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EXTRAORDINARY MEASURES: PROTESTING RULE OF
LAW VIOLATIONS AFTER *BUSH V. GORE*

Do Rule of Law theories entail particular obligations of enforcement? What do they imply about the responsibility of legal academics, when the Supreme Court renders a decision that is deeply threatening to the Rule of Law? The Court's decision in *Bush v. Gore* provides a unique opportunity for reflection on these questions. More than any case in recent history, this decision was initially challenged as a violation of Rule of Law norms. In an unprecedented move initiated by Stanford Law Professor Margaret Jane Radin, more than six hundred law professors signed a public statement declaring that "the U.S. Supreme Court used its power to act as political partisans, not judges of a court of law."¹ Yet the scholarly assessments that have emerged from the legal academy in the past year have not reflected a coherent view that this alleged violation demands atypical forms of resistance from those centrally invested in the Rule of Law. On the contrary, much of the scholarship that has analyzed the opinion has served more to normalize it than to underscore its departures. Moreover, almost none of this work has urged scholars to move beyond the conventions of legal commentary to protest its lawlessness. This article seeks to understand this disjuncture, and to explore its sources, both in scholarly understandings of the Rule of Law and in related, but distinct conceptions of the legal academic role. Drawing on a common thread of these arguments –

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¹ Statement of Law Professors for the Rule of Law, *New York Times*, January 13, 2001 (signed, at time of publication by more than five hundred professors).



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one that describes rule- or law-making as a form of social practice – I argue that this tendency in recent scholarly work is misconceived. I contend that the most compelling “social practice” versions of the Rule of Law suggest that law professors should move beyond the traditional boundaries of the academic role, to resist a breach of this nature and magnitude. In the final portion of the article, I identify some of the means by which legal academics might usefully respond to the violation implicit in the Supreme Court’s ruling.

I. ENFORCING THE RULE OF LAW

The traditional Rule of Law literature has had little to say about the pragmatic question of how, and by whom, precepts are to be enforced when they are violated. In paradigmatic Rule of Law scholarship such as that of Fuller² or Rawls,³ compliance with a conception of the Rule of Law is discussed primarily as a characteristic of a legal system as a whole, and only secondarily as an attribute of individual instances of (judicial) decision-making. Individual decisions can violate one or more of the precepts that comprise the Rule of Law: indeed, for Fuller, this may happen even in legitimate legal systems; for precepts may exhibit tension with one another in particular cases, which the lawmaker is obliged to reconcile.⁴ But the principal question in such accounts is more whether a legal system, taken as a whole – and it is generally some *hypothetical* legal system that is taken as a whole⁵ – reflects procedural precepts as notice, non-retroactivity, or generality of application, or such substantive features such as a connection to the liberty of subjects.⁶ Perhaps more centrally, even instances of

² See Lon L. Fuller, *The Morality of Law* (1964) (hereinafter *The Morality of Law*).

³ John Rawls, *A Theory of Justice* (1971).

⁴ Fuller gives the example that retroactivity in the application of a law (one precept of his “inner morality” of law) may sometimes be necessary to remedy a situation in which the law has not been sufficiently general in its application (another precept). See Fuller, *The Morality of Law*, supra note 2, at 211.

⁵ Fuller, for example, discusses the error-ridden and ill-fated reign of a sovereign he refers to as “Rex.” See Fuller, *The Morality of Law*, supra note 2, at 33–41.

⁶ John Rawls, *A Theory of Justice* 235–240 (1971).

deviation do not necessarily trigger an obligation of enforcement. In Fuller, for example, most aspects of the “inner morality” of law – a term he uses interchangeably with the “Rule of Law” – partake of a “morality of aspiration” rather than a “morality of duty,” meaning that departures are viewed as regrettable failures to attain the best of which humans are capable, rather than breaches of a minimal, enforceable responsibility.⁷ Fuller explains that basic social obligations that require only forbearance (“do not kill, do not injure, do not deceive”) may be imposed as duties. However, when social imperatives have an “affirmative and creative quality,”⁸ it is inevitably difficult to define at what point a duty to perform them has been violated. Because the “inner morality of law” is of the latter character, “[i]ts primary appeal must be to a sense of trusteeship and to the pride of the craftsman.”⁹ Thus, the question of what kind of response, from what categories of legal subjects, should follow from a failure to comply with the Rule of Law that does not typically arise.

Contemporary re-articulations of the Rule of Law have begun to shift this focus. Emblematic of this shift is the work of Margaret Jane Radin.¹⁰ Radin has offered a Wittgensteinian analysis of the Rule of Law that conceives rulemaking as a social practice. This

⁷ The one exception Fuller cites is the “desideratum of making the laws known, or at least making them available to those affected by them.” Fuller, *The Morality of Law*, supra note 2, at 43. Although apparently affirmative in character, this would seem to require less creativity and more of a mechanical act, making it possible to assess violations with some precision, a prospect about which Fuller is more dubious, in connection with the other precepts.

⁸ Fuller, *The Morality of Law*, supra note 2, at 42.

⁹ Fuller, *The Morality of Law*, supra note 2, at 43. In this discussion, it is not altogether clear whether Fuller is saying that it is too difficult to estimate with precision when a violation of a more affirmative imperative has occurred, or that it is too difficult, in connection with such imperatives, to say where the line falls between the kind of basic failure for which one should be held responsible and the kind of failure to achieve excellence that can only be regretted. The former would seem to be implied by the terms of this specific discussion, see Fuller, *The Morality of Law*, supra note 2, at 42–43, but the latter would seem to be more consistent with his overall discussion of the distinction between the morality of duty and the morality of aspiration.

¹⁰ See Margaret Jane Radin, Reconsidering the Rule of Law, 69 *Boston University Law Review* 781 (1989) (hereinafter, Radin, Reconsidering the Rule of Law).

approach problematizes the traditional distinction between rules and their application. Radin rejects the notion that rules are “formally realizable” – that the nature and range of their application can be inferred as a matter of logical deduction from the rules themselves. Rather, she describes the process of application as a central, if inevitably contingent, part of the formulation of the rule itself. Radin’s vision also blurs the distinction between the rulers and the ruled: it replaces the notion of rulemaking as a formal, largely governmental process with the notion of rulemaking as an inextricably social process, in which the assent and compliance of subjects are as much a part of the formation of the rule as its promulgation by legal authorities. Radin’s work is finally noteworthy in that it seeks to bring a Rule of Law vision to bear on specific instances of contemporary adjudication. She explains, for example, why Judge Skelly Wright’s highly innovative decision in *Robinson v. Diamond Housing Corporation*¹¹ reflects and reinforces the Rule of Law understood in this way. Though Judge Wright’s ruling, that tenants whose housing violates implied warrants of habitability should be entitled to remain in their housing rent-free until such violations are cured, reflected what might have been regarded as an unprecedented gloss on landlord-tenant law, it accurately captured a collective process of interpretation through which legislative enactments had been given meaning by judicial explication and grass-roots political activism.

In a more recent article, “Can the Rule of Law Survive *Bush v. Gore*?”¹² Radin uses Rule of Law analysis to criticize the Supreme Court’s resolution of the Presidential Election of 2000. *Bush v. Gore*, according to Radin’s analysis, violates Rule of Law precepts in many ways: the view of “irreparable harm” embodied in the initial stay, the equal protection analysis and the frank refusal to give the alleged violation a remedy through a meaningful remand, all exceed “the boundaries of acceptable argument”¹³ as to the applicable doctrinal elements; and the Court’s proviso that its analysis

¹¹ 463 F.2d 853 (D.C. Cir. 1972).

