages ongoing debates about these values.

The Symposiasts' expression of disenfranchisement suggests that judges have created a presumption that makes it harder for religious people to advance their interpretations of the Constitution in future conflicts. And one would expect a political

⁶⁹ And this interpretation is plausible given the strong suggestion that the crisis for American democracy would pass if the decisions were reversed. Indeed, at least one Symposiast argues that we should preserve judicial review so that the Court can enforce the correct constitutional values. See Hadley Arkes, *Prudent Warning and Imprudent Reactions*, in *THE END OF DEMOCRACY? II A CRISIS OF LEGITIMACY* 83 (Mitchell S. Muncy ed., 1999).

community to become less stable, if citizens who dissent from judicial decisions believed that those decisions would hinder any attempt to advance their views. Consequently, there is reason to curtail the exercise of judicial authority that increased the likelihood of people having this sense of disenfranchisement.

The tone of the Symposium certainly suggests that the Symposiasts believe themselves the victims of such a presumption, and perhaps their anger at the Court's decisions draws their attention away from flaws in our constitutional structure. Indeed, one would expect that the Symposiasts erstwhile allies are better situated to grasp the problem of instability; they believe that the Symposiasts' challenge threatens the stability of our system of constitutional government.⁷¹ And if instability arises because our constitutional structure allows judicial decisions to create an unfair presumption against certain views, this problem would survive even if the Court were to embrace the Symposiasts' position on the contested questions. Judicial decisions that legislatures must protect fetal life, allow schools to organize prayers and tolerate private discrimination against homosexuals would place the Symposiasts' political opponents in a position similar to their own. Their opponents would have to overcome serious obstacles in order to use the political process to advance their understanding of constitutional values, and they would in all likelihood experience the sense of disenfranchisement expressed by the Symposiasts.

This is not to say that the Symposiasts should embrace the structural claim. We do not know whether an institutional structure without judicial review will be more stable

⁷⁰ SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY, 121-26 (1992); Walter, Murphy, Who Shall Interpret? 48 *The Quest for the Ultimate Constitutional Interpreter*, REV. OF POLITICS 421

⁷¹ See generally, THE END OF DEMOCRACY?, *supra* note 3, at 65 114.

than one that assigns judges this authority. It might be the case that similar presumptions are created when elected institutions have greater authority to set the status quo meaning of the Constitution. Moreover, there are other considerations of both institutional design and substantive justice that will determine whether a political community is stable. And even if we were to endorse the structural claim that an institutional structure without judicial review is more stable, considerations of substantive justice might lead us to risk the added instability.

It would be odd, for example, if the Symposiasts would be content with a victory against judicial activism in a community that would vote overwhelmingly to support abortion rights, gay rights, and to exclude religion from the public sphere. One would hope that everyone can agree that there is a threshold at which procedural justice cannot justify violations of substantive justice, even if we do not agree where it is. And we should also be able to agree that structural claims have weight before we cross this threshold, even if we cannot agree on the weight they should have.

This essay only contends that it is difficult to gauge—or even consider—the weight of structural claims like those suggested by the Symposiasts, because they are so closely linked to the doctrinal claims that animate the attack on judicial activism. Nonetheless, constitutional theorists have long recognized this vice in our constitutional structure: a Court empowered with judicial review will resolve some issues prematurely and, in the process, undercut the political position of citizens whose views the Court disfavors.

The last point bears repeating: the Symposiasts' structural claim is deeply rooted in the debates of constitutional theory. Then why would theorists have so much trouble

assessing whether the structural claim has weight that is independent of the doctrinal claims with which it is entangled? One reason is that such claims are usually asserted to support doctrinal claims, and doctrinal claims tend to have greater salience. In those circumstances where theorists debate constitutional process, questions of substance lurk in the background much as we saw when we considered the first interpretation of the Symposiasts' structural claim.

