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Looking for Law in All the Wrong Places: A Critique of the Academic Response to the Florida Election

BY
KENNETH WARD*

I. INTRODUCTION

Let us attempt the impossible, to view the Florida election from a fresh perspective. We do so, oddly enough, by ignoring Bush v. Gore and the other cases that emerged from the election. Indeed, let us ignore the issues litigated during the election controversy and the other questions that concern how the Court exercised its power or how people should respond to its decision. Consider, instead, the barrage of scholarship that addresses the election. While it is premature to form conclusions on many of the issues that this scholarship has examined, we gain important insights about the discipline of constitutional theory by considering how scholars have approached the controversy.

This article examines Bush v. Gore to illustrate that the stakes of important cases lead scholars to view the problem of judicial authority from a perspective framed by adjudication. It contends that this legalistic perspective obscures significant political phenomena at the periphery of the immediate controversy, phenomena that should influence how constitutional theorists think about judicial authority and its relationship to law.1

We will see that scholars focus on how law affects the outcomes of

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1. The article will also address issues implicated by the state cases. For ease of expression, however, I will sometimes use Bush v. Gore to refer to the collection of cases. Given the purposes of this article, it is not necessary to distinguish the separate cases because I do not examine the doctrinal issues they raise. Moreover, it should be clear when I address arguments that pertain exclusively to state or federal judges.

2. I emphasize that though I view law from a political perspective—an important implication of the preceding sentences—my argument does not equate law and politics. See infra text accompanying note 28.
judges to advance good values. While these aspects of law are obvi-
ously relevant to how we should define judicial authority, they are not
the only or, perhaps, even the most important ways that law might bear
on the definition.

This article looks beyond the immediate context of Bush v. Gore to
identify how law remains relevant to questions of judicial authority,
even if judges do not decide cases based on legal principles. Rather than
assess what the judges did, we will examine a broader question implied

3. Most scholars care about who won the case, why they won, the legitimacy of the victory,
and the consequences of the adjudication for future battles. Many constitutional theorists have
asked whether the Court’s action can be justified as an interpretation of law, as an exercise of
political power, or whether the judges should have refused to decide the case. Others consider
how the holding should influence future appointments to the Supreme Court. We anticipate these
battles in terms of adjudication. Can the Court’s equal protection holding be incorporated into
liberal strategies regarding voting rights? Should the Court or elected institutions resolve
analogous conflicts in the future? Or, how should the President and Senate exercise their powers
of appointment and confirmation over the judges who will adjudicate these future conflicts? See,
e.g., HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000
PRESIDENTIAL ELECTION (2001); Guido Calabresi, Impartial (But not Partisan) Praise of
Principle, in BUSH v. GORE: THE QUESTION OF LEGITIMACY 67 (Bruce Ackerman ed., 2002)
[hereinafter BUSH v. GORE]; Charles Fried, An Unreasonable Reaction to a Reasonable Decision,
in BUSH v. GORE, supra, at 8; Jed Rubenfeld, Not as Bad as Plessy, Worse, in BUSH v. GORE,
supra, at 21; Bradley W. Zoonek, Bush v. Gore, Federalism, and the Distrust of Politics, 62
OHIO ST. L. REV. 1781 (2001); Pamela S. Karlan, The Newest Equal Protection: Regressive
Doctrine on a Changeable Court, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 77
McConnell, Two-and-a-Half Cheers for Bush v. Gore, in The Vote, supra, at 98; Richard A.
Posner, Bush v. Gore: Prolegomenon to an Assessment, in The Vote, supra, at 165; Jack M.
Balkin, Legitimacy and the 2000 Election, in BUSH v. GORE, supra, at 210; Steven G. Calabresi, A
Political Question, in BUSH v. GORE, supra, at 129; Jeffrey Rosen, Political Questions and the
Hazards of Pragmatism, in BUSH v. GORE, supra, at 145; Margaret Jane Radin, Can the Rule of
Law Survive Bush v. Gore?, in BUSH v. GORE, supra, at 110. Bruce Ackerman, Off Balance, in
BUSH v. GORE, supra, at 192; Cass R. Sunstein, Does the Constitution Enact the Republican Party
Platform?, in BUSH v. GORE, supra, at 177; Richard A. Epstein, “In Such Manner as the
Legisature Their May Direct”: The Outcome in Bush v. Gore Defended, in The Vote, supra,
at 13; ALAN M. DERSHOWITZ, SUPREME INJUSTICE (2001); Richard Briffault, Bush v. Gore as an
Equal Protection Case, 29 FLA. ST. U. L. REV. 325 (2001); Richard Hasen, Bush v. Gore and the
Future of Equal Protection Law in Elections, 29 FLA. ST. U. L. REV. 377 (2001); Peter M. Shane,
Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for
in Election Disputes, 29 FLA. ST. U. L. REV. 691 (2001); Lawrence H. Tribe, EROG v. HSUB and
by the fact of the case itself: why would people assign judges the authority to interpret law? More particularly, the article identifies three values that relate to this question: fairness, stability, and predictability. We associate these values with the rule of law, an ideal that is more concerned with the procedures people use to address social conflict than with the outcomes of particular controversies. These values define a priori considerations that should guide our choice of institutional procedures. They are different from the values that judges advance through particular decisions. I refer to these values as institutional virtues—or more generally, virtues—in order to sharpen the distinction.

While we use values to assess the outcomes of particular controversies, we use virtues to assess the institutional processes that settle such controversies. These virtues should inform our definition of judicial authority, but they do not bear on how judges decide particular cases. To grasp these virtues, therefore, we must see law as something more than the legal principles that judges interpret to resolve cases. The election cases illustrate how a narrow focus on legal principles leads scholars to confuse these virtues and to ignore fundamental questions of judicial authority that were implicated by those cases.

Note well that the article does not consider the particular legal principles that grounded or might have grounded the Supreme Court’s holding in Bush v. Gore. Rather, it uses the case to illustrate that: (1) virtues that animate the rule of law have a bearing on our thinking about the definition of judicial authority whether or not legal principles constrain judges; and (2) law has influence in the political community that is independent of how judges decide cases. Moreover, this article does not criticize or defend the Court’s holding; nor does it directly address the normative questions that must inform such positions. Instead, it exam-

4. Note that the distinction in terminology is only intended to mark the different levels at which we apply values to resolve conflicts among citizens’ interests. Although institutional virtues relate to questions of process, they are substantive in the same way that values are. Indeed, the same value can be applied at both levels. For example, I will contend that we should assess judicial authority in light of the virtue of fairness, and we know that judges interpret the Due Process Clause so as to advance the value of fairness. It is important to distinguish the terms, however, because the question of who should decide cases is different from the question of how to decide a particular case. In this article, I will identify arguments that relate to the virtue of fairness that suggest why we would assign judges the authority to interpret law. Once we assign judges this authority, some judges will no doubt make decisions that at least some people believe offend the value of fairness. Although we assign judges authority for reasons that relate to fairness, these reasons do not entail that judges will interpret legal principles in a way that advances the best conception of fairness. Indeed, we will see that the reasons that we assign judges this authority have little to do with the particular decisions we expect them to make. Nonetheless, particular decisions—or more likely a pattern of decisions—might lead us to reconsider the reasons that informed our definition of judicial authority. See infra text accompanying notes 60-100.
ines the case in order to illustrate that a focus on adjudication leads scholars to ignore aspects of law that have significance for the definition of judicial authority.

Section II steps outside the context of the election controversy to consider why a focus on adjudication distorts our view of judicial authority. It contends that scholars often focus on how to interpret the Constitution to resolve particular controversies. These scholars, then, are likely to ignore institutional virtues that have no bearing on such controversies, even though these virtues might explain why we assign judges authority to resolve such controversies. Section III links the academic response to the Florida controversy to the influence that legal realism has had in constitutional theory and judicial politics. It contrasts the legal realist focus on the outcome of cases with a broader perspective of the role law plays within the political community. Section IV is the article's core critique. It assesses the scholarly response to the election controversy. Scholars focus on how judges decided the election cases and how they might decide future cases. It is this focus that leads them to ignore or confuse institutional virtues such as fairness, stability, and predictability. Section V concludes by considering how a broader view of law, one that encompasses institutional virtues, might shape how constitutional theorists approach the problem of defining judicial authority.

II. CONSTITUTIONAL POLITICS V. CONSTITUTIONAL THEORY: THE ADJUDICATIVE ARENA

Many theorists view the Constitution as a law that is to be applied to resolve controversies, and view legal advocacy as a primary means for determining its meaning. It is not surprising, then, that adjudication frames the perspective of much work in constitutional theory. The Supreme Court usually has the final word on how the Constitution will be interpreted, and constitutional theorists hope to influence the Court's exercise of this power. These theorists endeavor to move legal doctrine closer towards their ideal conception of the Constitution. Thus, they participate in constitutional politics. In so doing, they view constitutional theory from the Supreme Court's perspective, from the perspective of adjudication, but it is a perspective that obscures important theoretical considerations. To see why, we must consider constitutional politics more closely.

Constitutional politics is a strange game. Citizens debate the meaning of the Constitution while using it to regulate their pursuit of a wide variety of interrelated interests. They seek resources and conditions that make life bearable, enjoyable, interesting, or satisfying. Constitutional law establishes institutions that regulate citizens' pursuit of these interests. It also expresses values to guide institutions as they exercise their authority, such as the values of liberty and equality we advance through the Fourteenth Amendment. These values often define conditions that greatly affect the lives citizens can live. We use constitutional law, then, to advance conceptions of how people should live or, less strongly, conceptions of the political environment in which people should choose their own course of life. It is our disagreements about these conceptions that give constitutional politics its unique character. Because citizens disagree about competing constitutional values, one object of the constitutional politics game is to determine the game that is being played.

Many have noted that constitutional politics has this dual character, and we can see that this character has had important ramifications for the agenda of constitutional theory. Theorists have argued about how to resolve political conflicts given the values that underlie specific constitutional provisions and the broader constitutional structure. Others have paid less attention to how judges should decide particular controversies and have given greater emphasis to how judges should exercise their power, what types of cases they should decide, and how they should justify their holdings. Still others have questioned whether judges should continue to play the prominent role in resolving conflicts about the Constitution's meaning.  

7. See, e.g., Bruce Ackerman, We the People: Foundations (1991); Mark Tushnet, The Conservatism in Bush v. Gore, in BUSH v. GORE, supra note 3.  
It is more difficult, however, to grasp the extent that constitutional politics—and in particular the adjudicative arena in which its battles are fought—shapes the perspective of constitutional theorists. Most—if not all—of the work mentioned above directly comments on Supreme Court holdings or future holdings, or addresses structural issues of constitutional law with an eye toward influencing substantive doctrine.

Therefore, theorists focus on the relationship between constitutional values and case outcomes. For example, most theorists recognize that our interest in particular cases might shape our view of the constitutional values that are at issue in those cases. Indeed, many have commented on the relationship between people’s party identification and the constitutional values that those people believe should have guided the decision in Bush v. Gore. But theorists pay less attention to the broader political context in which adjudication is situated. They do not adequately consider adjudication—or constitutional politics—in light of institutional virtues that are independent of the cases that judges might decide, virtues such as fairness, stability, and predictability.

There are exceptions. Some theorists have linked questions of judicial authority to virtues that are not implicated in particular constitutional controversies. Consider Jeremy Waldron’s recent defense of legislation as an alternative to judicial review. He argues that we empower these institutions to resolve conflicts about the meaning of values, and that we should choose an institutional structure based on considerations that do not assume an answer to such conflicts.

Waldron’s argument turns on a distinction between the process that we—a collective—should use to settle our disagreements about values

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9. While some have commented on the tendency of constitutional theorists to focus on the Court as the sole source of constitutional law and others have questioned the priority people assign the Court’s interpretation of the Constitution, we have paid much less attention to the consequences, for constitutional theory, of viewing constitutional theory problems in terms of the doctrinal questions that political institutions—whether courts, executives, or legislators—must answer. Scholars who work from a comparative perspective are less prone to this mistake. Mary Anne Glendon, for example, has provided great insight on how the language of law shapes our view of how political controversies should be resolved. See Mary Anne Glendon, Rights Talk: The Impoverishment of Political Discourse (1991). She is more concerned by the effects that follow from how political institutions resolve controversies than by the substantive outcomes of particular controversies.