¹² Margaret Jane Radin, Can the Rule of Law Survive *Bush v. Gore*, in Bruce Ackerman ed., *Bush v. Gore: The question of Legitimacy* 130 (forthcoming 2002) (hereinafter, Radin, Can the Rule of Law Survive).

¹³ Radin, Can the Rule of Law Survive, supra note 12, at 137.

holds for this case only frankly violates even the Rule of Law precept that “principles must endure from case to case.”¹⁴ But more significant than Radin’s critique is her reflection on what it implies for her professional role.¹⁵ The magnitude of these multiple violations transforms Radin into an “accidental activist”¹⁶ who circulates the “Law Professors for the Rule of Law” petition. She argues, moreover, that this response is not only legitimate but more readily justified than cynical responses that relativize the violation, or prudent, polite responses that treat the opinion as if it were usable law.¹⁷ In making this argument, however, Radin does not describe

¹⁴ Radin, *Can the Rule of Law Survive*, supra note 12, at 139.

¹⁵ Radin’s comfort with assessing, declaring and acting against Rule of Law violations, in contrast with that of Fuller. This may be attributable to the social practice character of Radin’s Rule of Law theory. Fuller’s theory is not devoid of any social aspect: indeed he defends it against the critiques of positivists like H.L.A. Hart, by explaining that analytic positivism sees law as a projection of governmental authority that does not envision any relation to the governed, whereas his theory that the certain requirements for making law comprise an “inner morality” of law takes as its starting point a conception of a relationship between the lawmaker and the people he governs. See Fuller, *The Morality of Law*, supra note 2, at 204–212. However, this conception is distinct from Radin’s in that, though Fuller’s inner morality of law envisions a relation to the governed, it is not an ongoing social process of engagement between the people and the rules that help to make law. For Radin, assessing law – the specific rules and the broader question of how well the lawmaker has done with his task – is not a fine-tuned judgment that emerges at the end of the process, to gauge the virtue or performance of the lawmaker: it is part of the process of making law itself. This process of assessment is viewed in its internal, substantive aspect when Radin takes on a case such as *Robinson v. Diamond Housing*; it is viewed primarily in its external manifestation in the more purely Wittgensteinian portion of Radin’s theory. But the social, and dialogic, character of lawmaking means that the lawmaker is in some sense always being held accountable, and that specific imprecisions in judging the product of the lawmaker’s work may be corrected or compensated for over the longer process of exchange.

¹⁶ Radin, *Can the Rule of Law Survive*, supra note 12, at 132.

¹⁷ Radin’s critiques of these positions are not systematically developed but are nonetheless illuminating. She assimilates the relativizing position to the cynicism of the media, which seem to expect crass political judgments from the courts, and may in fact foster them by eroding those conceptions that might function to constrain adjudication. See Radin, *Can the Rule of Law Survive*, supra note 12, at 140–141. She critiques the position that one should proceed “politely,” using the Court’s lemons to make doctrinal lemonade as “hypocritical” and argues that not

her political resistance as specifically reliant on her Wittgensteinian conception. She introduces this conception by describing it as the product of a more mature and intellectual cynicism, which doubts that a formalist conception of the Rule of Law can be a viable constraint on judicial action. She concludes that even given a conception in which law is not “fundamentally a set of rules laid down but rather a process of continuous reinterpretation,”¹⁸ some conduct is so far outside the social process we call rules that we can identify as “unjudicial”: *Bush v. Gore* was such a case.¹⁹ But she ultimately describes her own resistance in more personal, intuitive terms:

Bush v. Gore brought me down from the intellectual heights of debates about legal theory, including the debate about where the Rule of Law stands in the modern understandings of knowledge and practice. When I was faced with a gross, bald-faced violation of the Rule of Law, I didn’t want to argue Wittgensteinian theory, I wanted to protest in the streets.²⁰

Although this intuitive response (which I shared) is itself an interesting datum and stimulus to political action, I believe Radin can draw more specific fortification from her earlier theoretical position than this explanation suggests. A social practice conception of the Rule of Law, as introduced by Radin and modified by recent constitutional scholars, can provide the basis for an obligation on the part of legal academics to engage in precisely the kind of protest that Radin did.

This has not, however, been the consensus that has emerged in the recent scholarly response to *Bush v. Gore*. Many scholars have muted its departures from the Rule of Law, or have rejected its analysis without taking their resistance beyond the usual conven-

only might it fail with a Court who refuses to play the game, but it also neglects to help diagnose and solve a serious institutional problem. Radin, *Can the Rule of Law Survive*, supra note 12, at 141–143.

¹⁸ Radin, *Can the Rule of Law Survive*, supra note 12, at 145–146.

¹⁹ Although Radin introduces a social practice conception as a modification of more traditional Rule of Law accounts toward the end of the article, this conception actually informs Radin’s discussion, toward the beginning of the article, of why *Bush v. Gore* violated the Rule of Law. When she talks about the “boundaries of acceptable argument,” Radin is referring to a socially or collectively generated conception similar to the notion of the “field” that I use, infra.

²⁰ Radin, *Can the Rule of Law Survive*, supra note 12, at 146.

tions of academic commentary. After examining these approaches and highlighting the understandings that have motivated them, I will argue that the social practice vision explicit in Radin's earlier work and implicit in the best of these more quiescent critiques, provides a forceful argument for an academic responsibility to confront Rule of Law violations by the Court.

II. THE LEGAL ACADEMY AND THE RULE OF LAW AFTER *BUSH V. GORE*

A. *Containing Damage to the Rule of Law*

An early, and sizeable, group of legal scholars responded to *Bush v. Gore* with a search for justification. This group included not only those scholars who believed that the opinion was doctrinally sound, and therefore justified. It also included a group who described the opinion as deeply flawed but persisted in seeking an explanation that might mitigate its apparent illegitimacy. Exemplary of the efforts of this latter group are Frank Michelman's *Suspicion, or the New Prince*,²¹ and Cass Sunstein's *Order without Law*.²² Both begin with an incisive, substantive critique of the opinion: their analyses highlight the lack of precedential foundation for the equal protection argument, the unusual and unprincipled restriction of that argument to the facts of the case and the troubling insistence on intervention when intervention would be constitutionally unnecessary and beset by apparently partisan conflicts. Yet neither ends with a ringing condemnation of the Court's conduct in this case. On the contrary, one offers a purportedly plausible motive for the Court's decision, and the other points to a series of progressive doctrinal developments that might be drawn from it. These unexpected resolutions may reflect a view of how legal academics should respond to perceived violations of the Rule of Law.

Michelman offers a scenario in which the decision was a pragmatic, if less than analytically candid, defense against the spectre of democratic disorder. Convinced that the welfare of the country required a speedy, definitive, non-legislative resolution, the Court

²¹ 68 U. Chi. L. Rev. 679 (2001) (hereinafter, Michelman, *Suspicion*).