Consider first how Robert Cover illustrates what he calls the Court's "jurispathic"⁷² function through a critical analysis of Bob Jones.⁷³ The Court, according to Cover, must favor some understandings of community values over others, when it says what the law is. In so doing, it kills the understandings not chosen as well as the community practices that are affiliated with those understandings.⁷⁴ Consider as well Bickel's use of Brown to illustrate the "passive virtues."⁷⁵ He believes the Court must avoid legitimating controversial practices in the name of the Constitution or risk introducing great instability to the political community.⁷⁶ The Court's decision to delay remedy in Brown II,⁷⁷ allowed the debate about desegregation to continue without the Court creating too great a presumption for the interpretation it favored.⁷⁸ Bickel contrasts Brown with Plessy,⁷⁹ where the Court mistakenly legitimated the practice of segregation, and Scott v. Sanford,⁸⁰ where it mistakenly legitimated slavery.⁸¹

⁷²Robert M. Cover, *The Supreme Court, 1982 TERM: Foreword: Nomos and Narrative*, 97 HARV. L. REV 4, 40 (1983.)

⁷³103 S.C.T. 2017

⁷⁴See Cover, *supra* note 72 at 40-41.

⁷⁵See BICKEL, *supra* note 30 at 111-98.

⁷⁶*Id.* at 199-207.

⁷⁷349 U.S. 294 (1955.)

⁷⁸See BICKEL, *supra* note 30, at 244-72.

⁷⁹163 U.S. 537 (1896.)

⁸⁰60 U.S. (19 How) 393 (1857).

⁸¹See BICKEL, *supra* note 30, at 71, 76, 197 65-68 and 259-63.

Now consider two older examples: John Calhoun defends nullification in the context of a dispute over tariffs and with the broader question of slavery in the immediate background.⁸² He believes that this power ensures that a national majority does not impose a view of the Constitution on a local majority.⁸³ The anti-federalist, Brutus, makes the same argument from the reverse side when he attacks judicial review, because the power would ensure that the national majority will determine the meaning of the Constitution and would be biased toward the expansion of national authority.⁸⁴ His argument differs from the others in that it arises in a context in which the debate about constitutional doctrine is a debate about what process to create. Brutus's attention to the nature of judicial power, however, does not appear to go beyond his interest in limiting a potential leviathan, although the argument is remarkably sensitive to how judicial authority tends to delegitimize the views of disappointed interests.

We see again that the difficulty in assigning independent weight to structural claims is magnified by the different ways that considerations of structure intersect with considerations of doctrine. The first three examples illustrate how structural claims become linked, and I would argue obscured, by more salient doctrinal claims.

The fourth example reveals how doctrinal considerations will creep into our consideration of what appears to be a purely structural question; Brutus' claim is like (3), though it is not clear the extent it is driven by considerations of doctrine. He suggests that federal authority will not respond sufficiently to local conceptions of constitutional

⁸² John C. Calhoun, *Fort Hill Address*, in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 367-400 (Ross M. Lence, ed., 1992.)

⁸³ *Id.*, at 121-22, 239, 244? (*A Disquisition on Government and a Discourse on the Constitution and Government*)

⁸⁴ Brutus, XV, N.Y. J., Mar. 20, 1788, reprinted in *THE ANTI-FEDERALISTS* 350 (C. Kenyon, ed., 1966).

values and thus will be experienced as tyranny at the local level.⁸⁵ It might be that Brutus recognizes that federal answers to particular questions of constitutional values will be in conflict with the local understandings of those values—this is my interpretation of Calhoun—and this argument is parallel to my interpretation of the Symposiasts’ claim that looks to the substance of judicial decisions to determine whether religious interests are well represented.

But Brutus’s can also be interpreted in a manner that gives the structural aspect somewhat greater emphasis. He might be claiming that the distance of the federal judiciary from the people of the states ensures such conflicts will arise; although Brutus might not have particular controversies in mind, he can imagine some conflicts in which local values should triumph but don’t. In this second case, the procedural claim implies a substantive understanding in the same way as Ely’s argument that judicial authority is well structured to promote democratic⁸⁶ government implied a substantive argument about the significance of such governments.⁸⁷ Both interpretations, however, invite consideration of doctrinal issues, and these issues make it harder to identify the more purely structural claim, that the judiciary, as an institution, will encourage a sense of disenfranchisement among some citizens no matter how it decides cases.