10. Cf. Jack M. Balkin & Sanford Levinson, The Roles of Law Professors in the Wake of Bush v. Gore, 90 Geo. L.J. 173 (2001). Balkin and Levinson discuss the role that law professors should play in doctrinal argument. They examine whether law professors should view doctrinal debates from an internal or external perspective, but their focus remains on doctrinal outcomes.

11. See, e.g., Cass R. Sunstein, Introduction to The Vote, supra note 3, at 5.

12. See id.; see also Michael J. Klarman, Bush v. Gore Through the Lens of Constitutional History, 89 Cal. L. Rev. 1721 (2001); Gillman, supra note 3, at 189.

13. I am using fairness as a virtue and not as a value. See supra note 4.

14. See Waldron, supra note 8.
and the particular values that I—an individual—believe should guide the Court or other institution that resolves these disagreements. Constitutional theorists, according to Waldron, should concentrate on the question of how to respond procedurally to disagreements about values, as opposed to the question of which is the best of the disputed values. He claims that legislation, in contrast to judicial review, settles citizens’ disagreements about values without assuming answers to the questions that are in dispute. Thus, equality is an institutional virtue of the legislative process; such a process treats each citizen as an equal member of the political community no matter what values they hold.\(^\text{15}\)

Waldron’s point is significant in that he assesses judicial authority in terms of virtues that are independent of the controversies that courts or other political institutions must resolve.\(^\text{16}\) More significantly, it is easy to misread Waldron’s argument because he does not focus on the values that judges might apply in deciding particular cases. Rather, he views law as a political institution that citizens use to define a procedure to address the controversies they must resolve.\(^\text{17}\)

While Waldron is not alone in viewing law and judicial authority from a broader political perspective, his approach is atypical.\(^\text{18}\) I have argued elsewhere that American constitutional theorists have trouble grasping arguments like Waldron’s because these arguments consider law from outside the context of adjudication. In this article, I consider why it is so difficult for many American constitutional theorists to see law from this perspective. In examining the scholarship that responds to the Florida election controversy, it is easy to identify the influence of the narrower perspective. But we must also consider how much it misses.

The next section links the scholarship on the Florida election to a perspective associated with legal realism, a perspective that dominates the fields of constitutional theory and judicial politics. It also sharpens the contrast between this perspective and a broader view, such as the one that informs Waldron’s argument. Section IV then examines how the

\(^{15}\) See id. at 3, 6-7.

\(^{16}\) I remain agnostic on Waldron’s conclusions about judicial review; in a separate essay, I question whether Waldron adequately considers the possibility that judicial review might be consistent with institutional virtues that are independent of the considerations of justice that are implicated by particular controversies. (On file with author.) In that essay, I also point out that it is difficult to grasp Waldron’s argument because it transcends the context of adjudication. I contrast Waldron’s approach with John Hart Ely’s defense of judicial review in Democracy and Distrust. While Waldron’s proceduralist conception bears a superficial resemblance to Ely’s, they are distinguished by the fact that Waldron’s argument depends on political virtues that can be advanced independent of the context of adjudication. Ely’s procedural conception of democracy presupposes the answer to substantive questions of justice that are implicated by the cases that judges must decide.

\(^{17}\) See WALDRON, supra note 8, at 3, 6-7.

\(^{18}\) See also infra notes 68-72 and accompanying text.
narrower perspective of law distorts our view of the election cases. It identifies fundamental questions of judicial authority that underlie the controversy, questions that have been absent from much of the scholarly commentary. In addition, it suggests that important answers to these questions are informed by virtues associated with the rule of law, fairness, stability, and predictability.

III. LEGAL REALISM AND JUDICIAL AUTHORITY

A. Legal Realism and its Consequences: Law is Political v. Law is Politics

As a new law student, I discovered that we are all legal realists now. Though I was never sure what this meant, I soon learned that legal realism challenged the notion of law as an autonomous apolitical realm. In their most skeptical moments, legal realists contend that law is nothing more than what judges say it is. The election controversy seems to have let the public in on the legal academy’s secret by exposing the political ambition of judges. It has done what decades of scholarship by political scientists and academic lawyers have failed to do: convinced people that judges sometimes legislate when they purport to interpret the law. Oddly enough, even more of us are now legal realists.

19. I am using “legal realist” to refer to a broad range of work in constitutional theory and judicial politics that focuses on judicial policy-making from a variety of perspectives. It includes theorists who focus on how judges decide cases and contend that the outcome of cases will be significantly affected by the preferences of judges. These include, among political scientists who study judicial politics, attitudinalists and institutionalists who work from a strategic perspective. See generally Segal & Spaeth, supra note 6; Lee Epstein & Jack Knight, The Choices Justices Make (1998); Forrest Maltzman et al., Crafting Law on the Supreme Court–The Collegial Game (2000). It also includes works of positive political theory that explore how judicial authority might contribute to policy-making. See generally James Rogers, Information and Judicial Review: A Signaling Game of Legislative-Judicial Review, 45 AM. J. POL. SCI. 84 (2001). In addition, it includes constitutional theorists who defend a conception of judicial authority based on an expectation of the interests judges will represent or how judges will contribute to the debate about constitutional values. See generally Ackerman, The Storrs Lectures, supra note 8; Bruce Ackerman, We the People: Transformations (1998); Peretti, supra note 8; Sunstein, One Case at a Time, supra note 8; Tushnet, supra note 8.

20. But see Mary Ann Glendon, A Nation under Lawyers: How the Crisis in the Legal Profession is Transforming American Society 178 (1994).

21. Karl Llewellyn, The Bramble Bush 3 (1930); Karl Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222, 1237 (1931). While much of Llewellyn’s fame followed from this radical definition of law, the definition does not reflect his mature views. It is also not even clear that he endorsed this definition at the time. William Twining, Karl Llewellyn and the Realist Movement 148 (1973). Finally, the definition has roots that predate legal realism. See Oliver Wendell Holmes, The Path of Law, 10 HARV. L. REV. 457-78 (1897). Nonetheless, the definition reflects a focus on adjudication that is characteristic of both legal realism in general and Llewellyn in particular. More significantly, while this focus does not preclude a more nuanced definition of law, it encourages the narrower perspective that, I contend, has characterized work in constitutional theory and judicial politics.
Have citizens finally lost their naïveté about law? Perhaps not: the popular response to the controversy suggests that the public was not as innocent as we might have thought. Both politicians and the general public seemed to evaluate judicial decisions with an eye to their partisan interests. When judges reached decisions that appeared to thwart victory for one side, people who favored the other were quick to accuse the judges of acting lawlessly, and did not engage their interpretations of law. When judges reached decisions that promoted victory, political allies called for closure and the restoration of order. People’s concern for the outcome of the cases overwhelmed their concern for the legal principles that were supposed to resolve them.\textsuperscript{22} Indeed, while many people assume that the Court still would have ruled for Bush had the parties been reversed, no one seems to care all that much, except perhaps some scholarly types who appear bewildered at the confirmation of the legal realism they have professed.\textsuperscript{23}

The coalescence between academic and popular opinion is an interesting, though not surprising, sideline of legal realism’s broader influence in the political culture. The legal realists, if nothing else, emphasize that politics has a great affect on legal outcomes. Moreover, their actions have matched their message. Generations of legal scholars have engaged actively in constitutional politics, and have made debate about legal doctrine a familiar part of political competition.\textsuperscript{24} Most notably, they have sought doctrinal change by questioning the motivations of sitting judges and subjecting the ideology of potential successors to close public scrutiny. Hence, we should not be surprised if the public has learned the lessons of legal realism, that law is not an autonomous realm; law is political.\textsuperscript{25}

Consider, instead, how this legal realist conclusion affects the academic view of judicial authority. Many scholars respond to the conclusion that law is political by treating the judiciary like any other political institution. They focus on how judges, as political actors, use their power to advance their ideologies or other preferences.\textsuperscript{26} It is this interest in judicial policy-making that leads these scholars to consider judicial authority from the perspective of adjudication that characterizes

\textsuperscript{22} See \textit{supra} note 19. See also \textsc{Dershowitz}, \textit{supra} note 3, at 12, 176, 187.
\textsuperscript{23} See \textsc{Dershowitz}, \textit{supra} note 3; Frank I. Michelman, \textit{Suspicion, or the New Prince, in The Vote}, \textit{supra} note 3, at 123; see also \textsc{Richard Posner}, \textit{Overcoming Law} 489 (1995); Paul F. Campos, \textit{The Search for Incontrovertible Visual Evidence}, 72 U. Colo. L. Rev. 1039 (2001); Robin West, \textit{Reconstructing the Rule of Law}, 90 Geo. L.J. 215 (2001); \textsc{Fried}, \textit{supra} note 3.
\textsuperscript{24} See \textsc{Glendon}, \textit{supra} note 9, at 178, 192-96.
\textsuperscript{25} See \textsc{Gillman}, \textit{supra} note 9, at 6-7.
constitutional politics. Consequently, they view law as the legal principles that are the subject of adjudication.\textsuperscript{27}

Note that these scholars run the risk of equating law and politics, thereby mistaking the claim that law is political with the claim that law is politics. The latter claim denotes that law and politics are one and the same, and thus breeds confusion given that law has qualities that distinguish it from other forms of politics, qualities that could be important to how constitutional theorists think about judicial authority.\textsuperscript{28} In addition, these qualities are obscured in the adjudicative arena, a place where the doctrinal battles of constitutional politics are so prominent.

In their rush to join these battles, constitutional theorists should be careful not to equate law and politics. Instead, they should look beyond adjudication and consider what distinguishes law from other forms of politics. By asking questions such as how does law contribute to the political community or why do people govern themselves by law, constitutional theorists might better understand that law, though a political institution, has distinct qualities that are relevant to how we think about judicial authority. Section IV will illustrate this point, but to grasp this point we must shift our perspective away from adjudication because it is easy to underestimate how adjudication influences our perspective.

B. Law and the First Wave of Election Scholarship

The academic commentary on Bush v. Gore treats the decision as one moment in the ongoing battles of constitutional politics, and thus reflects the policy orientation of legal realism.\textsuperscript{29} Defenders of the Court attempt to identify some legal foundation for the Court’s intervention in presidential politics,\textsuperscript{30} but are satisfied to note the political exigencies that explain the Court’s presumption.\textsuperscript{31} The Court’s critics not only

\textsuperscript{27} Consider this point carefully. I do not criticize the legal realists or their descendants; I only note that much—not all, or even most—scholarship in the legal realist vein tends to view law from a particular perspective, one that has relevance to how constitutional theorists frame the problem of defining judicial authority. Moreover, I do not even attempt to define legal realism. From its origins, legal realism has had a protean quality that has resisted definition, and what was difficult then is now impossible. Therefore, I only contend that legal realism invites theorists to focus on judicial policy-making—both in the narrow and broader ideological sense—and thus encourages people to view law from the perspective of adjudication.

\textsuperscript{28} See Gillman, supra note 3, at 7. Gillman captures this possibility with the distinction between high and low politics. See also Tushnet, supra note 7, at 170.

\textsuperscript{29} See Moran, supra note 26.

challenge the legitimacy of its opinion as an interpretation of law, but also formulate strategies to wrest the Constitution from the Court's control. They propose novel theories to challenge future appointments, and some critics even press the need to rethink the authority we afford the Court's interpretations of the Constitution. The election scholarship contributes to an ongoing political battle about the meaning of the Constitution, one that will be fought in courts. It is therefore not surprising that scholars would direct their arguments to issues that might be litigated or to political conflicts that will influence such litigation.