²² 68 U. Chi. L. Rev. 757 (2001) (hereinafter, Sunstein, *Order without Law*).

felt obligated to end the election controversy, but without revealing the atypically pragmatic ground for its action. In this scenario, the Court was required to offer some “plausible legal grounds”²³ for its intervention, to frame them “extremely narrowly with a view of minimizing any risk of wreckage to the full body of constitutional doctrine,”²⁴ and to hand the victory to the candidate who was already ahead at the moment of the Court’s conclusive intervention. This is precisely what the Court did in using an unelaborated, contextually limited equal protection argument to hand the victory to George W. Bush. The Court, in this view, is no longer a partisan intermeddler but a Machiavellian prince: “a ruler and savior prepared to sacrifice all to save the imperiled republic – probity, reputation, even the salvation of an honored place in history.”²⁵ Under this explanation, the Court may still appear “arrogant, rash, miscalculated, even profoundly anti-constitutional”²⁶ but it may escape the charges of being “shameless or depraved.”²⁷

Sunstein’s article offers a variant on Michelman’s explanatory approach. He too proposes an order-based explanation, speculating on the crises that might have emerged in Florida, and in Congress, had the Court not intervened.²⁸ However, Sunstein combines this analysis with a time-honored legal strategy – an effort to explain how the offending holding might be used to progressive political advantage. He explains how the possibly pretextual equal protection argument might have “created the most expansive voting right in many decades,”²⁹ citing a range of cases to which the right might be applied and arguing that the Court’s invocation of equal protection might prompt legislative, if not judicial, revision of many electoral practices.

²³ Michelman, *Suspicion*, supra note 21, at 692. Michelman also describes them as “faux-legal reasons.” *Id.*

²⁴ Michelman, *Suspicion*, supra note 21, at 693.

²⁵ Michelman, *Suspicion*, supra note 21, at 693.

²⁶ Michelman, *Suspicion*, supra note 21, at 693.

²⁷ Michelman, *Suspicion*, supra note 21, at 693.

²⁸ Sunstein concludes that, in averting this parade of horrors, the Court “might have done the nation a big favor.” Sunstein, *Order without Law*, supra note 22, at 769.

²⁹ Sunstein, *Order without Law*, supra note 22, at 769.

Neither Michelman nor Sunstein is explicit about the reasons for this strategy. Yet it is not clear that either author actually seeks to persuade his readers that his hypothesis is the best way to think about this case. Michelman's hypothesis, in particular, is unveiled at the end of his argument, in a kind of *deus ex machina*. It is not assessed as a competing explanation; and Michelman concedes that it has "credibility problems of its own," although he neither enumerates nor attempts to resolve them. Sunstein's presentation is somewhat less tentative, although there are still many unanswered questions. His description of the disorder that might have befallen the country has the air of a worst-case scenario: Sunstein does not assess the likelihood that it would actually have materialized. Similarly, he does not assess the plausibility of the claim that *Bush v. Gore* might catalyze a course of voting rights reform. Is it likely that a conservative Court will extend the equal protection clause to myriad new electoral contexts? Could such an effort be consistent with the Court's explicit proviso limiting the application of the holding to these facts only? Sunstein makes little effort to answer such questions, though they would seem to be central to the plausibility of his hypotheses.

The speculative presentation of these alternative hypotheses suggests that they may reflect something other than a robust effort at persuasion. One may read them, instead, as one kind of a response to a perceived violation of the Rule of Law. In the face of such a threat, Sunstein and Michelman may see it as incumbent upon them as legal academics to minimize the damage the decision inflicts on the Rule of Law. This is not a social practice approach that sees subjects, including law professors, as an integral part of the process that makes the law. It is, at least institutionally, a more formalist view, with the hierarchical gloss that this implies: the Court is the source of law and the repository of legitimacy; that legitimacy must be defended even when it is under attack from a decision by the Court itself. Law professors are a part of the system that produces law; they have powerful interpretive skills and a wide understanding of the possible factors that could animate Supreme Court decisionmaking. Both their investment in the system and their ability to envision a broader range of interpretations make it appropriate for legal academics to circle the wagons – either as a

matter of intuition or as a conscious strategy – when the Rule of Law is threatened. Thus the search for alternative explanations, and the manifestation of presumptive faith in the Court’s legitimacy that characterizes these essays could be understood as a way of vindicating this responsibility. These are not, as they might have been, substantive defenses of the Court’s decision. Michelman’s focus is on the Court’s ostensibly heroic pragmatism; Sunstein’s is on the good that might come from its flawed opinion. Both ultimately have the effect of normalizing the opinion – in relation to past institutional practice, or future doctrine – as part of an effort to contain the damage to the Court’s legitimacy and, ultimately, to the Rule of Law.

B. Critique v. Resistance

A second group of scholars, exemplified by Jack Balkin³⁰ and Robert Post,³¹ provide a different vantage point on the legal academics’ obligation to the Rule of Law. In the view of these scholars, *Bush v. Gore* was unequivocally problematic. Their critiques are unalloyed by the kinds of ameliorative hypotheses offered by Sunstein and Michelman; for Post, at least, the opinion is anomalous and destabilizing enough to shake his faith in the possibility of constitutional lawmaking. Yet neither sees the decision as necessitating any exceptional form of response; the standard form of academic critique is, to these scholars, appropriate to the challenge. The reasons for this more conventional approach are not explicitly parsed; they appear to derive both from the authors’ conceptions of the rule of Law and from their understanding of the legal academic role.

Robert Post confronts the challenge of *Bush v. Gore* as the consummate legal insider: as a long-time constitutional law professor, he must meet the skepticism of his students and teach them to apprehend the complex interplay of politics and principle that is lawmaking in the constitutional realm. Yet he is struck by the

³⁰ Jack Balkin, *Bush v. Gore* and the Boundary Between Law and Politics, 110 *Yale L. J.* 1407, 1408–1409 (2001) (hereinafter, Balkin, *The Boundary*).

³¹ Robert Post, *Sustaining the Premise of Legality: Learning to Live with Bush v. Gore*, in Bruce Ackerman, ed. *Bush v. Gore: The question of Legitimacy* (forthcoming 2002) (hereinafter, Post, *Sustaining the Premise of Legality*).

acute shame and foreboding he experienced when the case was decided: for the first time in his career, he found himself “apprehensive about entering the classroom, afraid that the opinion would undermine what [he] aspired to offer [his] students.”³² Provocatively affective in its orientation, his essay probes this subjective perception to see what light it sheds on the opinion and on the enterprise of constitutional adjudication.

Post first reflects on why the unredeemed failings of the opinion produce fear and embarrassment, rather than anger or outrage. The surprising character of his reactions may be traceable to the nature of constitutional lawmaking itself. Law, as Post describes it, occupies a unique position in our society because it “commands as well as persuades;” but the “price for these prerogatives is that law must hold itself accountable to the appraisal of reason and craft.”³³ Law professors, who assess the claims thus made by any opinion of legality, must often confront the skepticism of their students. This skepticism is particularly acute in the constitutional area, where the conspicuous mix of “constitutional law and political vision”³⁴ leads students to doubt the relevance of assessment according to these standards. *Bush v. Gore* powerfully reinforces such cynicism. Moreover, the Court so clearly indicates that it will not be bound by the usual demands of craft and reason, that it seems credulous, in Post’s view, to assess it in terms that assume this aspiration.