It is not surprising that in their criticism of judicial activism the Symposiasts identify an argument that would attack expansive judicial authority of the type endorsed by Dworkin. But the structural claim we identified would extend to any justification of judicial review, including those the Symposiasts might endorse, and that is why it is hard

⁸⁵ *Id.*

⁸⁶ Such substantive claims were no doubt present in the other claims as well. Cover, for example, was more interested in interests like those of Bob Jones University than in the outcome of that particular case. And

to grasp the structural aspects of their argument. Indeed, the Symposiasts view judicial authority from the doctrinal perspective that characterizes Dworkin's argument. They seek to advance an understanding of constitutional doctrine that follows from their particular conception of substantive justice. Therefore, they emphasize claims that are analogous to (1) and (2), and, like Dworkin, the doctrinal aspect of their third claim swamps the structural argument.

In the remainder of the section, we examine another consequence of the doctrinal orientation that characterizes the arguments of the Symposiasts and Dworkin. Given their focus on the values judges identify, they treat the judiciary's role in resolving controversies as a step in the broader political process that identifies community values, rather than as a distinct role. Therefore, they fail to recognize the tension between the two roles we expect judges to perform. Their arguments reflect the ascendant paradigm in constitutional theory, a paradigm in which theorists attempt to assess judicial discretion in the process that identifies constitutional values. The section concludes by tracing the tension back to Bickel, in many ways the fountainhead of this paradigm.⁸⁸

B. The Doctrinal Orientation and the Tension Between Structural Claims

So far, we have seen how the doctrinal aspects of a claim like (3) can obscure its structural aspects, but we have only considered structural claims relating to the process that identifies constitutional values. But the structural claims we associated with Dworkin and the Symposiasts could also be interpreted in a manner that gives greater

although Bickel and Calhoun were more interested in particular doctrinal outcomes, their views both suggest deeper assumptions about substantive justice.

⁸⁷ See Tribe, *supra* note 45.

⁸⁸ See, *supra* note 32.

emphasis to the judiciary's role in resolving controversies. Consider again Dworkin's claim (3). Integrity seems to be a virtue that characterizes the Court's resolution of controversies. A well ordered judicial process would ensure that all citizens receive the benefit of having the community's legal principles applied to their cases.

Nonetheless, Dworkin believes that judges do more than resolve controversies based on pre-existing legal principles. He expects judges to interpret these principles in light of the considerations of justice that are manifest in the political community's past practices, considerations that would not be obvious to the parties or to citizens more generally.⁸⁹ Judges, according to Dworkin, should perform a quasi-legislative function; they are to decide cases in a manner that advances the ideal of justice that underlies the community's principles.⁹⁰ Recall why Dworkin defends an expansive conception of judicial review. He believes that the judiciary is well suited to advance our deliberations about the understanding of equality that informs important principles of constitutional law.⁹¹ In so doing, he assumes there is no tension between the Court's role in resolving controversies and its role in identifying constitutional values; the Court is well suited to resolve controversies because it advances our understanding of the values our constitutional principles entail.

The tension between these roles is implicit in the Symposiasts' structural claim. It is not evident in the two interpretations we have previously examined, however, because those interpretations focus on the process that identifies constitutional values as opposed to the process that resolves controversies. The Symposiasts, for example, might expect judges to advance Dworkin's understanding of justice, but would view this as a reason to

⁸⁹ See DWORKIN, *supra* note 6 at 93.

⁹⁰ See *Id.*

curtail judicial review; they would contend that Dworkin's understanding does not reflect the views of religious citizens.⁹² They might also expect instability to arise from an institutional structure that excludes the views of religious citizens from the process that identifies community values.⁹³

But we can interpret the Symposiasts structural claim in light of the role judges play in resolving particular controversies. Their concern about delegitimization suggests a third criticism that can be applied to Dworkin's argument or any argument that justifies judges having discretionary authority to identify community values. Citizens, according to this interpretation, are less likely to accept the decisions of judges who they believe to be hostile to their views, even as those decisions apply to immediate cases. This criticism differs from the others in that it asks whether the Court is the proper institution to resolve particular controversies. The Symposiasts do not consider this argument seriously, because they are concerned about constitutional doctrine.