Now consider how this scholarship seems to evince a respect for law that one would not expect from work in a legal realist vein. Many of the arguments—on all sides of the issues—seem to share the premise that judicial authority should be guided by legal principles and considered in light of virtues we associate with the rule of law. Nonetheless, much of this scholarship is self-consciously political in the legal realist sense that people use political means to pursue a political purpose, to wit, influencing legal doctrine. These scholars consider the rule of law as the means people use to pursue policy changes that follow from a change in legal doctrine. Thus, they view law from a perspective framed by adjudication.

Margaret Radin, for example, considers three ways that those who oppose Bush v. Gore might respond to the damage they believe the case does to the rule of law. The first response, one she associates with a "hard-nosed version of 'legal realism,'" treats the legal holding as nothing more than an exercise of political power. The Court, according to this view, did what it always does; the Justices pursued their political preferences and, once again, confirmed that the rule of law is only a myth. A second response is to reaffirm the rule of law, notwithstanding considerable evidence that the Justices made partisan decisions. These opponents would assume that the Justices acted in good faith, and


32. See, e.g., Karlan, Calabresi, Rubenfeld, Radin, Tribe, supra note 3.

33. See Ackerman, supra note 3; Sunstein, supra note 3, at 186-89; Balkin, supra note 3, at 223-27; DERSHOWITZ, supra note 3, at 197-206.


35. See Radin, supra note 3, at 120.

36. See id. at 120-21; see also GILLMAN, supra note 3, at 8.
would litigate to extend the holding to other contexts where its principles apply.\textsuperscript{37}

Radin also presents a third response. She argues that the Justices have forfeited their right to have their holding benefit from this presumption of good faith; she does not think the holding merits the authority of law.\textsuperscript{38} Nevertheless, she uses the holding to encourage people to reconsider their understanding of the rule of law.

Radin embraces part of the "hard-nosed" legal realist critique; she recognizes that judicial decisions are not constrained by legal principle. In contrast to many scholars, she clarifies the legal realist claim that law is political. She defines the rule of law as a social practice whereby judges apply rules in specific contexts and, in so doing, adjust those rules to express the values of the people they govern.\textsuperscript{39} Radin contends that the decision in \textit{Bush v. Gore} undermines a crucial aspect of this social practice in that it flaunts the virtue of treating like cases alike,\textsuperscript{40} and she seeks to reconstruct the rule of law as a social practice by challenging the legitimacy of the holding.\textsuperscript{41}

We can see that Radin's argument addresses an important ramification of legal realism. If legal outcomes both shape and are shaped by a broader political context, we must be clear about the particular role we expect law to play within this context. For example, each response that Radin discusses is premised on an assumption about how law contributes to the political community. The "hard-nosed" legal realists want to shatter the myth of the rule of law because they believe that the social structure is sustained by citizens' perception that it is supported by the authority of law.\textsuperscript{42} These theorists challenge the legitimacy of what they consider to be an unjust social structure by undermining its legal foundation. By contrast, the second group of thinkers hope to reinforce that foundation because they believe it provides an avenue for the pursuit of justice. They seek to apply the legal principles that tethered \textit{Bush v. Gore} to other contexts that involve voting rights. Radin, herself, defends a conception of the rule of law that shares the assumption that judicial decisions are means for defining and applying values that


\textsuperscript{38} See Radin, \textit{supra} note 3, at 122.

\textsuperscript{39} See id. at 123-25.

\textsuperscript{40} See id. at 117-18.

\textsuperscript{41} See id. at 125.

\textsuperscript{42} See \textit{GILLMAN, supra} note 3, at 8; Tushnet, \textit{supra} note 7.
express the community’s conception of justice. Radin makes a valuable contribution by identifying the problem of how we should understand the rule of law as a social practice. She recognizes that we have to assess judicial authority in light of a broader understanding of how law contributes to the political community. She suggests that the rule of law has virtues that are independent of the values that are the subject of adjudication. And she might be right that Bush v. Gore is problematic when assessed from this broader perspective.

But is this perspective broad enough? All three responses that Radin considers associate law with adjudication, understood as a political process that advances, and perhaps legitimates, social values. These responses, consequently, assess judicial authority based on how they expect judges to decide particular cases. While such expectations must have considerable influence on how we define judicial authority, there are other considerations that do not depend on the outcomes of adjudication.

Moreover, we grasp these considerations by examining how law contributes to the political community in ways that are independent of these outcomes. In contrast to hard-nosed legal realists and scholars who seek to extend the Supreme Court’s holding, Radin associates law with broader benefits that follow from the virtue of treating like cases alike, though she never explicitly addresses the question of what these benefits are or why we engage in law as a social practice. Furthermore, her argument suggests that law is a means to advance values. Thus, her argument about how law contributes to the political community is itself directly dependent on the outcomes of adjudication.

In the next section, I will illustrate how Radin’s narrow perspective prevents her from considering the significance of virtues that are relevant to the definition of judicial authority. But first, we will see that adjudication frames the perspective of many scholars who consider questions of judicial authority. We will also contrast this perspective with one that looks for law beyond the adjudicative arena.

43. See also Fiss, The Fallibility of Reason, supra note 37. Fiss has a similar conception of law, one that shares Radin’s focus on adjudication.

44. This is not to say that they are assessing judicial authority based upon the justice of particular decisions. While they might do so, they might also make their assessment based on the decisions they expect judges to reach across a range of cases.
C. Two Views of Law

1. The Legal Realist View of Law in Constitutional Theory and Judicial Politics

In the 1950s, H.L.A. Hart challenged legal realist claims about the nature of law. He argued that these claims about how judges decide cases did not entail claims about what law is. Law, according to Hart, pertains to the rules that assign authority to decide cases and it need not determine how those cases are decided. Hart marks a border between those who study what judges do and those who study jurisprudence.

We see a legacy of legal realism in contemporary debates in the field of judicial politics, particularly in the work of those associated with the attitudinalist model of judicial decision-making. These scholars place great emphasis on how judges' ideological attitudes and values influence their decisions. And just as the claims of their realist predecessors drifted into jurisprudence, the attitudinalists' claims have influenced another field, constitutional theory. It is more difficult, though, to mark the border between the study of judicial politics and constitutional theory. There is considerable overlap between the questions of what judges do and what role judges should play in a system of government, the second of which concerns constitutional theorists. In addition, a porous border has allowed both legal realism and its attitudinalist variant to shape how constitutional theorists view law.

Many theorists view law only as the legal principles that might constrain judicial interpretation. They assume that if particular principles do not significantly determine how judges decide cases, then law contributes little to our understanding of judicial authority. Therefore, as constitutional theory moved toward the conclusion that legal principles do not eliminate judicial discretion, theorists have increasingly assumed that law is irrelevant to the justification of judicial authority.

This assumption is premature. It follows from the mistaken thinking that Hart attributes to the legal realists: that these theorists confuse a conception of adjudication for a conception of law. People who see law only as the legal principles that might explain how judges decide cases cannot grasp that law advances institutional virtues in ways that are not directly related to the outcomes of cases.

46. Id.
47. Id.
48. Id.
49. See Segal & Spaeth, supra note 6, at 65-66.
Both constitutional theorists and political scientists have moved towards the conclusion that legal principles do not decide cases, and therefore have tended to assume that law is irrelevant to the justification of judicial authority. I attribute this tendency to constitutional theory's infatuation with what Alexander Bickel called the counter-majoritarian difficulty, the need to justify judicial review's place within a government that derives its legitimacy from elected institutions.

Many constitutional theorists have treated the counter-majoritarian difficulty as a puzzle to be solved. They try to demonstrate that judicial review is consistent with democracy by identifying legal principles that constrain—or should constrain—the exercise of judicial review. This view reflects the influence legal realism has had on constitutional theory. Legal realists challenged the idea that judges mechanically applied an antecedent law, and thereby established the need to justify the principles people define as law. Constitutional theorists, in turn, have transformed the problem of justifying judicial review into one of identifying the legal principles that should constrain judges. In so doing, they conflate three questions: (1) which values should particular legal principles advance; (2) whether legal principles can constrain judicial interpretation; and (3) which virtues do we advance through a system of constitutional government, the rule of law.

Constitutional theory's infatuation with the counter-majoritarian difficulty has also influenced work in judicial politics; it has encouraged the attitudinalists to embrace a legal realist understanding of law. The attitudinalists attack what they call the legal model of judicial decision-making, a model that is an amalgamation of different responses to the counter-majoritarian difficulty. They demonstrate that various versions of the legal model do not constrain judicial discretion, and conclude that

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51. Note that this conclusion bears mainly on the United States Supreme Court's authority given that the Court tends to address questions that allow partisan ideology to have greater influence and that the Justices have final authority to determine the meaning of the law. See SEGAL & SPAETH, supra note 6, at 71-72; GILLMAN, supra note 3, at 224-25 n.15. Nonetheless, the question of Supreme Court authority to set the meaning of law in such cases is a central issue of constitutional theory. Also, note that the considerations that justify the power of judicial review are different from those that justify other forms of judicial authority. See infra text accompanying notes 76-77. I will argue that considerations of law should influence each of these questions.


53. See generally ELY, supra note 8; ACKERMAN, supra note 7; ACKERMAN, supra note 8; MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); PAUL W. KAHN, LEGITIMACY AND HISTORY (1992).


55. See generally ELY, supra note 8; ACKERMAN, supra note 8; ACKERMAN, supra note 7; TUSHNET, supra note 53; ROBERT BORK, THE TEMPTING OF AMERICA (1990); KAHN, supra note 53.
Their argument views law only as an independent variable that might explain how judges decide cases. It suggests that the outcome of cases is explained by politics or law; the decisions reflect the policy preferences of the judges or the legal principles they interpret. The attitudinalists conclude that legal principles do not determine the outcome of cases, and suggest that political scientists should not take seriously the distinction between law and politics. With this suggestion they transform their argument about what judges do into a claim about what law is. Like the realists, they conclude that law is only what judges say it is. This conception of law reinforces the idea that law is not relevant to the problem of justifying judicial authority. It spurs constitutional theorists who have moved beyond the problem of whether legal principles constrain judges, and instead examines how judges affect the political process that defines constitutional values. In fact, this shift in analysis has stirred an interesting trend in recent constitutional theory: two prominent theorists, whose views span the political spectrum, have argued against judicial review based on their prediction of the values that judicial decisions will advance.

But we cannot identify the proper scope of judicial authority, if, like the attitudinalists, we view law only in the context of adjudication. Theorists who equate law with the legal principles that judges enforce ignore the possibility that we have reasons to govern ourselves by law even if it does not constrain judges. These reasons could be relevant to how we justify judicial authority.

II. A BROADER VIEW OF LAW

The political community uses law to resolve conflicts among the competing interests that its citizens pursue. Everyone recognizes that law encompasses the substantive principles that judges apply to decide cases, but we often fail to see that law also encompasses the structural principles that define the constitutional system of government as well
as the institutional virtues that characterize such a government. The attitudinalists, for example, focus on the substantive principles that judges must interpret to resolve particular controversies and ignore the structural principles that assign authority to the political institutions that resolve such conflicts. The election controversy involved both types of principles. People looked to substantive principles to decide the winner of the election and to structural principles to determine which institutions had authority to resolve the controversy in accordance with the first set.

Moreover, the political community advances values in at least two ways when it governs itself by law. On the one hand, it advances values by expressing them as the legal principles that we apply to resolve conflicts among citizens' interests. For example, the Florida election implicated substantive principles that promote values we associate with democratic government. These principles of state and federal election law—both statutory and constitutional—express values such as majority rule, one person one vote (or a different variant of equality), and finality.

On the other hand, law, as a political institution, advances values when it settles disputes through a formal set of procedures. Recall that I refer to these values as virtues in order to distinguish the virtues that animate the rule of law from the values advanced when we apply particular legal principles to resolve a case. Legal theorists have identified an array of virtues associated with the rule of law. They contend that
these virtues characterize institutional processes that satisfy certain conditions. Although these conditions might not be satisfied if legal principles do not constrain judicial decision-making,\(^6\) this is not necessarily the case.