The same features that make it naïve to respond with anger to the opinion also prompt strong feelings of fear and embarrassment. Constitutional lawmaking – in its paradigmatic, legitimate form – is for Post a contingent, collaborative process. It occurs when a court’s strenuous, inevitably uncertain efforts to meld politics and principle into reasoned, well-crafted decision-making are met by an academic interpreter’s committed effort to intergrade even surprising or anomalous decisions into the extensive constitutional fabric that precedes and will follow them. The regularity of this complex, collective effort belies its difficulty and uncertainty: in “the molten core of

³² Robert Post, *Sustaining the Premise of Legality*, supra note 31, at 2 (page numbers refer to pre-publication draft on file with author).

³³ Post, *Sustaining the Premise of Legality*, supra note 31, at 14.

³⁴ Post, *Sustaining the Premise of Legality*, supra note 31, at 16.

constitutional lawmaking,” Post notes “. . . law and will wrestle in perpetuate indeterminacy, and . . . the triumph of legality depends on nothing more efficacious than our continuing determination to make it so.”³⁵ *Bush v. Gore* was embarrassing and fearsome because the Court’s betrayal underscored not only the potential for the triumph of will, but the instability of the collaborative effort. Law professors can contribute by painstakingly weaving the disparate threads into a meaningful whole, yet, in cases like *Bush v. Gore*, the Court can simply turn its back on the demand for reason or craft. The possibility of rupture highlighted by the opinion makes the tenuousness of the process through which we create our shared fabric anguishingly clear.

Yet despite his deep distress about the opinion, and despite his collaborative view of the process by which constitutional law is forged, *Bush v. Gore* does not transform Post into an “accidental activist.” He does not see the Court’s violation of these norms as demanding any response, beyond the trenchant academic critique that he offers. Moreover, in time, even his reluctance to discuss the case in a context that would suggest a claim to legality has tended to fade:

As *Bush v. Gore* recedes in time . . . I can recognize the resurrection of old habits and proclivities . . . I find it easier to conceive the decision as merely an aberration, an important but temporary lapse in the nation’s ongoing and encompassing commitment to constitutional law. Although it feels slightly gullible to do so, I can now even wax indignant at the opinion’s many departures from acknowledged norms of craft. I take this to signify that the singularity of the decision is no longer quite so threatening to my capacity to sustain the premise of legality.³⁶

With a new sense of wariness or disillusionment, but with no diminished commitment to the traditional boundaries of his task, Post has resumed his responsibilities in the collaborative construction of the constitutional fabric.

What explains Post’s disinclination to mount a more sustained protest – aimed either at the Court or the public – of the Court’s breach of its specified role? Post does not address this question directly, yet two possible answers might be drawn from the interstices of his text. One is largely psychological in nature: the

³⁵ Post, *Sustaining the Premise of Legality*, supra note 31, at 16.

³⁶ Post, *Sustaining the Premise of Legality*, supra note 31, at 16.

vertiginous sense of rupture created by full apprehension of the lawlessness of this case is, Post suggests, too overwhelming to sustain over the long-run. “*Bush v. Gore* tore open the very fabric of constitutional law,” Post argues, “and by doing so, forced a choice: Either to repair that fabric, at the risk of perpetuating a falsehood and a myth, or to suspend allegiance to the premise of legality, at the risk of losing hold on the possibility of constitutional law.”³⁷ If one concludes, as Post seems to, that acknowledging the lawlessness of the Court’s opinion means “losing hold on the possibility of constitutional law,” the cost is, psychically, too great.

A second answer derives from Post’s view of the limits of the legal academic role. Notwithstanding his contingent, collaborative view of the process of constitutional lawmaking, Post remains committed to a largely conventional notion of the academic role. The law professor is to introduce students to the dynamic process of constitutional lawmaking – a role that is rendered more traditional by Posts’ positioning of students as skeptics and professors as defenders of the lawlikeness of constitutional adjudication.³⁸ Engagement with the Court is possible, even necessary, so long as it is articulated moderately within specified institutional channels: classroom critiques, law review articles, exchanges with other law professors.³⁹ In this regard, Post’s academic is precisely the person Radin invokes when she says:

[w]e law professors are normally conservative, in the sense that we don’t go around signing petitions or statements that criticize judges; instead we try to stay polite with them. We keep our arguments to the restrained venue of law reviews. Judges are our professional colleagues. They are the people we went to law school with. We normally don’t want to offend them, both because they are our

³⁷ Post, *Sustaining the Premise of Legality*, *supra* note 31, at 16.

³⁸ In at least some of the academic settings in which I have taught, the students – perhaps compelled by a desire to make coherent sense of the body of doctrine – taken refuge in formalistic or rule-oriented frameworks for organizing and assimilating the materials, and it has been the professor’s job engender skepticism.

³⁹ Even efforts to persuade the Court through the vehicle of professors’ *amicus* briefs occupy a gray area: here, academics trade precariously on the limited capital provided by their scholarly expertise, to make points that may be more a matter of political predilection than of scholarly insight. Robert Post, Faculty Workshop on “Sustaining the Premise of Legality,” UC-Berkeley (Boalt Hall) School of Law, October 4, 2001.

friends and colleagues, and because we might appear before them some day, or want them to regard our law review articles favorably.⁴⁰

Legal academics may be partners in the forging of constitutional meaning, but in the context of this professional and institutional hierarchy, it is a constrained junior partnership. Post expresses an outward confidence that the usual conventions of academic exchange can convey any message of disapprobation, yet one senses an undercurrent of resignation: that if they cannot, there is little one can hope to do in any case. To depart from this deferential model of collaborative engagement – whatever the Court’s behavior – is to abandon one’s post, and risk the alienation of the judiciary.

Jack Balkin’s approach contrasts in some ways with that of Post. If Post offers a highly personal look at the classroom dilemma posed by *Bush v. Gore*, Balkin offers a dispassionate assessment of its consequences across a range of settings. Balkin is an unabashed critic of the opinion: its analytic failings as well as the circumstances and manner of the Court’s intervention suggest strongly that “low politics of partisan advantage” played a more important role than the “high politics of political principle.”⁴¹ But much of Balkin’s analysis is forward-looking: he is interested in what happens, over time, when the American constitutional system suffers an assault of this magnitude. Balkin asks what the decision means for debates about constitutional lawmaking and how it is likely to affect the Court’s legitimacy, in a range of institutional contexts.

One focus of Balkin’s analysis is the future of the opinion in American law schools. Though *Bush v. Gore* seems likely to vindicate the insights of legal realists or critical legal scholars,⁴² it will also be destabilizing for mainstream legal academics, among whom Balkin predicts a rapid effort to “reduce cognitive dissonance in manifold ways.”⁴³ In the longer run, he argues, the opinion faces one of three possible futures: it may be wholly normalized, or

⁴⁰ Radin, *Can the Rule of Law Survive*, supra note 12, at 132.

⁴¹ Balkin, *The Boundary*, supra note 30, at 1408.

⁴² Balkin develops this point specifically in Part III.

⁴³ Balkin, *The Boundary*, supra note 30, at 1409. He describes the ritual massaging into the fabric of legal doctrine that awaits the opinion: the conservatives’ efforts to reconstruct the majority opinion so as to give it fuller elaboration and better doctrinal grounding; the liberals’ project of turning a startling contemporaneous defeat to longer-range doctrinal advantage.

integrated into doctrine; it may be forgotten as an ill-fitting embarrassment, or it may be taught as part of the “anti-canon”⁴⁴ – a series of opinions through which constitutional law professors try to inculcate in their students a sense of what the Court should *not* do. Focusing on this last possibility, Balkin suggests that *Bush v. Gore* is more likely to be analogized to the Legal Tender Cases, a sequence of post-Civil War cases that exposed the Court’s partisanship, then to *Dred Scott* or *Lochner*, cases in which Courts read divisive or controversial political commitments into constitutional texts.