This orientation leads them, like Dworkin, to collapse the distinction between the process that resolves controversies and the process that identifies community values, and thus makes them less likely to consider whether the institution of the judiciary is well suited to resolve particular controversies. The Symposiasts treat the Court's decisions as instances in an ongoing process that identifies constitutional values. They appeal to the idea that although elected institutions must accept Court authority to resolve particular cases, these institutions have authority to interpret the Constitution independently as they exercise their own authority.⁹⁴ They trace this argument to Abraham's Lincoln's

⁹¹ See DWORKIN, *supra* note 7 at 34.

⁹² See *supra* note 65.

⁹³ *Id.*

⁹⁴ See Arkes, *supra* note 69 at 80.

justification for resisting Dred Scott. According to this view, the Court's interpretation of the Constitution is final for the parties but the political debate about what the Constitution means continues.⁹⁵ Although this implies a claim about the authority institutions should have in identifying constitutional values,⁹⁶ it is primarily a rhetorical justification that girds a substantive challenge to the Court's interpretation of the Constitution.

Because the Symposiasts consider the Court's identification of constitutional values as part of an ongoing process, they do not examine the tension between the Court's role in resolving particular controversies and its role in identifying such values. Notwithstanding their strong views about constitutional doctrine, the Symposiasts' criticism of the Court has little to do with how disappointed litigants might respond to the Court and everything to do with how the Court's decisions influenced subsequent debates about constitutional values. The claim that the Court disenfranchises certain views would lose much traction, if we knew that the parties who lost those cases would suffer no disadvantage in future conflicts about what the Constitution means.

The Symposiasts do not consider the Court a fair arbiter of constitutional controversies as a consequence of the role it has played in identifying constitutional values. But they do not examine the ramifications of this judgment, because their argument treats the resolution of particular controversies as only a step in the process that identifies constitutional values rather than as a distinct process. This tendency is even more pronounced among the many constitutional theorists who, like Dworkin, defend

⁹⁵ *Id.*, at 45, 55-62; Bork, *supra* note 66 at 17 "Our Judicial Oligarchy;" 17; The Editors of First Things, *supra* note 66 at 119-20; Russell Hittinger, *Government By the 'Thoughtful Part,'* Robert P. George, *Justice, Legitimacy and Allegiance*, in *THE END OF DEMOCRACY II: A CRISIS OF LEGITIMACY* 22-23, 34 35 and 102-03 (Mitchell S. Muncy ed., 1999.)

⁹⁶ And to the extent it makes the claim that elected institutions should resolve ambiguous constitutional provisions, it does so based on the expectation that they will reach better decisions. See Gary D. Glenn, *The Venerable Argument Against Judicial Usurpation*; George W. Carey, *The Philadelphia Constitution*:

judicial activism and try to guide the Court's identification of constitutional values.

Because these theorists begin with the assumption that judges will have considerable discretion in deciding cases, they are even less likely to consider whether the Court's role in identifying constitutional values undercuts its ability to resolve controversies.

Consider again Bickel's justification of judicial review, a model for two generations of constitutional theorists. He believes that judicial review can be justified, notwithstanding its counter-majoritarian character, because the Court's authority is tempered by other political forces that determine whether the Court is successful in advancing its understanding of constitutional values.⁹⁷ Bickel too uses Lincoln's attack on Dred Scott to illustrate that judicial decisions are one moment in an ongoing political fight over constitutional values.⁹⁸ He believes that the efficacy of the Court's attempts to say what the Constitution means depends on how elected institutions and citizens, more generally, respond to the Court's interpretations of constitutional principles.⁹⁹ It is this dependency that leads Bickel to emphasize the importance of the passive virtues.