Steven Macedo, for example, links the rule of law to the goal of public justification, and thus the virtue of reasonability.\(^7\) He contends that judges respect citizens as reasonable beings by justifying the exercise of government authority in terms that litigants can grasp.\(^7\) This conception of the rule of law depends on judges exercising their authority in a certain manner—they have to justify their exercise of authority in certain terms—but it does not depend on legal principles constraining judges.\(^7\) Judges, according to this view, can in some circumstances decide cases for either party so long as their decisions are properly justified.

Moreover, though Macedo's argument appears to be focused on adjudication, the virtue that drives his argument lies outside the adjudicative arena. It is possible that an institutional structure without judicial review could better satisfy Macedo's conception of reasonability. Indeed, we have already seen that Waldron appeals to a virtue outside of adjudication to defend such a structure in his attack against judicial review. He claims that we must consider the authority of institutions that resolve conflicts about justice in light of virtues that are not implicated by such conflicts. He endorses legislation as an alternative to judicial review because he believes that a well-ordered legislative process

\(^6\) Keith Whittington has argued that judges undermine a system of self-government when they enforce constitutional principles that do not reflect the Constitution's original meaning. See Whittington, supra note 8. His approach is emblematic of theorists who tether originalist interpretation to considerations of how the Constitution, as law, contributes to the political community. Theorists have recently defended originalism in terms of various institutional virtues. See Richard S. Kay, American Constitutionalism, in CONSTITUTIONALISM (Larry Alexander ed., 1998) (defending originalism as advancing the virtue of constancy and thus promoting order); Michael J. Perry, What is "the Constitution"? (and Other Fundamental Questions), in CONSTITUTIONALISM, supra (defending originalism as necessary to advance the Constitution's aim of coordinating social interaction); Jed Rubenfeld, Legitimacy and Interpretation, in CONSTITUTIONALISM, supra (linking originalist interpretation to the virtue of freedom).

\(^7\) See Macedo, supra note 8, at 159-62.

\(^8\) 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.
will be characterized by the virtue of equality no matter the values advanced by particular statutes.\textsuperscript{73}

We now return to the academic response to the Florida election. We will see that scholars could not escape the grip of adjudication and thus could not address normative considerations that were outside of the immediate controversy. In particular, they did not pay adequate attention to fairness, stability, and predictability, institutional virtues that should inform a definition of the judicial authority.

IV. **Constitutional Theory and the Florida Election: Normative Considerations**

The vitriol surrounding the election controversy colors people's assessment of how judges decided the cases, and perhaps made it inevitable that some disappointed partisans would challenge judicial authority. Many have claimed that the judges exceeded their authority by deciding a case that was beyond the relevant law.\textsuperscript{74} Others have questioned the way that judges have exercised their authority to interpret law.\textsuperscript{75} Little attention has been paid, however, to the question of why we would assign judges this authority.

In this section, we will see that citizens' intense interest in the election's outcome has obscured the considerations that underlie the authority that the judges exercised. More particularly, I contend that the academic response to the election controversy reveals a tendency to view judicial authority from a perspective framed by adjudication, and that this perspective prevents scholars from considering institutional virtues that might explain why we allow judges to interpret law.

A. **Fairness, Stability, and Consistency: The Rule of Law and the Definition of Judicial Authority**

Consider an irony. Judges, as servants of the law, are expected to interpret legal principles based on the values those principles express and not based on their personal preferences, but the need to interpret these principles suggests that we do not know how those values should be applied in particular contexts. One reason we assign judges the power to interpret the law is that the legal principles are not clear. Hart

\textsuperscript{73} See supra text accompanying notes 14-18. Indeed, Waldron believes that such a process would advance the virtue of equality even if legislators chose to pass a law that would offend many people's substantive conception of the value of equality. In order to grasp Waldron's argument one must distinguish the institutional virtues reflected by a system of law—the process through which a community resolves its disagreements about justice—and the values we apply to resolve such disagreements.

\textsuperscript{74} See infra text accompanying notes 104-19.

\textsuperscript{75} See infra text accompanying notes 120-43.
attributes this uncertainty to law’s open texture. General legal principles, according to Hart, cannot resolve particular controversies when they have not been articulated sufficiently to do so. Attempts to apply such principles must overcome vague or ambiguous language as well as conflicts among the values that different principles seek to advance. Hart contends that in such circumstances judges must supplement the principles implicated by the case; they must legislate.  

The Florida controversy arose because of the open texture of Florida’s election law. The conflicting legal principles that governed the election—both state and federal—were not up to the task of identifying a clear winner. These conflicting principles made it possible for judges to interpret the law to the advantage of either candidate. In other words, there was no source of law to provide unassailable answers to the legal questions posed by the election. Given this circumstance, it is ironic how readily partisans on both sides accused judges of lawlessness, of acting without regard to the law. We looked to judges to resolve the controversy because it was not clear what law applied in the circumstances of the election.

The Florida controversy, then, introduces the question of why we might defer to judicial interpretations of unclear laws; what a priori considerations would lead us to let judges supplement legislation such as the constitutional and statutory scheme that failed to mark a clear winner of the election. This question takes three different forms. First, there is a question of statutory interpretation: the Florida Supreme Court sought to resolve the controversy through its interpretation of Florida election law. Second, there is a question of constitutional interpretation: the United States Supreme Court exercised judicial review and ruled that Florida’s election law, as interpreted by the Florida Supreme Court, violated the Constitution’s equal protection guarantee.

The United States Supreme Court and the Florida Supreme Court, then, did not exercise the same type of power. Moreover, the charges of judicial usurpation that were issued against both courts suggest a third question of judicial authority, one that we also associate with debates about judicial review: the extent that we should allow judges to set the meaning of the Constitution for future cases.

76. See Hart, supra note 45, at 124-32.
77. It also introduced this question at the federal level; the Supreme Court had to interpret congressional statutes relating to elections.
78. The problem of supremacy itself can be posed in different ways, and some of these ways do not go to the problem of extending decisions to future cases. We might, for example, believe that in resolving this type of controversy, the judges are claiming the authority of an elected institution. Moreover, the question of supremacy can take at least two different forms, even assuming the context of future decisions. On one hand, it could be left open as a question that is
Although each of these questions concerns the authority to interpret unclear legal principles, they are different questions. Moreover, institutional virtues that are relevant to how we answer these questions take on different significance given differences in the questions. Therefore, we cannot evaluate how the judges exercised their authority until we have a better grasp of the virtues that might justify such authority. To do so, we must understand how the rule of law influences our answers to these different questions.

The Florida Supreme Court and the United States Supreme Court applied legal principles to resolve an immediate controversy. We normally think that judges have a very strong claim to authority when they apply legal principles in particular contexts. To understand why, we must consider how our conception of the separation of powers is informed by a virtue of fairness.

It was striking how readily critics charged these courts with usurping legislative power, given that they exercised authority comfortably within the conventional understanding of the separation of powers. One reason that we divide power among the Legislature, Judiciary, and Executive is to ensure that legislation is written at a level of generality that reduces the chances that legislators will enact self-interested or biased statutes. The separation of powers, then, advances fairness, a virtue that is closely associated with an influential conception of the rule of law.

We can see that this virtue might also help us understand judicial authority. According to this view, we maintain the advantages of general legislation by assigning judges the authority to interpret legislation and apply general principles in particular contexts. Law's open texture is a consequence of general legislation, and we assign judges the authority to eliminate this open texture because we expect, *ex ante*, that it is fairer to the parties to have judges rather than partisan executives supplement the indeterminate law that is applicable to their case. We also

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decided by the political interaction of different institutions. Supremacy, according to this view, measures the power institutions have to express their preferences in the legal doctrine that emerges from the broader political process. On the other hand, we might think that the law should influence that process by clarifying the power that different institutions have by, for instance, resolving the supremacy question itself. We have seen recent proposals to do so by amending the Constitution to reduce the scope of judicial review. See Bork, *supra* note 8, at 96-119; Tushnet, *supra* note 8.


expect that there are fewer risks when judges exercise this authority than if legislators resolve cases through retroactive statutes.81

Note that although fairness should inform a definition of judicial authority, it applies differently to the three questions we identified. For example, fairness suggests that we should not allow a legislature to resolve an immediate controversy based on a statute that it has previously passed, but this consideration has no bearing on the question of who should have authority to apply the Constitution to resolve controversies.82 Neither Congress nor the Court wrote the Constitution.83

In addition, the considerations of fairness that might lead us to assign judges the authority to interpret statutes or constitutions do not extend to the Court’s power to set the meaning of law for future cases. Indeed, we deny judges ultimate authority to set the meaning of statutes; legislatures have authority to pass new laws that clarify the meaning of earlier statutes, and, in effect, to reverse judicial interpretations of those statutes.

Fairness suggests one reason we might assign legislatures this authority. Legislatures, ideally, consider issues from a perspective that encompasses broader interests than courts. Judges have to resolve particular controversies. Thus their interpretations of law are greatly influenced by the evidence of litigants who have important interests that depend on those interpretations. By contrast, the legislative process accommodates a wider range of evidence, and legislators have incentive to consider the various interests that might be affected by their decisions.84 It would seem that these considerations apply with equal force in giving legislatures authority to set the meaning of constitutions.85

81. See Gillman, supra note 3, at 80.
82. In the election cases, Congress had a claim to exercise the authority based on the text of the Constitution, but consider other contexts. Imagine that Congress passed legislation that gave itself a supervisory power over Supreme Court decisions regarding the meaning of the Constitution, that Congress could reverse the outcomes of particular cases. While it would seem that such legislation would be in tension with the Constitution’s ban against Bills of Attainder and would violate people’s understanding of the separation of powers, my point is that the meaning of the Constitution is a question of constitutional politics, and that our answers to such questions should be informed by higher order virtues such as the virtue of fairness that informs the separation of powers. When viewed from this perspective, such legislation is not obviously unconstitutional. Nonetheless, there are considerations that would make it seem unwise, most notably the possibility that Congress would have power to resolve constitutional controversies that define its own power. We should note, though, that the same problem arises in cases when the Court determines the extent of its power.
83. Other considerations related to fairness would certainly influence how we answer this question. See infra text accompanying notes 84-91.
84. See Waldron, supra note 8, at 66.
85. Note how this understanding of fairness shades into Waldron’s understanding of equal respect. See supra text accompanying notes 14-18. We see two different aspects of fairness. On one hand, a decision is fairer to the extent it is made by a process that is further removed from the
More significantly, fairness has greater significance for judicial authority to resolve immediate controversies. In most circumstances, judges have the final say as to the immediate outcome of a given case. While an interpretation of law has tangible consequences for the litigants, it is only one factor that influences what the law will mean for future cases. The power of judges to set the meaning of law is contingent; legal doctrine is often shaped by political forces that are beyond the control of judges. We know, for example, that elected institutions have considerable influence in determining whether court holdings are effective. The scholarly response toBush v. Goreitself indicates that at least some commentators believe that the Court cannot control the future effects of its precedents, even when it tries to limit a holding to a unique set of facts. People engage in constitutional politics knowing that judges have considerable discretion to evade precedents and that judges take advantage of this freedom.

In defining judicial authority, therefore, we must be clear that while a judge’s influence over future cases is contingent, she has final authority over the immediate parties to a controversy and has significant leeway to favor parties based on partisan considerations. We should assign fairness greater weight in such circumstances, given that the finality of the holdings makes it difficult to remedy the unfairness of particular decisions. We must have reasons, ex ante, to think that judges, in contrast to elected institutions, are more likely to exercise this authority without regard to their own interests. It is not surprising, therefore, that theorists have sought to ground judicial authority in considerations relating to the independence, legal training, and professional

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86. Thus, the Supreme Court has final authority over the outcomes of particular cases. Although this is the norm, there are exceptions. For example, Executives sometimes have power to grant pardons and suspend sentences. Congress could, conceivably, compensate people who suffer because of an unfair decision, though it would not be able to have a winning party compensate the losing party because of the unfairness of the decision from which he or she derived benefits.