The main domain in which Balkin sees the case’s legacy unfolding, however, is the political realm. Although he believes the Court’s legitimacy will not suffer over the longer run, its middle-term fate depends largely on how the public receives the product of its labors: the Bush Presidency. Although he is agnostic about the likelihood of this outcome, he argues that Democratic critics’ best chance for the repudiation of *Bush v. Gore* lies in the skillful use of the political institutions and processes established by the Constitution to discredit the Bush Presidency, limit its long-term influence and reclaim the coordinate institutions of government for the Democrats.

Despite their obvious differences, Balkin and Post share a normative reticence in their response to the case. Neither explicitly advocates exceptional forms of protest; Balkin, too, adheres largely to the usual practices of scholarly critique. Yet Balkin seems ultimately agnostic as to whether the case should incite unconventional forms of resistance by law professors. He seems committed to the development of the “anti-canon,” as a means of reminding students how easily courts and lawyers can become implicated in moral and institutional errors. But he stops short of advocating that

Balkin also highlights the ways in which ideological division and the institutional position of the Supreme Court reinforce these efforts: with cadres of lawyers committed to the legitimacy and the particular ideological program of the current Supreme Court, it may not be necessary for the opinion to be integrated fully into pre-existing doctrine; with the assistance of these minions, doctrine may reshape itself better to accommodate the decision. Balkin, *The Boundary*, *supra* note 30, at 1445–1447.

⁴⁴ Balkin, *The Boundary*, *supra* note 30, at 1449 (citing J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 1018 (1998)).

academics select this approach to the case, over normalization or neglect; he limits himself to explaining the kind of anti-canon case he believes *Bush v. Gore* to be. Balkin shows greater interest in a less traditionally “academic” realm: the political process. It is here, Balkin suggests, that the American people can contain the political and legal damage of the Bush Presidency, and, by precipitating a subsequent Democratic victory, even rebuke the Court for its choice.⁴⁵ But his only explicit, normative suggestion – that the proper recourse for *Bush v. Gore* lies in the constitutionally-prescribed avenues for political contest – does not respond directly to the Court’s faithlessness or disregard for the normal processes of constitutional lawmaking. His comprehensive criticism of the opinion notwithstanding, Balkin treats *Bush v. Gore* less as a Rule of Law problem than as a case with politically threatening consequences.

One possible explanation for this characterization may lie in Balkin’s view of the Rule of Law itself. This view emerges as Balkin answers the argument that *Bush v. Gore* refutes the insights of legal realism, because it is so clearly “off the wall” that it has few implications for the broader constitutional functioning. Responding to this claim, Balkin notes that “the question of what is ‘off the wall’ and ‘on the wall’ is not a determinate matter. It is tied to a series of social conventions, including which persons in the legal profession are willing to stand up for a particular argument.”⁴⁶ Perhaps more importantly, the question of what is on or off the wall is “not wholly divorced from political ideology.”⁴⁷ The notion that disciplining principles such as legal craft create an area outside of which liberals and conservatives are likely to agree is, according

⁴⁵ It is worth noting however, that though Balkin describes the democratic initiatives that might lead to a containment of the Bush Presidency and by inference a rebuke to the Court for its initiative in *Bush v. Gore*, he gives comparable advice to the Republicans for defending the Court and its appointee, suggesting that in this section he is previewing possible scenarios and outcomes rather than advancing normative proposals.

⁴⁶ The fact that prominent lawyers were willing to advance these arguments and the Supreme Court to make them, contributes importantly to making them not clearly “off the wall.” Balkin, *The Boundary*, supra note 30, at 1444.

⁴⁷ Balkin, *The Boundary*, supra note 30, at 1445.

to Balkin, “seriously flawed”.⁴⁸ even the location of that boundary can “become a bone of political contention, the specialized form of political contention carried out through the forms and practices of legal argument.”⁴⁹ This forceful relativizing of what is “off the wall”⁵⁰ might be regarded as a kind of barrier to a strong academic response to Rule of Law violations. It would be difficult to advocate a strategy of forceful protest if identifying, or persuading others that, Rule of Law violation is an untractably uncertain and indeterminate process.

Even if this reading of the above argument is correct, however, it is difficult to know what it implies about Balkin’s normative position. Balkin’s sense that it is difficult to engage conclusively about what constitutes a Rule of Law violation may have led him to reject the possibility of a more unconventionally resistant academic role. This, in turn, may have triggered his focus on more political means of containing the damage from the case. However, one may also read his interest in more explicitly political forms of response as an attempted enlargement of the academic purview: academics might turn to political solutions as an unconventional means of underscoring the lawlessness of the opinion. Balkin does not elaborate on his reasons for this emphasis, however, and his readers are left to draw their own conclusions.

III. THE LEGAL ACADEMIC IN A WORLD OF SOCIAL PRACTICE

The reluctance of scholars such as Post and Balkin to attempt a non-traditional response to *Bush v. Gore* is in some respects surprising. Unlike Sunstein or Michelman, they see no way of tying the opinion to some reasonable pattern of institutional practice, or some future doctrine that will ameliorate its apparent lawlessness. More to the point, their larger view of the Rule of Law does not require that academics serve as apologists for the Court,

⁴⁸ Balkin, *The Boundary*, supra note 30, at 1446.

⁴⁹ Balkin, *The Boundary*, supra note 30, at 1446.

⁵⁰ Indeed, the use of the term “off the wall” – a term that is colloquial and likely to be perceived as far more subjective than reified or mythologized terms such as “lawfulness” or “Rule of Law” – serves to relativize (or highlight the relativized character) of the discussion from the outset.

or limit themselves to damage control in vindicating the Rule of Law. In fact, both share with Radin a view that those outside the Court – and particularly those with expertise in assessing or interpreting the Court’s pronouncements – play an active role in the process of lawmaking. For Balkin, the social practice is a cacophonous, multiperspectival, uncoordinated process of debating the merit or plausibility of decisions, and defining the boundaries of legality. For Post, the social practice consists of a narrower, more explicitly collaborative partnership between courts and their legal academic interpreters. Neither scholar understands this vision to entail any obligation of unconventional resistance on the part of legal academics who see a violation of the Rule of Law. A conventional form of academic criticism is what both ultimately have to offer, though each, in his own way, seems to sense its inadequacy.

In the final section of this paper, I will argue that this limited normative view is in tension with these authors’ social practice premises. In fact, a social practice view of lawmaking militates strongly in favor of a responsibility on the part of the legal academic – at least as great and perhaps greater than that of other citizens – to offer forceful, exceptional resistance to lawlessness on the part of the Court. In this section, I will reconceptualize Rule of Law violations by the Court, from the perspective of this broader social practice understanding. More specifically, I will highlight a kind of violation, implicit in the Court’s decision in *Bush v. Gore*, that inflicts particular damage upon a social practice vision of lawmaking. I will explain why this category of violation, in particular, mandates the kind of extraordinary action exemplified by Radin’s petition, and responds to the reservations about starker forms of resistance implied by Balkin and Post. In concluding, I will describe some of the ways in which a legal scholar might attempt to resist or protest an opinion like *Bush v. Gore*.