The Court, according to Bickel, should employ the passive virtues to delay making final determinations about what the Constitution means until it has had time to secure the consent of elected institutions and the broader public.¹⁰⁰ The passive virtues are various discretionary devices, such as the requirements that a case present a live controversy, that is ripe, and not a political question.¹⁰¹ Bickel describes them as techniques and devices that allow the Court to resolve controversies without rendering a

Dead or Alive, in THE END OF DEMOCRACY II: A CRISIS OF LEGITIMACY 110-112, and 235 (Mitchell S. Muncy ed., 1999.)

⁹⁷ See BICKEL *supra* note 30.

⁹⁸ *Id.* at 65-70.

⁹⁹ *Id.*

¹⁰⁰ See *supra* notes 75-81.

decision on constitutional grounds and thus do not require the Court to legitimate social practices in the name of the Constitution.¹⁰²

Bickel, as we have seen, is concerned by the instability that results when the Court prematurely legitimates controversial social practices in the name of the Constitution,¹⁰³ and he commends the passive virtues as means to avoid this outcome.¹⁰⁴ He also illustrates how the Court can use the passive virtues to suspend the application of constitutional principles until a later time by which it can convince people that its understanding of constitutional values is the correct one.¹⁰⁵ Bickel recognizes that the Court brings considerable prestige to the endeavor. He describes the Court's ability "to concretize the symbol of the Constitution" and suggests that people are more likely to embrace political practices the Court deems constitutional—or even not unconstitutional—because they accept the Court's authority to speak in the name of the Constitution.¹⁰⁶

Bickel believes that the Court can perform the function he identifies without being perceived as an instrument of partisan ideology; the Court can sustain its prestige.¹⁰⁷ But it would seem that the Court's prestige will diminish as soon as it ventures beyond the consensus understanding of constitutional values and tries to influence our disagreements about what the Constitution means. We have already seen how the Court's prestige and its position in the institutional structure can create fairly strong presumptions against

¹⁰¹ See Christopher J. Peters and Neal Devins, *Alexander Bickel and the New Judicial Minimalism* in *THE JUDICIARY AND AMERICAN DEMOCRACY*, 47-51 (Kenneth D. Ward and Cecilia R. Castillo eds., 2005.)

¹⁰² See BICKEL *supra* note 30, at 70-72.

¹⁰³ See *supra*, note 81.

¹⁰⁴ See *supra*, note 76.

¹⁰⁵ See BICKEL *supra* note 30, at 111-98.

¹⁰⁶ *Id.*, at 29-33, 129-32. He calls this the "Mystic Function."

¹⁰⁷ *Id.*, at 236-45.

views it rejects. The people who hold these views will feel disenfranchised by the Court's actions and resentful towards the Court.

Bickel recognizes this as a problem the Court must face if it is to maintain its position in the process that identifies constitutional values.¹⁰⁸ He illustrates how the Court sustained its authority against the significant challenge it faced after the Brown decision.¹⁰⁹ Bickel describes the initial success of the political movement that mobilized against desegregation and how this movement failed once it was perceived to be engaged in mob violence rather than passive resistance to the Court.¹¹⁰ People came to embrace the Court's interpretation of the Constitution and rejected the alternative put forth by its opponents.¹¹¹ Bickel, however, does not address whether the Court's success affected its ability to resolve controversies.

The Court became the enemy of those who lost the fight over constitutional doctrine.¹¹² It seems likely that this had repercussions for judicial efforts to resolve future controversies, especially those involving the implementation of newly ascendant anti-discrimination norms.¹¹³ It would be surprising if this hostility toward the judiciary did not lead people to resist its authority and thus prolong or exacerbate controversies that could have been settled more efficiently or peacefully, if judges were not perceived as interested parties in active pursuit of an ideological agenda.

Moreover, it is likely that judges' participation in the process that identifies community values will have subtle effects on the institution of the judiciary, effects that will influence the Courts ability to resolve controversies. Justice Scalia, for example,

¹⁰⁸ *Id.*, at 65-72

¹⁰⁹ *Id.*, at 244-72.

¹¹⁰ *Id.*, at 255-56.

¹¹¹ *Id.*, at 271.