88. See Fiss, The Fallibility of Reason, supra note 37, at 89.

89. See generally Harold J. Spaeth & Jeffrey A. Segal, Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court (1999).


91. I am assuming that non-judicial institutions will have the same ability to manipulate doctrine and precedents to achieve an outcome that they like. But recall that there is likely a range of cases where the requirement of principled decision-making could serve as a restraint. See supra text accompanying note 68.
experience of judges.  
Fairness is not the only virtue relevant to the general problem of how to define judicial authority. Indeed, it is not the only virtue relevant to the particular question of judges’ authority to resolve particular controversies. Given the fact that a judicial decision is likely to be the final word on immediate controversies, we would want the institution that resolves those controversies to promote stability. The legal system does so by encouraging losing parties to end their disputes, notwithstanding the perception that important interests were compromised in the resolution of these disputes. It asks people to subordinate these interests to a broader interest in maintaining social order. 

The rule of law, then, seeks stability. It instills in litigants—and potential litigants—the sense that their interests are given adequate consideration, even though the outcome of a particular case must always be a blow for one of the parties. To do so, the rule of law must establish a standard by which disputes will be assessed, and create an institutional structure to apply those standards in a manner that convinces people that legal decisions follow from pre-existing standards, not from the decision-maker’s interest in the controversy.  

Therefore, we must consider judges’ authority to interpret law in light of the virtue of stability. Do we have reason, for example, to believe that judges will be more skilled than elected officials at communicating the bases of their decisions? Would we expect them to be better at explaining how abstract standards apply to particular controversies? As with fairness, it would seem that legal training and judicial experience might work in judges’ favor. On the other hand, elected officials might have greater political savvy and thus have a better sense of how people will respond to their decisions. In applying the norm of stability to various institutional structures, we also would have to account for psycho-sociological factors relating to how citizens perceive courts, legislators, and the authority of law.  

92. Legal training or experience, for example, might make judges better at accounting for their own partisan interests. See Anthony T. Kronman, The Lost Lawyer 55-60, 110-16 (1993); see also Sunstein, supra note 8.  
93. See Planned Parenthood v. Casey, 505 U.S. 833 (1992). This case ties legitimacy to the perception that decisions are principled as well as the fact that they actually be principled. We see that stability is related to the value of reasonableness that Steve Macedo associates with the rule of law. See supra text accompanying note 68. We can also see that the norm of stability is complemented by the norm of fairness. An institution that is likely to decide cases fairly will give people reason to accept the authority of its decisions.  
94. See generally Kronman, supra note 92.  
96. It would be relevant, for example, that people viewed the judicial process as fairer than
Predictability is the last institutional virtue that we will consider. It is closely related to stability. It is concerned with the standards the political community uses to resolve disputes among its members and reflects our interest that these standards be clear. People are more likely to subordinate their particular interests to a general interest in the social order when the standards used to sustain order are sufficiently clear. Predictable standards allow people to define their interests with a sense of the demands that an interest in social order will place on their pursuit of such interests.

The rule of law fosters predictability by providing citizens information about how the government will exercise its authority, thereby helping to coordinate complex social interactions. Citizens can pursue their preferences with some idea of the consequences of various actions they might take. Consider a simple example: the way we use law to control traffic flow. Law in this case succeeds by establishing clear rules about where to drive, when to stop, and how fast to go. Chaos would ensue if the law were not clear. Imagine, for example, what would happen during a Manhattan rush hour if a power surge caused all the traffic lights to flash green.

Constitutional law serves an analogous function by establishing clear rules that allow people to anticipate the use of political power. It defines the conditions that trigger the exercise of such power as well as the conditions that legitimate its exercise. Citizens, then, pursue their interests with more information concerning when they can command government assistance and how to avoid government sanction.

Predictability, in contrast to both stability and fairness, is mainly relevant to the question of judicial authority to set the meaning of law for future cases. In addressing this question, we must consider whether judges have characteristics that would make them sensitive to our interest that legal doctrine be predictable. It is conceivable that their independence, legal training, and commitment to the law would make

the legislative process, even if that was not the case. We would have to weigh this factor against the likelihood that judges would be able to use this false perception to advance their own interests and perhaps violate other virtues that are relevant to our definition of judicial authority.

97. See Alexander & Schauer, supra note 68, at 136, 1371-74; Kay, supra note 69.

98. Similarly, we would have to consider these virtues in light of the greater complexities of the institutional arrangements that influence the content of legal doctrine. We might, for example, think that people believe that judicial decisions have a stronger claim to legitimacy than legislative decisions. This would allow the Court to have greater influence on the content of legal doctrine and would be a reason not to clarify the Court's superior claim to set the meaning of the Constitution—for example, by passing a constitutional amendment that says that the Legislature and the Executive must accede to the Court's interpretation of the Constitution. On the other hand, we might think that it would skew authority in favor of the Legislature if we were to pass an amendment that would allow Congress to pass legislation to reverse a Supreme Court precedent.
them more sensitive than elected officials to this interest. On the other hand, we might think that the legislature has greater incentive to determine how different parties respond to legal rules and thus might be in a better position to make the law more predictable.

The virtues of fairness, stability, and predictability are significant to the problem of defining a conception of judicial authority. This is not to say that these virtues explain why we should defer to judicial interpretations of unclear law, but only that important reasons for why people have chosen to do so relate to these virtues. Note that I have not defended a conception of judicial authority, nor have I argued that these are the only—or even the most important—virtues that would inform such a conception. We have not even considered how institutional virtues weigh against our desire for just decisions, or how our understanding of these virtues should be adjusted if we were to accept the conclusions of critics who point to the election cases to confirm the existence of partisan judging. I only contend that an adequate conception of judicial authority must account for the significance of institutional virtues, and that the context of adjudication makes it difficult to even consider them.

We now return to the academic response to the election controversy in order to illustrate how the stakes of the litigation influenced the scholarly assessment of the power that the judges exercised. Most scholars did not even consider the virtues that we have identified, and the few that did seemed to mistake the bearing these virtues have on the definition of judicial authority.

B. The Normative Analysis of Florida

The stakes of adjudication make it difficult to see beyond the immediate litigation. Those who study constitutional politics are well aware of the danger that the context of a particular case may bias judgment. It is difficult to evaluate competing interpretations of the Constitution without considering how those interpretations will effect our lives. We know, for example, that people's view of the Second Amendment seems to correlate with their attitude about guns, that people's view of the Equal Protection Clause seems to correlate with attitudes about race, gender, and discrimination, and that people's view of the Due Process Clause seems to correlate with attitudes about sexuality. I do not argue

99. Predictability does not require that outcomes be certain, it only requires that people have some sense of where the law runs out and how judges—or other institutional actors—will approach the problem of clarifying the relevant standard.
100. See generally Dworkin, supra note 8; Radin, supra note 3; Fiss, The Fallibility of Reason, supra note 37.
101. For a notable exception, see West, supra note 23.
that people interpret the Constitution with specific results in mind or to advance a personal agenda; I only note that issues of constitutional law are often sufficiently complex to allow people to interpret constitutional values in a manner most favorable to their immediate interests.\(^\text{102}\)

Things become more complex when we examine questions of constitutional structure, questions such as the proper scope of judicial authority. It is at this second level of abstraction where we must define the process that should resolve disagreements about constitutional values. In so doing, we must avoid potential biases: our immediate interests might influence the conception of constitutional values we favor, and our conception of constitutional values might influence which institution we believe should resolve disagreements about these values.\(^\text{103}\)

It is these biases that lead people to view judicial authority from the perspective of constitutional politics. They focus attention on the direct effects of judicial holdings—the immediate outcome and the constitutional values that we expect to be advanced because of these outcomes—and distract attention from the questions pertaining to the definition of judicial authority. We will see that many scholars seem to be more interested in fighting battles to influence constitutional doctrine than in examining the decision in light of a normative standard. These scholars do not even consider the institutional virtues that we have identified.

A second group of scholars have assessed the decisions in light of institutional virtues. They too seem more interested in joining the battles about future doctrine than in clarifying the normative standard that underlies their criticism of the Court. They question the legitimacy of these decisions as part of a strategy to weaken the Court or influence its future holdings. These scholars do not address the question of whether these decisions should lead us to redefine our conception of judicial authority. More significantly, they do not provide an adequate account of the virtues that should inform such a conception of judicial authority.

\(^{102}\) Cf. Sunstein, supra note 8.

\(^{103}\) In other words, it would be wrong for me to favor judicial review because I believe that judges, in comparison to elected institutions, are more likely to resolve these disagreements in a manner that advances my vision of constitutional values. This, of course, assumes that we do not empower institutions with a goal of maximizing a particular vision of justice. Radin and Fiss seem to reject this assumption. They do not distinguish among the questions of what justice requires, i.e., what is the best institutional arrangement for pursuing justice and how do we apply notions of justice to resolve our disagreements about the former questions. Both would seem to accept unjust decisions, if in the long run they expected the Justices—in comparison to elected institutions—to reach decisions that are more in line with the requirements of justice. They do not address the possibility, however, that people have fundamental disagreements about justice and that we act unjustly by allowing an institution such as the Judiciary to resolve these disagreements. See Waldron, supra note 8.
I. JUDGES AS USURPERS

Critics on both sides of the election controversy allege that judges usurped power by making decisions that should have been left to elected institutions. The charge of usurpation has come in a variety of forms, but the different forms all follow from a perspective framed by adjudication. Critics address how judges exercised their power; did the judges act properly in deciding these cases? It would seem that an analysis of this question should be framed by the considerations of why people assign judges the authority to interpret law. But we will see that, for the most part, these scholars pursued a very different agenda.

While the charge of usurpation is familiar in debates about judicial review, it seems out of place in a discussion of the election controversy. Critics who allege usurpation in response to controversial decisions are often concerned that judges usurp legislative power by setting the meaning of the Constitution for future cases. In contrast, the election cases implicated the question of why judges should have power to resolve immediate controversies. 104

Consider Roe v. Wade. It stirred debate about the general legislative question of whether women should have the right to choose to have an abortion. Roe herself received comparatively little attention and did not benefit directly from the right the Court defined on her behalf. The election cases, by contrast, are unlikely to have much influence on subsequent cases; they were controversial because of the effect people expected them to have on the outcome of this past election. 105

More significantly, consider how the charge of usurpation confuses the basis of the authority that the judges exercised. Critics who charge judicial usurpation suggest that judges derive authority from the legal principles they enforce, and abuse that authority by writing new legislation. Yet this view mistakes the problem of judicial authority that the

104. See Yoo, supra note 30, at 225.

105. By contrast, in a case like Roe v. Wade, the Court presumably would be much more concerned about the general right to choose to have an abortion than whether Roe herself is able to have one. Indeed, the latter question was moot by the time the Court reached its holding. Similarly, people were more concerned with how the Florida Supreme Court’s resolution of the vagueness of Florida election law would affect this case and not how it would affect future cases. Imagine that the same issues came up with regard to an election for a seat in the Florida Senate, and imagine that control of the Senate did not turn on the election. It would seem that the Florida legislature would abide by the Florida Supreme Court’s decision—and probably allow it to continue as a precedent, an authoritative interpretation of Florida’s election law—whether the Court allowed recounts or not, regardless of the rule the Court chose to resolve the problem of voter intention. Similarly, one would expect very little controversy when the Florida legislature ultimately chooses the rules that will govern future elections. In all likelihood, any controversy that arises will be a reflection of this past election. It is hard to imagine that the questions to be answered would generate controversy in the absence of facts about a particular election.
election controversy poses. We have seen that the relevant question is who should legislate to resolve controversies that arise when legal principles are not clear enough to constrain a decision. At most, we should consider whether our perception of judicial partisanship should lead us to reconsider the reasons that we allow judges to legislate in these contexts.

The charge of usurpation obscures these reasons. This would explain why so few scholars have examined the significance of judges’ decisions in light of *a priori* expectations about fairness and stability. Could we have expected better from Florida’s legislators? It was astounding how little comment was sparked by their threat to settle the election through retroactive legislation, a move that directly contravenes our expectation that legislators should write general laws, not laws that benefit particular people.