A. An Emerging Social Practice Vision

In the “social practice” view articulated by Margaret Jane Radin, law formation requires more than the promulgation of a rule: it also requires an active response by those who are subject to it. It is not simply their assent or compliance, but the ease or inevitability with which they seem to decide in favor of compliance that helps

to establish the rule's validity. To the extent that there is reservation or discomfort about the applicability of the rule, the rule is undermined, shifted in its range, or redefined. Moreover, Radin does not simply describe a one-way relation in which the legislators propose and the people dispose: what legislators enact, or judges decide, gains its law-like quality, in part, from the way in which it reflects norms circulating among the governed. Judge Wright's decision in *Robinson*, Radin tells us, was lawful in part because it affirmed and encouraged the housing activism that was part of a larger movement of grass-roots protest at the time.

The social practice vision implicit in the work of Balkin and Post is different in certain respects. It focuses primarily on the constitutional law that is made by federal courts⁵¹ and it reflects a normative enterprise of making a powerful and non-democratic Court accountable to those it governs, for what Post would describe as its inevitable intermingling of politics and principle. This vision also replaces the external observation of practice described by Radin and Wittgenstein with a more internal perspective: it does not simply observe patterns of compliance but inquires into the assessment that produces affirmation or critique. It stands in the shoes of the non-governmental partner assessing a judicial interpretation, and it asks how that assessment should be made. The non-governmental partner in this vision is differently situated than the citizens discussed by Radin: she is not contemplating the immediate application of law to her own life, but assessing an emerging doctrine that has been applied to the lives of others, and may yet be applied more broadly. In this sense, the non-governmental partner in the constitutional social practice vision is more like Radin herself, reflecting on the lawfulness of Judge Wright's opinion in *Robinson*.

In other ways, however, the two visions are quite similar: law-makers generate opinions or enactments, that are assessed, debated in their language, assumptions or implications; the social 'partners' decide whether to offer their assent, and their response ultimately

⁵¹ This distinction may make little practical difference inasmuch as Radin rejects such features of rule formalism as formal realizability, see Radin, *Reconsidering the Rule of Law*, supra note 10, at 800; in this sense, a rule that might be regarded by a formalist as more determinate in its scope and applicability than a constitutional doctrine, for Radin functions in much the same way.

affects the scope and meaning of the law. In the constitutional context, the assessments of the non-governmental partners and the debates they generate create a field, whose range and patterns of incidence or dispersal sketch the boundaries of the “legal.” Whether an opinion is thought to be sound, controversial or potentially illegitimate depends in part on its relation to this field. Accounts of this sort may provide a more limited form of “social practice” than that described by Radin: the Supreme Court is still an unequal partner in this relation, with the power to make individual interpretations “stick” notwithstanding their tension with the voices from the field. Yet, the functioning of the field tends to mitigate this tension, and this inequality over time. As academics, lawyers and other analysts and commentators offer their competing perspectives on the Court’s decisions, and on their application in other contexts, ameliorative dynamics can emerge. By linking the Court’s decision with past holdings or projecting it into future cases – much as Post suggests – these analysts can shift or unsettle its meaning in ways that may mitigate its tension with the perspectives that create the field. If there is vigorous and fairly unified critique of the Court’s opinion, and if such critique informs or extends to lay members of the public, commentators may induce the Court to begin to shift its interpretation itself. Even in cases where the field is, as Balkin suggests, more cacophonous and disunified in its substance, and more evanescent in its boundaries, sites of strong controversy may keep the status of an opinion in play, and may create fuel for future movement by giving fodder to dissenting members of a divided judiciary or Court.

What I have just described is the “normal Science” of a social practice approach. The functioning of this system imposes a kind of responsibility to respond: particularly, though perhaps not exclusively, on those whose specialized knowledge makes them more able to glimpse tensions, or gives them greater authority in putting pressure on legal meanings.⁵² This obligation is, in general, quite

⁵² In Post’s view, the universe of those particularly equipped to engage in this partnership is more circumscribed: although he likely sees an ancillary role for journalists, political scientists and the like. “Sustaining the Premise of Legality” suggests that legal academics, perhaps constitutional law professors, have a particular role in the social engagement that forges the law. I tend to think that this universe is slightly larger and looser and involves a range of interpretive professionals, as well as laypersons in some contexts. I should add that this notion, that

easily discharged: offering such commentary is, after all, the job of legal academics, journalists and other analysts. It can be readily, and unremarkably, accomplished within the usual scholarly and popular venues in which such reflections tend to be offered, or incorporated in various forms of appellate brief. We must now consider how things differ when academics and other commentators confront an opinion which they do not simply view as wrong-headed, but rather see as a violation of the Rule of Law.

B. Violating a Social Practice View of the Rule of Law

To answer this question it is necessary to define more clearly what might constitute a Rule of Law violation, for purposes of this vision. One obvious possibility is simply a more extreme version of the controversial opinion described above. If the shifting constellation of interpreters' views defines a kind of responsive field of legality, a controversial opinion approaches the boundary, while a Rule of Law violation moves off the map entirely. One might call this kind of violation a "field violation." This is clearly the kind of breach that Radin envisions when she says:

Within th[e] domain of acceptable legal argument there is controversy. After each side has given the other side what it believes are completely convincing arguments, the controversy often remains. Yet the community of legal practitioners understands that some arguments are off the charts or out of bounds – not acceptable legal argument . . . *Bush v. Gore* . . . is . . . outside the boundaries of acceptable argument.⁵³

Balkin raises a credible objection to this view when he argues that with the boundaries constantly in flux, as they would be in this kind of uncoordinated, collective process of formulation, and with perceptions likely to vary wildly with variations in ideology or features of social location, it is actually quite difficult for individual commentators to tell, let alone to agree with others about, what is off the map. Whether this means, as his argument seems to suggest, that it is impractical or incoherent to contest Rule of Law violations

interpretation by legal scholars and others creates a field that may exert force on future constitutional decision-making, is not unique to the authors I discuss here. Threads or variants of it, may be identified in the thought of other legal theorists: Ronald Dworkin might be one example.

⁵³ Radin, *Can the Rule of Law Survive*, *supra* note 12, at 136–137.

in these terms, is less clear. Presumably, even Balkin would concede that there are some kinds of decisions that are simply outside the bounds, particularly of portions of the field that have become stable enough to permit participants to agree about ‘distance’: *Dred Scott*, a case he describes as being less than analogous to *Bush v. Gore*, would seem to be such a case. So Balkin’s objection may ultimately decrease to a disagreement about the number of cases that fall within this unusually clear category, and, perhaps about whether *Bush v. Gore* is one of them.

Balkin may also disagree – this is not entirely clear from the passage I discuss above – about the extent to which argument is likely to be availing, in a legal universe where differences cannot be resolved by reference to some universal rationality or shared decision procedure. Some scholars have argued that the indeterminacy and irreducible pluralism of perspectives identified by critical scholars points to a kind of nihilistic despair: with no unifying set of foundational principles, exchange is simply a matter of asserting “just what you think” and there is little point to efforts at persuasive argument.⁵⁴ It is not clear that Balkin holds this view; in fact, it would be surprising in a scholar so conversant, and so frequently allied, with various forms of critical theory. However, a moderated version of this view might be consistent with the view implicit in his discussion: that protesting a Rule of Law violation may not be the best terms to contest the decision in *Bush v. Gore*. I would tend to say, with scholars such as Joseph Singer or Roberto Unger, that argument – inconclusive as it will often be in a universe not structured by common, foundationalist premises – is all we have to attempt to persuade each other, and our best chance lies in making use of it.⁵⁵ If the ‘field’ is not a fixed domain, and we inevitably

⁵⁴ See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale L. J.* 1 (1984) (hereinafter, Singer, *The Player and the Cards*) (describing and critiquing this kind of argument).