¹¹² *Id.*

¹¹³ See e.g., GERALD ROSENBERG, THE HOLLOW HOPE ____ (199_)

has noted that once people recognize the role judges play in the process that identifies constitutional values, they will demand that the people chosen to be judges will reflect their views.¹¹⁴ And we would expect that citizens who believe themselves disenfranchised by an ideological court are more likely to take an interest in future appointments. Therefore, it is not surprising that the Court's attempts to redefine constitutional values in Brown and other cases have led to a more politicized nomination process.¹¹⁵ It would be surprising, however, if an increasingly political appointment process did not have some influence on how the judiciary, as an institution, views particular cases.

Scalia, for example, describes a Sixth Amendment case in which the Court makes an exception to the confrontation clause in order to ensure that the victim of a child molester was spared the trauma of facing her attacker without increasing the chances of the attacker's acquittal.¹¹⁶ He contends that rights lose their significance, when judges interpret them in light of political pressure they might experience.¹¹⁷ But we should also expect that judges appointed to advance longer term doctrinal goals would be less responsive to the interests of the parties, even if they were to experience no immediate political pressure.

¹¹⁴ See SCALIA, *supra* note 47, at 46.

¹¹⁵ See MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF THE SUPREME COURT CONFIRMATIONS* (1994); DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICE: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES*, (1999) Bickel would not necessarily disagree. He became increasingly skeptical of judicial review as he witnessed the excesses of the Warren Court. People, according to Bickel, perceived the Justices as ideologically driven and, what is more, lost faith in the consensus of values embodied in the symbol of the Court. He associates the chaos of the Vietnam War/Watergate Era with this breakdown, the main symptoms being a total disrespect for authority and the rise of a form of popular politics in which demagogues attempt to advance particular views in the name of the people. See ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 120-23 (1975); BORK *supra* note 47, at 131-32, 193.

¹¹⁶ See SCALIA, *supra* note 47, at 46-47.

¹¹⁷ *Id.*

Indeed, Bickel's description of how judges should exercise their authority illustrates how an ideological Court will be less responsive to the immediate interests of litigants. Because he views judicial decisions as part of the process that identifies constitutional values, Bickel does not consider adequately how the Court's interest in shaping constitutional doctrine affects its ability to do justice in particular cases. Consider again the passive virtues. The Court might use the passive virtues to avoid a constitutional judgment that it believes the society is not ready to endorse. In so doing, it would deny one of the parties a judgment to which they are entitled.¹¹⁸ For example, Bickel discusses the cost to people who suffered harm because the Court did not decide the constitutionality of restrictions that the state of Connecticut placed on birth control.¹¹⁹ He believes that costs such as these are acceptable given the role the Court is to play in identifying constitutional values, but this seems to beg the question as to whether the Court should perform a function that is at odds with another important function it performs.¹²⁰

Similarly, Bickel's discussion of Brown does not address the costs the Court imposed on a generation of African-Americans by delaying its remedy to the injustice of segregation. On the one hand, the Court's decision in Brown II is a concession to a political environment in which there was little chance that the South would desegregate its schools peacefully; justice, in all likelihood, would have been denied even if the Court had insisted on immediate integration. On the other hand, Bickel recognizes that the Court could have found the schools in violation of the principle of separate but equal, the law

¹¹⁸ Gerald Gunther, *The Subtle Vices of the 'Passive Virtues': A Comment of Principle and Expediency in Judicial Review*, 64 COL. L. REV. 1(1964).

¹¹⁹ See BICKEL *supra* note 30, at 156, 173.

¹²⁰ *Id.*, at 173-74.

prior to Brown.¹²¹ In so doing, the Court would have been in a better position to remedy the violation, whether by insisting that African-American students receive a greater share of educational resources or perhaps even by requiring desegregation until adequate facilities were provided.¹²²

While there would have been resistance to these rulings as well, they would have at least secured more for the parties, especially if the Justices were perceived as respecting the values that supported the regime. Perhaps these gains would not have been great, but the alternative was to subordinate people's interests to a longer term doctrinal goal. Bickel does not acknowledge that the Court's role in identifying constitutional values is in tension with its role in resolving a particular controversy. Rather than secure plaintiffs benefits to which they were entitled under the law, the Court pursued a new understanding of constitutional values that might—or might not—yield gains for similarly situated people at some undetermined time in the future.