Moreover, it is not clear that the scholars who bring this charge have much concern for the question of judicial authority to set the meaning of the Constitution. Consider the claims of those who link *Bush v. Gore* to recent decisions in which the Court has declared its supremacy in the realm of constitutional interpretation by asserting that Congress and the Executive must accede to its understanding of the Constitution. These scholars contend that the Court’s holding in *Bush v. Gore* manifests the same distrust of elected institutions, and, what is more, suggests a new boldness—the Court in *Bush v. Gore* has ventured into an arena that is more clearly political.

Note, however, that these scholars do not seek to reevaluate the Court’s authority in light of virtues such as fairness and predictability.

106. See *supra* text accompanying note 76.
107. The issue of stability has arisen in response to those who contend that the Court avoided a constitutional crisis. This debate centers on whether the Justices made a correct decision, whether there really was a potential crisis, not whether judges were in a better position to promote stability. It is not clear that the Florida cases should lead us to question the judges’ authority because of the virtue of fairness. Although the Florida Supreme Court Justices might have had a preference for one of the candidates, they did not participate in the presidential campaign. By contrast, Florida’s Governor was actively involved in the campaign and a brother of one of the candidates; Florida’s Secretary of State, was co-chair of the state campaign for one of the candidates and a close ally of the Governor; and Florida’s Attorney General was co-chair of the state campaign for the other candidate. One would think that each of these people would have difficulty insulating their interpretation of law from the partisan pressures of their constituents and parties. Indeed, it has already been suggested that the Republican Party will reward Florida’s Secretary of State for her partisanship.


109. These critics, however, do consider these virtues indirectly. They contend that though the legislative process is more chaotic than the judicial process, we have reasons to favor a legislative
Although they contend that the reasons to favor a legislative resolution of the controversy outweigh the instability that might be wrought by an extended and disorderly political conflict,\textsuperscript{110} they do not develop the comparison.\textsuperscript{111} More significantly, they seem to consider the case from the perspective of adjudication. Rather than address the normative question of whether the Court should have the authority to decide cases such as this, these scholars criticize the decision the Court made in this particular case. They contend that the Court should have let the controversy be settled by elected institutions. Indeed, some worry that attacks against the holding go too far and might undermine the Court's ability to exercise its authority in the future.\textsuperscript{112}

These scholars, therefore, appear more concerned about constitutional politics than they do about constitutional theory. They do not contend that elected institutions, rather than the Court, should have final authority to set the meaning of the Constitution. It seems, instead, that they seek to limit the influence of this Supreme Court. By alleging judicial usurpation, they encourage elected institutions to challenge the Justices' interpretations of the Constitution. Such a political response would constrain these Justices without imposing formal restriction on the Court's power—compare this response to the constitutional amendments that critics such as Tushnet and Bork have proposed as a means to limit judicial supremacy.\textsuperscript{113} These scholars thus challenge this Court while leaving open the question of who should have final authority to set the meaning of the Constitution.\textsuperscript{114}

resolution of the controversy, and these reasons have to do with the likelihood that the Legislature is more representative than the Court. Nonetheless, the comparison is never really developed—they never really weigh the interest in fairness and stability against the gains from a legislative resolution—and they seem to attribute the Court's refusal to acknowledge these reasons to the make-up of this Court. Thus, they seem to consider the case based on how the judges exercised their power. They criticize the Court for not giving adequate weight to the reasons that they should defer to legislatures rather than addressing the normative question of whether the Court should have the authority to make such a determination.

\textsuperscript{110} These reasons mainly had to do with the likelihood that the legislature is more representative than the Court.

\textsuperscript{111} They, therefore, do not even consider the possibility that we might want judges to decide cases like this because of our interest in promoting stability in the aftermath of such controversies. Tribe's concern for the Court's influence over the long term seems to blind him to the considerations that apply when we gauge who should have the authority to resolve particular controversies.

\textsuperscript{112} See supra text accompanying note 37. Note especially efforts of scholars who seek to sustain the Court's authority over the long term. See Tribe, supra note 3; Fiss, The Fallibility of Reason, supra note 37; and Calabresi, supra note 3. Cf. DERSHOWITZ, supra note 3, at 182. Dershowitz has recommendations for controlling courts that abuse their authority, but he also recognizes the need to maintain the Court's independence so that it can continue to serve as a viable check on other institutions of government.

\textsuperscript{113} See supra note 59.

\textsuperscript{114} We have seen that some critics challenge the Court's decision while hoping to avoid this
Nonetheless, the charge of usurpation has also taken more modest and, perhaps, appropriate forms. Some critics who raise this charge do not really challenge the Court's authority to resolve controversies based on its interpretation of law. They do not consider whether the judiciary is the best institution to interpret an existing legal scheme. They, in contrast, ask which is the best institution to decide an election that ended in a tie. In other words, they assume that the law had run its course and could no longer be useful in resolving the election controversy. These critics contend that elected institutions have the stronger claim to authority because there was no law to apply.

Many, for example, have argued that Bush v. Gore posed a political question, one that should not have been subject to judicial resolution. These arguments are formidable, especially when we consider the various legal texts that seem to assign elected institutions the authority to resolve election disputes. Yet these arguments also view the case from an adjudicatory perspective. The definition of a political question is an issue of constitutional politics that was relevant to this case. These arguments do not challenge the authority judges have to determine whether a case poses a political question. Instead, they argue that the judges exercised this authority badly by deciding these cases on the merits. It is important to note, however, that at least some of these arguments appealed to virtues of the rule of law to explain why the judges should have refused to exercise authority in these cases.
II. BUSH V. GORE AS AN AFFRONT TO THE RULE OF LAW

A second group of scholars claim that Bush v. Gore does great damage to the rule of law. More particularly, they argue that the Court acted unfairly by refusing to extend its holding to future cases. In so doing, it failed to treat like cases alike. Although these scholars criticize the fairness of the Court's holding, they too focus on adjudication. They criticize the decision as unprincipled and consider how it will influence future holdings, but they do not consider how this holding, as an example of unfairness, should influence our definition of judicial authority. Moreover, they do not address the significance that stability has for this case or for the broader question of why we would assign judges the authority to resolve controversies based on their interpretations of law.

Some scholars have argued that Bush v. Gore is unfair. They, however, see fairness as a quality of particular decisions rather than a virtue of the broader system of law; they gauge fairness by the constraining force of legal principle. And while we would expect that judges advance fairness by resolving controversies based on previously defined legal principles, this is only one aspect of the virtue of fairness.

Many scholars have questioned the fairness—and thus legitimacy—of Bush v. Gore, given the Court's failure to ground its holdings in principle. Legal principles constrain judging in at least one of two ways. On the one hand, holdings could follow from existing legal principles or from prior interpretations of those principles. On the other hand, judges might be constrained by the knowledge that their holdings will become precedents. Judges, according to this view, are less likely to be swayed by contingencies that follow from the immediate contexts of cases if they cannot limit the impact of their decisions to those contexts.

The constraining force of principle is closely related to the rule of

120. See, e.g., Calabresi, supra note 3, at 75-78; Radin, supra note 3, at 114-18; Dershowitz, supra note 3. Dershowitz's claim is stronger in that he believes that the Court not only failed to base its decision on principles that it would extend to future cases, but it also made a decision that ignored principles that these same judges have previously defined. See, e.g., Fiss, The Fallibility of Reason, supra note 37, at 84, 94-95. Fiss's view of the case is different in that he thinks that law's facility at promoting values is independent of the decisions that judges make. Id. See also Gillman, supra note 3, at 8-9. Gillman illustrates how expectations of fairness are related to people's perceptions of how the Court should decide cases. Id. This view links fairness to legitimacy, understood as whether people accept judicial decisions as opposed to legitimacy understood in terms of the reasons that we might assign judges authority.

121. Indeed, one of the central criticisms of Bush v. Gore is that the opinion itself attempts to limit its applicability to the immediate case, and thus evades the discipline that follows from the requirement of treating like cases alike.

122. See Calabresi, supra note 3, at 67; Fried, supra note 3, at 8; Post, supra note 108, at 108-09; Radin, supra note 3, at 114-18; Rubenfeld, supra note 3, at 21.
law and its demand that judges be neutral, non-arbitrary, non-partisan, and fair. Nonetheless, most of the scholars who contend that Bush v. Gore undermines the rule of law do not clarify the conception of fairness that informs their analysis. They, instead, address more immediate consequences of the adjudication and what they consider to be the Court's illegitimate exercise of power. They consider how this decision should influence our response to future holdings, strategies to reshape the Court, and how such decisions might influence people's perception of the Court. These scholars, then, assess the significance the holding has for constitutional politics.

We have seen, however, that at least some critics seem to take fairness more seriously. Radin, for example, clarifies how fairness follows when judges are constrained by legal principles. She accuses the Justices of flaunting the rule of law when they limited the holding to the facts of the case. According to this view, the Justices sought to evade the constraint that follows from knowing that a holding will become a precedent. It is this constraint that encourages judges to account for broader interests, and thus move toward the more general perspective that characterizes legislative processes. In other words, by treating like cases alike, judges advance fairness.

Is it surprising, therefore, that these critics do not address the question of whether, as a consequence of Bush v. Gore, we should limit the Court's authority to interpret the Constitution. Instead, they are

123. See supra notes 76-90.
124. I will use the term fairness to capture these different aspirations.
126. See supra note 33. See also DERSHOWITZ, supra note 3, at 180-82.
127. See Calabresi, supra note 3, at 75-83; Balkin, supra note 3, at 222-28; Radin, supra note 3, at 125; GILLMAN, supra note 3, at 10; Klarman, supra note 12.
128. It is interesting that many of these critics compare Bush v. Gore to earlier controversial decisions—such as Roe, Lochner, and Plessy—in order to emphasize that this holding, unlike those, makes no pretense of being principled and is thus arbitrary.
129. See Radin, supra note 3, at 117-18.
130. See supra text accompanying note 81.
131. See supra note 3, at 118.
132. Indeed, we have seen that the legislature already has a stronger claim to authority in this area. Consider, by contrast, statutory interpretation. In that case we would still have concern because the legislature has great control of its agenda. Thus, it could pass statutes that advance its interests and then interpret them to ensure that those interests are advanced. The Court, on the other hand, has comparatively little ability to aggressively pursue its interests. Yet, considerations of partisanship might lead us to assign the authority of interpreting statutes to electorally accountable executives or, alternatively, to elected judges.
attracted by future battles of constitutional politics. They appeal to fairness to challenge the authority of this Court or, alternatively, to force the Justices to extend the principles that underlie the holding. These critics adopt the perspective of adjudication, and this perspective shapes their normative conclusions.

We can see why constitutional politics would attract scholars. We have seen that people can influence constitutional doctrine by alleging that judges have usurped legislative authority. As experts in constitutional law, these scholars might expect that their allegations of unprincipled judging would have added force. More significantly, we also have seen that the power of judges to set the meaning of law is contingent, that legal doctrine is often shaped by political forces that are beyond their control. Indeed, in framing the question of why we would assign judges authority to set the meaning of the Constitution, we assumed the likelihood that people would challenge their interpretations.

Nevertheless, we must not allow a reasonable interest in the future of constitutional doctrine to confuse our view of the normative questions introduced by Bush v. Gore. Even if we assume that the Court used its power unfairly and that there is reason to resist its efforts to set the meaning of the Constitution, we still face the question of why judges should have authority to resolve controversies based on their interpretations of law. The scholars who allege unfairness do not address this question and actually distract attention from it. By focusing attention on future doctrinal battles, they take it for granted that the Court will have

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133. Perhaps we should attribute the allure of constitutional politics to the unique circumstances of this case. We know that the vast majority of cases are not controversial and are handled in a manner that seems consistent with our expectations of law. See Gillman, supra note 3, at 7-8; Lawrence Baum, The Puzzle of Judicial Behavior 65-70 (1997). Moreover, although Supreme Court cases tend to be unique in that they present controversial questions of doctrine, Bush v. Gore is atypical to the extent that the Justices might have had an immediate interest in who won the case. On the other hand, Bush v. Gore is typical in that landmark cases dominate constitutional theory, and we have seen why: constitutional politics has great allure for constitutional theorists, given that it settles the major issues we address, including the proper scope of judicial authority. Indeed, we have litigated this issue both directly—Marbury v. Madison—and indirectly—cases that redefine the extent of judicial authority. Bush v. Gore seems to be such a case.