⁵⁵ Singer and Unger make their arguments in slightly different contexts. Singer is concerned with the process through which we all make up our minds about important moral choices, and judges make up their minds about important legal choices, rather than the process through which we attempt to persuade each other that a Rule of Law violation has occurred, but his representation of these processes through the metaphor of conversation is relevant to this latter context as well. Singer notes:

differ about its boundaries, we can at least make the best case we can to each other that a particular case lies within or outside it. Such arguments respect our substantive commitments, and despite the lack of shared perspectives or controlling premises, may sometimes be able to generate at least a partial coalescence of views. As Singer notes, “Consensus, if it exists, is not something that just happens to be there . . . it must be created;”⁵⁶ and we create it, to the extent we can, through continuing engagement and inevitably partial forms of argumentation.

A more telling problem with using this understanding of a violation to impute a responsibility to undertake unconventional acts of protest is the one suggested by Post: a violation of this nature can be met with the ordinary forms of academic critique. According to this understanding, a Rule of Law violation is a bad decision, only *moreso*: the view of the critic is that the elaboration of a legal position in a given opinion places it far outside the boundaries of

When judges decide cases, they should do what we all do when we face a moral decision. We identify a limited set of alternatives; we predict the most likely consequences of following different courses of action; we articulate the values that are important in the context of the decision and the ways in which they conflict with each other; we see what relevant people (judges, scholars) have said about similar issues; we talk with our friends; we drink enormous amounts of coffee; we choose what to do. There is nothing mysterious about any of this. The only thing that makes it appear mysterious is the myth that judges have an advantage that ordinary citizens do not have that allows them to adjudicate value conflicts rationally: legal reasoning. But there is really nothing about legal reasoning that gives judges an edge on difficult political and moral questions. All it does is articulate in a more systematic fashion the conflicting arguments that are generally considered relevant to political and moral questions.

Singer, *The Player and the Cards*, *supra* note 54, at 65. Unger envisions a decision-making process that involves mediating between “the available ideals of social life . . . and their flawed actualizations in society,” but he too envisions a dialogic (and dialectical) process as replacing a reliance on some shared rationality or decision procedure. “To engage in [this process] self-reflectively,” he notes, “you need make only two crucial assumptions: that no one scheme of association has conclusive authority and that the mutual correction of abstract ideals and their institutional realizations represents the last best hope of the standard forms of normative controversy.” Roberto Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 561, 579–580 (1983).

⁵⁶ Singer, *The Player and the Cards*, *supra* note 54, at 64.

the field – farther, perhaps, than the Court or others might suspect. This would seem to be a kind of problem that could be confronted by legal academics in the usual terms in which they respond to the Court: through law review articles, or the kind of indignant classroom critique offered by Post once his initial moment of vertigo recedes. One can attempt a more precise or cogent description of the boundaries of the field, in order to help the Court or other commentators see how obviously a particular opinion falls outside it. The dramatic kind of protest initiated by Radin may seem unnecessary when the defects of an opinion can be effectively exposed in this way.

However, this is only one kind of Rule of Law violation: there are others, I would argue, that cut more deeply into the fabric of social practice lawmaking. Let us imagine, for example, an opinion that largely dispensed with the need for justification of its decisional outcome: it offered little or no argument for its resolution but simply asserted its decisional will. Such an opinion would not simply breach the boundaries through which debate and discussion had, roughly, defined the “legal”: it would short-circuit the process of assessment altogether. This would clearly breach the preconditions of the partnership inferred by Post; but it would also be anathema to broader conceptions of constitutional social practice. If lawmaking doesn’t end with promulgation – or in the constitutional context, with judicial articulation – there must be evaluation and response. For such assessment to occur, there must be some effort by the judiciary at elaboration or justification. Without it, there is little to assess or respond to, and the social practice of lawmaking cannot continue. Like a citizen who is asked to follow a law of which she has no knowledge, the social partner confronted with such a decision lacks the substantive basis on which to comply or resist. The entire enterprise of lawmaking, in its social or collective guise, is rendered impossible. We might call such a violation a “social practice violation.”

There are also other, related means of truncating the social practice component of lawmaking. If an opinion not wholly devoid of justification, was rendered in such a way that it effectively cut itself off from past precedent or future application, this would curtail a social practice of assessment and response. This kind of “social

practice” violation targets not simply the necessity but the nature of constitutional assessment. Post argues persuasively, for example, that part of the collaborative activity of lawmaking is to interpret judicial decisions in ways that relate them to past precedents and possible future cases. An opinion that starkly departed from past precedent, or sought to insulate itself from future application, would be virtually impossible to locate in the relevant domain, and therefore it would be largely immunized against the kind of analytic treatment through which any shared practice of lawmaking might occur.⁵⁷

I would argue that *Bush v. Gore* commits both “field” and “social practice” forms of Rule of Law violation. Concerning Court’s equal protection analysis, or its definition of irreparable harm, in enjoining the recount in the first place, the opinion is subject to the objection that it was simply off the map, as precedent and the debates of commentators had defined the legal terrain in those areas. But other elements of the opinion come closer to the domain of ‘no effort at justification at all’: the failure to permit the state to remedy the violation by the initiation of a recount under appropriate standards, made possible by a tendentious and almost completely unelaborated interpretation of the safe harbor provision of the Electoral Count Act, might be the most obvious example. But most conspicuously, the Court’s jarring combination of an almost unprecedented equal protection analysis, with a proviso that this approach should not be presumed to apply to future cases, makes engagement with the case, on the usual terrain of the past and future, all but impossible. The decision is not rendered as a thread that can be juxtaposed to, or

⁵⁷ The possibility of these distinct forms of Rule of Law violation provides at least a partial answer to Balkin’s concern about the ultimate indeterminacy of claims of Rule of Law violation. The claim that a decision has truncated the social dimension of lawmaking is subject, of course, to differing views, that cannot predictably be resolved in a post-foundationalist world. Some critics see the “safe harbor” discussion as fully and credibly elaborated while others may view the decision as plausibly related to the past and at least potentially injectable into the future. However, at the least, the gravamen of these claims is not simply an amplified version of the usual critical claim about distance from the socially-defined center of gravity. Because what is being alleged is, comparatively, a rarer and more serious event; there may be fewer cases in which there is so little chance of making persuasive headway that claiming violation of the Rule of Law seems pointless.

woven into, a larger constitutional fabric; temporally and analytically speaking, it reduced to a single, vanishingly small point, as to which evaluative purchase becomes virtually impossible. Robert Post eloquently charges the Court with truncating the political process; but, equally importantly, the Court has truncated the social process responsible for generating the meaning of legality.