IV. Conclusion

We have seen that structural claims are easily obscured by the doctrinal questions that often frame debates in constitutional theory. The remainder of this essay considers how such claims might influence these debates.

To begin, it is worth repeating that our interest in justice must at some point trump any concern for the institutional structures we use to pursue justice. We would not want to sever our assessment of judicial authority from any expectation of how judges should

¹²¹ *Id.*, at 171.

¹²² *Id.*, Bickel notes that prior to Brown the Court pursued such a strategy in the area of higher education. The Justices were careful not to reaffirm the Plessy principle and were perceived as undermining it, and this suggests that he views these decisions as consistent with his understanding of the proper use for the passive virtues.

decide cases. People do not have an obligation to obey governments whose policies fall below some threshold of justice and would be justified in resisting particular injustices advanced by such governments. Defining the duties citizens have when their government pursues policies in tension with important requirements of justice is a problem of political theory, however.

Constitutional theory addresses a related problem: the best institutional arrangement for pursuing justice. In considering which arrangements are best, we have to recognize that these institutions must also manage people's disagreements about justice. Structural claims speak to this problem. Our assessment of their significance will depend both on how we view justice and view our disagreements about justice. Structural claims should become less important the greater our confidence that governmental institutions can identify and enforce norms of justice, and scholars with strong views of what constitutional doctrine should be will likely assign less weight to these claims. Indeed, we saw that the structural claims made by both Dworkin and the Symposiasts did little more than complement doctrinal claims that were the core of their arguments.

Structural claims have greater significance when we believe that government institutions will not be able to resolve our disagreements about the values that should govern people's lives. In such conditions, we have greater interest in how institutions go about making decisions. We saw, for example, that the fact of disagreement adds weight to the Symposiasts' claim that judicial authority disenfranchises certain views. Although the Symposiasts seem particularly concerned with how disenfranchisement undercuts the

quest for justice, they also suggest that instability arises when people believe that judges have created an unfair presumption against such views.

Note well, however, that the essay only contends that constitutional theory is characterized by a doctrinal orientation that makes it difficult to identify claims of this type; the essay does not defend the claim or assess its significance. The consideration of specific structural claims is best saved for another day.¹²³ We will instead consider some implications that our analysis of structural claims has for debates in constitutional theory more generally.

The case for expansive judicial authority to identify constitutional values appears weaker if we seek a process that will manage our disagreements about justice rather than resolve them. The legislative process tends to be better suited to respect disagreement.¹²⁴ Legislatures typically have incentives to define policies that accommodate diverse interests. The American legislative system, with its abundance of minority vetoes, is particularly well suited to represent minority views and thus ensure that any significant piece of legislation has super-majority support. The judiciary, by contrast, is designed to increase the chances that judges will decide cases correctly. Because judges have to decide for one party or the other—they have less opportunity than legislators do to

¹²³ Nonetheless, our recent experience of judicial activism suggests its plausibility. The Symposium itself is part of a highly partisan struggle to control the courts, a struggle that seems to push our politics towards greater ideological polarization. Scholars once attributed the stability of American constitutionalism to the consensus of values at its foundation. Indeed, Bickel thought that such a consensus made judicial review possible and that the Court served as its guardian. *See* BICKEL *supra* note 30, at 30. *See also*, LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA*, (1955); And although we can debate whether this was ever an accurate description of American politics, it is certain that the fissures in the foundation of American constitutionalism have created greatest stress in periods characterized by judicial activism. To establish judicial authority as the source of the stress, we would have to determine whether judicial review creates the presumption that has been hypothesized, whether judicial decisions actually have the effect of delegitimizing opposing views of constitutional values such that citizens who hold these views are disadvantaged in the ongoing debate about what the Constitution means. We might, for example, compare how citizens respond to the exercise of different types of institutional authority and examine whether legislative decisions are more easily overturned than judicial decisions.

compromise and accommodate—there is a greater urgency for good decisions. And the design of the judiciary reflects this need.