134. See generally Radin, supra note 3; Calabresi, supra note 3; Post, supra note 108; Rubenfeld, supra note 3. Cf. Dershowitz, supra note 3, at 182-84. Dershowitz proposes reforms that respond to the problem of judicial misconduct. Id. Though his argument suggests a broader view of the role the Court should play in our system of government, he assigns the Court a role that depends on the decisions that the judges will make. Id. He believes that the Court serves as a bulwark against violations of constitutional rights. Id.

135. See supra text accompanying note 37.

136. See supra text accompanying notes 73-76. Indeed, it was the contingency of future holdings that explained why fairness would have less significance to the question of judges' power to set the meaning of the Constitution.
the power in question. What is more troubling, they confuse the way that fairness applies to the question. They assume that fairness depends on the constraining power of principle, and seem to claim that judges exceed their authority when legal principles do not control their decisions. We, however, do not assign judges this authority because we expect them to be constrained by legal principles.

Recall that the question of judicial authority flows from the problem of law's open texture. We assign judges the authority to clarify vague or ambiguous legal principles, knowing that in many cases such principles will not constrain judicial authority. Judges often can interpret them to the advantage of either party to a case. We saw how well the election controversy epitomizes this problem.

Therefore, the proper response to evidence of unfairness is to reconsider the reasons that would lead us to assign this authority to the Court. We would assign judges this power if we thought, ex ante, that judicial independence, legal training, professional experience, concern for reputation, or some other factor would make them fairer than elected institutions in resolving immediate controversies. While the Florida election cases might lead us to question whether judges should have the authority to interpret law, to do so because judges were not constrained by the legal principles that should have decided the case fundamentally misunderstands the nature of this question.

Critics such as Radin might respond that although legal principles cannot constrain judges, judges must bind themselves by treating their interpretations of principles as precedents. We have seen that Radin associates the rule of law—and principled judging—with the notion of treating like cases alike, and links the unfairness of Bush v. Gore to the Court’s attempt to deny its holding any precedential authority. Regardless, she still fails to ask whether evidence of the Court’s unfairness should lead us to reconsider the reasons we assign it this authority.

Perhaps Radin believes that the holding is an anomaly, that the Court’s interest in the cases it decides will not normally lead it to avoid establishing precedents. On the other hand, she might recognize how easy it is for judges to evade precedents, and that precedents are made unstable by changes in the makeup of courts and the different contexts in

137. It might be the case, however, that Bush v. Gore is an anomaly, given the unusual stakes of the election and that the judges had an immediate interest in the case that was tied to the parties as opposed to a partisan concern for the shape of future doctrine. Moreover, given that their partisan interests in the parties is tied to their interest in shaping future doctrine, it might be appropriate to respond to a perceived abuse of power through the political checks that are relevant to the third question.

138. See supra text accompanying notes 39-41.
which judges apply precedents. Each of these speculations would explain why she would try to influence future holdings of the Justices rather than address the question of the Court’s authority. The latter speculation suggests a significant problem. If it is true that judges will not be bound by their own interpretations of principle and if principled judging is essential to fairness, then fairness cannot explain why we assign judges the authority to interpret law. This problem is beyond the scope of this article, but we should note that Radin’s focus on how to respond to the Court’s holding prevents her from giving it adequate consideration.

Moreover, this focus on the future of constitutional doctrine prevents Radin and other scholars from considering the institutional virtues that might inform a definition of judicial authority, even if it were true that judges’ partisan interests prevent them from deciding cases fairly. Critics of Bush v. Gore, for example, have not considered how stability bears on the decision to assign judges the authority to resolve controversies. One exception seems to be the scholars who examine the issue of whether intervention by the Supreme Court averted a constitutional crisis. These scholars, however, debate the values that judges advanced through their decision, and do not address a priori considerations of stability that might explain why judges should decide cases of this type.

There are at least two reasons why scholars would not pay adequate attention to stability, and both follow from the tendency to view judicial authority from the perspective of adjudication. On one hand, scholars might assume that stability is irrelevant to the legitimacy of judicial authority if legal principles do not constrain judges. On the other hand, they might assume that stability is a long-term consideration that is only relevant to the broader political process that defines constitutional doctrine.

Like fairness, it is tempting to link stability to principled judging.

139. See generally supra note 89.

140. We should also note that both Radin and Fiss see law as a means to promote substantive justice, and thus their work is oriented toward shaping future doctrine and not toward the problem of how to resolve immediate controversies in light of law. See Owen Fiss, Foreword to The Supreme Court 1978 Term: The Forms of Justice, 93 Harv. L. Rev. 1 (2001); Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781 (1989).

141. It would seem, however, that fairness is a value of sufficient importance such that we would strip the Court of its authority unless we thought that there was no institutional structure that would decide cases fairly.

142. But see Yoo, supra note 30, at 239-40 (focusing on how people respond to the Court as opposed to whether the Court promotes stability). He suggests that people’s response to the Court is linked to stability. Id.

143. See generally Garret, supra note 31.
One would expect that partisan decisions would undercut stability, but stability is a product of how people respond to the judicial decisions. Though it is not likely that people will respect the decisions of a Court they view as unprincipled, we should not assume that stability must follow from principled decision-making.

To understand why, consider again the problem of law’s open texture. We have seen that judges can interpret vague or ambiguous legal principles to the advantage of either party to a case. Judges often decide cases in which the political community has not clarified the principles that would resolve the underlying controversy. Yet resolve it they must; we would face chaos if judges—or other political institutions—allowed controversies to fester while awaiting social consensus concerning principles that would provide resolution. Stability is important because we need to move past controversies, while recognizing that our differences about principles will linger.

The political community risks instability when it resolves these controversies. Litigants and their supporters often view their own positions as principled and their opponents’ positions as partisan. Moreover, they lack the mastery of legal language to know whether a holding is principled, and thus it is likely that they will resent holdings that harm their interests. Moreover, it is not clear that greater knowledge of law would reduce their suspicions. People who have the requisite training learn that it is often impossible to distinguish partisan from principled positions, and that lawyers and judges are adept at masking partisan positions in the language of principle. We therefore cannot be certain that judges base their decisions on principle, and often must defer to their authority, recognizing the possibility that they have used it to advance partisan interests.

Given such circumstances, it would seem that we should measure stability based on our expectations of how citizens will respond to the different institutions that might resolve controversies. According to this view, stability is best served by an institution that people respect whether its decisions are principled or not. Stability, then, would provide reason to favor a Court that makes people think it is principled over one that actually is principled.

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145. See generally Sunstein, supra note 3.
146. See generally Finn, supra note 5.
147. See generally Leif H. Carter & Thomas F. Burke, Reasons in Law (1998); see also Gillman, supra note 3, at 3, 176; Dershowitz, supra note 3, at 187.
148. Casey says that legitimacy entails that the Court be principled and that it be perceived as principled. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992). My analysis suggests
partisan Court promotes stability by expanding the range of interests that
the political system represents. It is plausible to think that people
would defer to the authority of a Supreme Court that has, over time,
built a reputation for representing citizens’ interests.

This is not to say that the Court should mislead people in order to
maintain stability or better represent people’s interests. Stability is just
one virtue we use to assess judicial authority, and such a Court is likely
to offend fairness, equality, integrity, reasonability, and other virtues we
associate with the rule of law. It also seems unlikely that a Court
could maintain stability by systematically deceiving people, especially
when we consider that both politicians and scholars advance their
careers and partisan interests by exposing judicial hypocrisy. Nonethe-
less, the political community needs an institution to settle disputes in
contexts where there is no consensus about the meaning of applicable
legal principles. Stability is therefore relevant to the definition of judi-
cial authority, and that is why scholars make a mistake by assuming that
judicial authority necessarily loses legitimacy when judges fail to base
their decisions on principle.

Scholars also fail to address stability because they subsume the
problem of stability within the question of the Court’s authority to set
the meaning of the Constitution. They consider the Court’s authority
to resolve controversies in light of its role in the broader battle to define
constitutional doctrine. We have seen that judges do not have final
authority to set the meaning of the Constitution, even though they con-
trol the final disposition of particular cases; they have final authority to
interpret the law to resolve immediate controversies. Citizens,
indeed, might accept such authority, because they can challenge judges

\[\text{that the perception of principled decision-making might be more important to the norm of stability and the fact of principled judging to fairness. See also Michelman, supra note 23.}\]

149. See, e.g., Peretti, supra note 8. These theorists, however, address longer-term concerns associated with the question of why the Court should have authority to set the meaning of the Constitution. In this article, I argue that this perspective makes it difficult to grasp the cost of short-term instability.


151. See supra notes 76-101.

152. See Calabresi, supra note 3, at 78-80. Indeed, Calabresi provides an example of a New York Court of Appeals judge who introduced stability through non-principled adjudication. Id. Though perhaps apocryphal, Calabresi’s story suggests that in some circumstances judges can address a deficiency in law that is beyond legislative correction. Id. It seems odd to view such decisions as exceptions to legitimate authority given that one function of the Supreme Court is to settle cases that do not lend themselves to principled resolution. See Yoo, supra note 30.

153. But see West, supra note 23.

154. Indeed, we have seen that the likelihood that citizens will challenge judges who try to apply their interpretations of law to future cases is relevant to how we view the question of judicial supremacy. See supra text accompanying note 23.
who seek to extend the applicability of controversial interpretations of law. This would explain why people would respect the Court, notwithstanding their perception of partisan judging; they see the Court as integral to a political system that represents a broad range of interests.\textsuperscript{155}

It is a mistake, however, to consider stability only in terms of the broader question of how the political community should set the meaning of the Constitution. The possibility that other political institutions might limit instability does not mean that we should ignore the costs that would follow if we allow the wrong institution to settle our disputes. Citizens, for example, might tolerate—and expect—partisan decisions from the Court because they believe that the political system as a whole adequately represents their interests in spite of the Court, and thus ensures that constitutional doctrine ultimately reflects these interests.\textsuperscript{156} More significantly, they will respond to holdings they reject, and in some circumstances they will measure their response as much by the circumstances of the original controversy as by the abstract questions of constitutional doctrine that those circumstances implicate.

Consider recent legislation that provides the government greater authority to investigate terrorist activities in the United States. Many people believe that the legislation is inconsistent with the Constitution's commitment to privacy and equality. Imagine that the Supreme Court upholds this law and interprets it broadly in a case involving anti-abortion activists. Also imagine that the decision suggests prejudice against these groups and that their members were already predisposed to think that the Court was hostile to their interests. They contest the decision. Most do so through legitimate political channels, but some extremists engage in illegal acts of violence that they direct at both governmental institutions and private citizens. Within a few years political pressure succeeds, and the Court reverses its judgment to the satisfaction of most citizens.

We can see that short-term instability can damage the political community, even if the broader political system limits the cost of this damage. More significantly, the example suggests that sometimes we

\textsuperscript{155} See supra text accompanying notes 92-95; see also Gillman, supra note 3, at 5-9. Gillman also notes that Justices face pressure to conform with people's expectations concerning how judges base decisions on partisan considerations or on what type of partisan considerations it is appropriate for judges to base such decisions. \textit{Id.} Similarly, I have previously argued that many people embrace the Court, notwithstanding their perception of partisan judging. See Ward, supra note 150, at 1262. People associate the Court with what they consider to be golden ages in which the Court defends important interests, and know that the political system provides opportunity to challenge the Court when it fails to meet this expectation. \textit{Id.}

\textsuperscript{156} Or, they might believe that the political system represents their interests well enough to make it foolish to challenge what they consider to be illegitimate exercises of power. See \textsc{Russell Hardin}, \textsc{Liberalism}, \textsc{Constitutionalism}, and \textsc{Democracy} (1999).
can attribute instability to the immediate controversies that the Court resolves and not to the Court’s interpretation of constitutional doctrine. It is not likely that people would have responded as they did if the Court had made its decision in response to a different and less explosive set of facts.