Judges are given independence to isolate them from political pressures. They tend to be highly educated and apply their training to evidence that is revealed through a process that has been finely calibrated to increase the chances of a correct decision. It is not surprising then, that many arguments for expansive judicial authority have emphasized how the judiciary is well suited to identify important constitutional values that the legislative process often ignores. People, who believe that they have special insight into justice or particular confidence in the understanding of justice that they hold, are more likely to have faith in an elite judiciary, a judiciary that may one day be populated by judges like themselves.

On the other hand, the judiciary's exalted status can become a vice in a community characterized by deep disagreements about justice. In such a community, partisan elites would seek to control judges in order to gain a presumption favoring their particular interpretation of the Constitution, and, in so doing, they would inflame the controversies that manifest the underlying disagreements about justice. Consequently, we would have reason to favor the stability achieved by an institutional structure that is more likely to leave unresolved divisive questions of constitutional interpretation,

But we cannot manage our disagreements without resolving the particular controversies that implicate broader questions of justice, and we expect that judges often will resolve these controversies. That is why (a) the judicial process is designed to maximize the likelihood of good decisions and (b) judges have less flexibility to compromise and accommodate. In addition, some of the virtues that scholars claim

¹²⁴ See WALDRON, *supra* note 38.

support the authority of judicial review lend themselves to the function of resolving short term controversies. Consider again Dworkin's claim about integrity or Macedo's about reasonability. Judges promote social stability when their decisions resolve controversies with finality, and citizens more readily can accept the authority of decisions that are well reasoned and that treat like cases alike. I suspect that scholars in search of a justification for expanding judicial power have assumed that the qualities that make judges good at resolving particular controversies can be applied to our broader disagreements about justice. We have seen, however, that expanding such authority risks changing the institution in ways that will render it less adept at resolving those controversies.

Lastly, structural claims should influence how we approach questions of judicial authority, even if they do not lend themselves to the particular conclusions discussed above. Constitutional theorists are too readily drawn into doctrinal battles of constitutional politics.¹²⁵ Our scholarly resources are spent declaring and justifying landmark decisions, rather than examining the consequences of competing institutional structures.

More significantly, most constitutional theorists have training in law or political science, training that lends itself to questions of how institutions operate and the effects institutions have rather than to speculations about justice. And though scholars have paid increasing attention to the effects of different institutional structures, they have tended to treat institutions as independent variables that might explain the dependent variable, constitutional doctrine. They have paid comparatively little attention to the role these institutions might play in managing society's disagreements. This deficiency becomes

¹²⁵ See Martin Shapiro, *Political Jurisprudence, Public Law, and Post Consequentialist Ethics: Comment on Professors Barber and Smith*, 3 *STUDIES IN AMERICAN DEVELOPMENT* 89, 99 (1989.)

especially troubling, if our disagreements about justice run so deep as to survive any political settlement.

What is more, constitutional theory might very well advance a discussion of how to go about addressing disagreements about justice, even though the disagreements themselves are beyond its effective resolution. It might be possible to build a scholarly consensus about questions of constitutional structure, because such questions are at least one step removed from the substantive disagreements that animate political controversies. Dworkin, for example, will more likely accept the claim that the judicial institution creates presumptions prematurely than he will the claim that judges should not guarantee women's right to choose to have an abortion.

Even if we cannot agree on the constitutional structure that best addresses our disagreements about justice, it is quite possible to achieve a consensus about the likely consequences that follow from using certain institutional structures to resolve these disagreements. The Symposiasts will continue to recognize that judicial review creates an undue presumption in favor of certain views, even if the Court were to reverse the decisions that they believe have disenfranchised religious views. And in the event of a rebirth of conservative activism, Dworkin would as well. In such a case, Dworkin and the Symposiasts would disagree about the justice of the new decisions. They might agree about the role the Court should play in identifying constitutional values, even though their disagreements about justice or other structural considerations will weigh against their meeting of the minds. They would agree, however, that a Court empowered with judicial review is prone to create too great a presumption against certain understandings

of constitutional values. At a minimum, structural claims allow us to better understand the depth and subtleties of our disagreements.