We can see the danger of short-term instability by considering *Bush v. Gore* itself.\textsuperscript{157} Jack Balkin links the legitimacy of *Bush v. Gore* to the broader political context of the Bush presidency.\textsuperscript{158} He contends that our view of the decision ultimately will be determined by the success or failure of the Bush administration.\textsuperscript{159} While this contention might be an accurate prediction of how people will perceive the holding or of how they will perceive the Court in the future, it ignores the role that stability plays in defining judicial authority.

All else being equal, we would assign judges the authority to resolve controversies such as *Bush v. Gore* if we thought that citizens were more likely to accept the judges’ resolution of controversies; we seek to empower an institution that would allow us to move past such controversies. Balkin, by contrast, considers the legitimacy of judicial decisions—and presumably the legitimacy of the Court—based mainly on the long-term consequences of those decisions.\textsuperscript{160} He seems to view subsequent political battles as extensions of the election controversy, and his argument provides reason for people who believe that the Court stole the election from Vice President Gore to undermine the Bush presidency. By making our understanding of the Court’s resolution of a controversy—not its interpretation of law—the product of an ongoing political controversy, Balkin invites the kind of instability we use law to avoid.\textsuperscript{161}

The academic response to *Bush v. Gore* illustrates how a focus on adjudication leads scholars to ignore or confuse the significance that fairness and stability have for the question of why we would assign judges the authority to resolve immediate controversies. Because fairness and stability are virtues that characterize political institutions, they do not directly bear on the substantive questions that these institutions

\textsuperscript{157} Oddly enough, the problem of instability may have been alleviated by the terrorist attacks of 2001 and the effect they have had on American citizens.

\textsuperscript{158} Balkin is concerned about the legitimacy of the decision and does not address the question of why we allow judges to decide such cases or how the norm of stability influences our answer to the question. I discuss Balkin because his argument suggests that we evaluate judicial authority itself based on longer-term political battles.

\textsuperscript{159} Compare Balkin, *supra* note 3, at 214-18, with Dershowitz, *supra* note 3, at 177-78 (discussing an argument made by Judge Richard Posner, an argument that is analogous to Balkin’s).

\textsuperscript{160} See Balkin, *supra* note 3, at 217-18.

\textsuperscript{161} See id. at 223.
Therefore, scholars must look beyond adjudication in order to grasp the significance that such virtues might have for questions of judicial authority.

V. CONCLUSION: A PREFACE TO CONSTITUTIONAL THEORY

The Florida election, no doubt, is troubling. It seems very likely that at least some judges sought to promote partisan interests and perhaps even acted contrary to the reasons that would justify judicial authority. Nevertheless, we cannot determine that this is the case unless we have a better understanding of those reasons. To gain such an understanding, we need to broaden our perspective of law.

The legal realist view of law distorts the problem of how one justifies judicial authority. By focusing on the question of whether legal principles control judicial decision-making, legal realists suggest that either legal principles constrain judicial discretion or judges legislate. If the former is true, judges can derive authority from the principles they enforce. Otherwise, we must justify their authority based on our expectations of judicial legislation. We have seen, however, that this misstates the problem of justifying judicial authority. As Florida demonstrates, judges cannot derive authority from the legal principles they enforce because those principles do not have a determinate meaning until judges interpret them. Law’s open texture necessitates authority to supplement vague or ambiguous legal principles; it requires executive or judicial legislation. The question, then, is not whether judges legislate, but whether we have reason to assign this authority to judges.

More significantly, the legal realist view obscures potential justifications of judicial authority that follow from a broader view of law. The conclusion that legal principles do not control judicial discretion leads theorists to collapse the distinction between law and politics; judges, like ordinary legislators, pursue preferences. This invites the assumption that law is not relevant to the justification of judicial authority. Yet we have seen that the institutional virtues that characterize the rule of law bear on questions of judicial authority, whether or not legal principles constrain judicial decisions.

This article has sought to bring attention to the role that institu-

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162. We have seen, however, that there are sometimes cognate values that directly bear on the outcome of adjudication. Indeed, the values of fairness and stability were relevant to these cases. My point is that while such values matter to the adjudication, it is as virtues of the rule of law that they inform a definition of judicial authority.

163. This charge has been brought against judges on both sides of the controversy, but resolving the particular charges is well beyond the scope of this paper. Theresa H. Hammond, Judicial Jabberwocky in the Presidential Election 2000: When Law and Facts Collide with Politics, 52 MERCER L. REV. 1567 (2001). But see GILLMAN, supra note 3; Tribe, supra note 3.
tional virtues might play in the justification of judicial authority, virtues we find outside of the context of adjudication. Its argument is significant given that theorists tend to evaluate judicial authority based on how they expect judges to decide landmark cases. Nonetheless, we have established only a foundation on which theorists might justify judicial authority. Indeed, we have only identified three virtues that are relevant to the question, and provided a sketch of how they might contribute to such a justification. In addition, this article suggests new issues that a persuasive justification of judicial authority must address. I will conclude the article by bringing these interesting issues to the foreground.

The institutional virtues that I have associated with the rule of law are political. They therefore contribute to a political justification of judicial authority. But what does it mean for the rule of law to contribute to a political justification of judicial authority? The theorists I discuss in Section III(C)(ii) are illustrative. They define judicial authority based on political considerations that follow from the reasons that people govern themselves by law; they believe that the political structure should manifest institutional virtues. By contrast, we have seen that many scholars view judicial authority as a purely political institution and ignore such virtues. They accept the legal realist assumption that principles will not constrain judicial decision-making, and then consider the values that judges might advance.

We might also compare those who associate judicial authority with institutional virtues to related theorists who view judicial authority in strictly legal terms. This comparison is of limited utility though, because at some level, the distinction between law and politics collapses. Although some theorists might still consider law and politics autonomous realms, no one could reasonably deny that there are political consequences that follow from the decision to use a system of law to resolve disputes among citizens. Therefore, the decision to establish a legal system is political, and considerations of politics dictate the structure of such a system.

Rather than debate the extent that law is political, we could distin-

164. See supra text accompanying notes 76-100.
165. See supra text accompanying notes 60-72.
166. Note how the legal realist view reverses my characterization of the relationship between law and judicial authority. It considers law as a product of judges and thus focuses on what judges do. Consequently, legal realists pay much less attention to how the reasons that favor the rule of law bear on a conception of judicial authority.
167. See supra text accompanying notes 26-27.
168. See Gillman, supra note 3, at 6.
169. See Frederick Schauer, Formalism, 97 YALE L.J. 509 (1998) (suggesting that law is autonomous to the extent that it serves political purposes associated with rule based decision-making).
guish these theories based on how they assess the constraining force of legal principles. Some theorists, for example, believe that partisan judging is not consistent with the rule of law. These theorists consequently define a conception of judicial authority that limits the cases that judges can decide, or defend a theory of interpretation that explains how legal principles might constrain judicial decisions.

While we might call such theories legalistic, it is unclear what is gained by using that term. Given law's open texture, any theory that assigns judges authority to interpret law must anticipate some likelihood of partisan judging. There will always be circumstances in which judges can interpret legal principles to the advantage of either party and not face any serious ramifications. The more interesting issue involves the tension between partisan judging and the virtues that characterize the rule of law: to what extent is the rule of law consistent with discretionary judicial authority?

We have seen that institutional virtues are independent of the particular cases that judges decide. Further, it is plausible that some virtues could be advanced even if judges often based decisions on partisan considerations. Macedo, for example, links judicial authority to the virtue of reasonability. Partisan judges could satisfy Macedo's conception of judging so long as they expressed the interests they favor in terms of principles that were applicable to the cases that they decided. On the other hand, it would seem that a political system would be unfair if judges systematically engaged in partisanship. Evidence of such judging would provide ample reason to rethink the considerations of fairness that might lead us to assign judges such authority.

Therefore, we must weigh the dangers of judicial partisanship against what we expect judges to contribute to a system of politics. This suggests yet another issue: how to resolve tension that arises among the different roles that we expect judges to play. In this article, we have considered institutional virtues that might inform a definition of judicial authority. This, however, is not to deny that judges might also contribute to the political community by making decisions that represent certain interests or advance good values, or by participating in the process

171. See, e.g., ELY, supra note 8; WHITTINGTON, supra note 8; BORK, supra note 55.
172. See Ward, supra note 150, at 1261-63.
173. See supra text accompanying notes 76-100.
174. See supra text accompanying notes 70-72.
175. See, e.g., PERRETTI, supra note 8.
176. See, e.g., DWORKIN, supra note 8; EISGRUBER, supra note 8.
that defines such values.\textsuperscript{177}

Moreover, we have seen that theorists have identified a variety of virtues that characterize the rule of law, and that these virtues apply differently to the different questions of judicial authority.\textsuperscript{178} It seems likely, therefore, that the reasons that might lead us to expand judicial authority in one area would lead us to restrict it in another. We might, for example, assign judges the authority to resolve particular controversies based on considerations of fairness and stability. We might think that the Court will not have an immediate interest in the overwhelming majority of cases they decide—\textit{Bush v. Gore} would be an anomaly—and that citizens are more likely to embrace its decisions because they view the Court as a legal more than a political institution.\textsuperscript{179}

Note, though, these same considerations would suggest that we should limit the Court's authority to set the meaning of the Constitution. Recall that fairness is associated with the separation of powers; we divide power among the Legislature, Judiciary, and Executive to ensure that law is written at a level of generality that reduces the chances of self-interested or biased legislation.\textsuperscript{180} While we empower judges to determine how general rules should apply to the circumstances of particular cases, to maintain fairness we must limit the influence that those circumstances have on the definition of these rules. Thus, we risk losing the benefits of general legislation by expanding judicial authority to set the meaning of the Constitution.\textsuperscript{181}

In addition, while it would promote stability if citizens accepted judicial decisions because they associate the Court with law, the same consideration should give us pause in extending the Court's authority to set the meaning of the Constitution. We allow judges a share of this authority because we can challenge the interpretations that they favor; the meaning of the Constitution remains an open political question.\textsuperscript{182} Nonetheless, if citizens are more likely to be persuaded by what they perceive to be the legal authority of judicial interpretations, then judges gain an added advantage in the political battle over constitutional meaning. People who believe that questions of constitutional meaning are political questions and that judges have no special expertise that bears

\textsuperscript{177}. See, e.g., Ackerman, supra note 7; Sunstein, supra note 8; Michelman, supra note 8.

\textsuperscript{178}. See supra text accompanying note 68.

\textsuperscript{179}. This would explain why people tend to view the Court more favorably than elected institutions even though they seem to have very little knowledge about the Justices and most of their decisions. See Yoo, supra note 30, at 225-26, 229; see also Ward, supra note 150.

\textsuperscript{180}. See supra text accompanying notes 82-83.

\textsuperscript{181}. There are, of course, other considerations that would lead people to expand such authority, and some scholars have even argued that we would benefit if law were more responsive to particular contexts. See, e.g., Catherine Mackinnon, \textit{Only Words} (1993).

\textsuperscript{182}. See supra text accompanying notes 83-84.
on such questions would then have reason to curtail judicial authority to set the meaning of the Constitution. They should seriously consider reforms that would allow Congress to overturn judicial interpretations through a statute or a resolution.\textsuperscript{183}

By broadening our perspective of law, we introduce important considerations and complications for theorists who seek to justify judicial authority. We solidify the foundation on which to begin such a justification. But justification is a task best reserved for a different article.

\textsuperscript{183} See Bork, \textit{supra} note 8, at 96-119; Tushnet, \textit{supra} note 8. But this authority should only extend to the future application of judicial interpretations. We have already seen that the authority to resolve particular controversies presents a different question.