In addition, in *Bush v. Gore*, the nature and publicity of the decision enhance the significance of the violation. The Court perpetrated these breaches in a case of unprecedented importance, in a context of unparalleled visibility. With the eyes of the nation upon it, after more than a month of publicly analyzed legal twists and turns, the Court could not have imagined that its analytic departures, or its failures to justify or relate its position, would go unremarked. The salience of the decision – the fact that it selected a President of the United States – exacerbates both forms of violation: a decision that veered from the domain of “law,” or truncated social processes of lawmaking might be less threatening in a technical area with few implications for the average citizen. In a decision that selects the President, and helps define electoral process, such departures are particularly difficult to accept. The publicity or visibility of the case serves mainly to underscore or amplify the “social process” violation. A court that abandons its commitment to a shared process of lawmaking in plain view of the citizenry has done something particularly flagrant. The question, thus clearly framed, concerns the contours of the obligation to respond.

C. A Practice of Resistance

In cases in which the social practice of lawmaking is radically disrupted, the usual forms of academic commentary are ill-suited to the task of response. To rely exclusively on forms of discourse that take the importance of dialogue as a central premise, when one’s discussion partner has left the field, or sought to render discussion impossible, seems obtusely beside the point. Moreover, the terms of standard legal critique – scholarly assessment of the “distance” between an opinion and the substantive boundaries of “law” – are inadequate to convey the nature or magnitude of the departure, and insufficiently public to alert the varied constituencies who should be concerned with such an event. What is needed at this point is

not simply more dialogue, but a frank objection to the truncation of dialogue, and an appeal to the importance of the social process that conventionally produces law.

Legal academics are particularly well-suited to perform these tasks. The legal academy is itself symbolic of the possibility of debate, and the practice of collaborative interpretation, in the making of law. Perhaps more to the point, legal scholars are well situated to explain to those with a more attenuated role in the social practice of lawmaking, when and how a decision by the Court has truncated the possibilities for socially-grounded dialogue. Such intervention may not be sufficient to trigger reconsideration by the Court, when the Court has even temporarily abandoned its commitment to more collective lawmaking. But it may be sufficient to generate awareness among the public and other institutions of government, whose vigilance, or tendency to regard with greater skepticism future decisions of the Court, may ultimately exert a pull on the Court's commitment to Rule of Law values. Moreover, not just the role-related competence of the legal academic but the stakes of the question create a responsibility among law professors to respond with extraordinary forms of protest under these circumstances. Post has argued that to acknowledge frankly the full magnitude of *Bush v. Gore*'s departure from norms of constitutional lawmaking "risks losing hold of the possibility of constitutional law." While I understand his conceptual point, as a matter of practice, this gets it precisely backward: to *fail* to acknowledge – publicly, articulately, to the full range of audiences who will hear – the full magnitude of the opinion's departures risks losing hold of the dialogic, collaborative possibilities of the social practice of constitutional lawmaking.

The manner and venue in which such a message should be delivered should be calibrated to the circumstances and magnitude of the violation. Resort to the political realm – such as Radin effected with her "Law Professors for the Rule of Law" petition – that reflects a symbolic refusal to occupy the realm of academic debate and persuasion that the Court's decision has evacuated. It is similar, in this sense, to Post's reluctance to discuss *Bush v. Gore* in a venue that might itself support the opinion's tenuous claims to legality. But such action does more than simply refuse, or exceed,

the traditional academic venues: condemnation of the opinion in the press, or through action in other institutions of government, serves to expose the opinion as an assertion of political will rather than a legitimate product of the collective, justificatory processes of law. The effect of such exposure extends beyond the symbolic: if properly framed, it might incite discussion of Rule of Law values; it can in any case mobilize constituencies, including those located in other branches of government, whose actions might constrain a court that has temporarily renounced a more collaborative approach to lawmaking.

However, once the decision to treat the opinion as a political act has been made, the academic resister inevitably faces choices about what forms of political resistance are appropriate. In this context, it may be useful to reflect on what – beyond public exposure of the Court’s breach, and provocation of dialogue about Rule of Law values – academics might want to achieve through their intervention. If one regarded the decision as an act of political will, one might also want to try to avert its consequences. In the case of *Bush v. Gore*, however, the possibility of this form of action is virtually eliminated by the Court’s decisive curtailment of the political process. Had the Court’s opinion permitted a recount in Florida,⁵⁸ for example, academic resisters might have turned to Congress, counseling members on how to reassert their constitutional prerogatives – and problematize the Court’s intervention – as it confronted choices among competing delegations. But given that the Court effectively precluded Congressional resolution – and

⁵⁸ Had the Court’s opinion permitted a recount in Florida, the opinion would have been somewhat less objectionable on (social practice) Rule of Law grounds. The apparent “field” violation implicit in the Court’s reading of equal protection, and the more serious “social process violation” in its departure from precedent and restriction of future application of its holding would have remained, although whether those would have been sufficient to justify academics’ resistance might have depended on how decisively the opinion actually affected the election. This complication underscores the point I make above about the role of factors such as the visibility of the decision and the salience of the issue. I will assume, for the sake of discussing this possibility, that the Court could have handed down an opinion that would have permitted the recount, and the possibility of some Congressional role in resolving the election, yet it still committed sufficient “field” and/or “social practice” violations to spur some academics to resistant action.

virtually any other form of intervention that might have affected the outcome of the election – the choices facing academics with this goal were exceedingly slim. Academics convinced of the illegitimacy of the Court’s decision might have counseled Al Gore to refuse to concede. However, this defense of the Rule of Law might have produced effects worse than the initial violation. While I do not rule out the possibility that legal academics, like other lawyers, might participate in acts of civil disobedience, counseling action that might have brought the government to a standstill does not seem like the appropriate place to begin.

Academics might, more appropriately, focus on forms of protest that would keep the Court’s breach before the eyes of the public, or interventions that would mitigate the most damaging consequences of its decision. However, even in addressing damaging consequences, academic resisters should continue to call attention to the social process violations that give rise to their indignation. Action that treats the Court’s decision as an assertion of political will seems most constructive when it does not simply fight political fire with political fire, but also underscores the value of a return to more dialogic, justificatory processes of lawmaking. For example, legal academics, like many other citizens, participated in protests at the inauguration:⁵⁹ informative brochures or leaflets in that context might have permitted law professors to demonstrate that the problem was not simply the judicial selection of President Bush, but the way in which it was perpetrated. Academics may also find it useful to contest some of the most controversial prerogatives of Bush’s Presidency on the grounds that he was selected through an illegitimate assertion of judicial power. One prerogative that has been a particular focus of academic attention, in this regard, is the President’s power to appoint judges, particularly Justices of the Supreme Court.⁶⁰ The justification for such action might seem strongest if

⁵⁹ Or, in the realm of micro-protest – which is less significant but not to be ignored – my personal favorite is a bumper sticker that says “Re-Elect Gore in 2004.” This kind of communication contests the legitimacy of the Court’s action; however, it does not explicate the problem in Rule of Law terms.

⁶⁰ Bruce Ackerman has argued, for example, that the President’s Supreme Court nominations are generally entitled to substantial deference from the Senate, because of the electoral relationship between the President and the people. However, *Bush v. Gore* disrupted this relationship, making the Senate “the only

one assumes a particular reason for the Court's departure from normal lawmaking processes: a desire to "pack itself" by selecting a Republican whose appointments would be politically congenial to the *Bush v. Gore* majority. It is not clear that all defenders of a social practice view would necessarily share this assumption. Yet even for those who do not, the President's power to appoint judges with lifetime tenure might be seen as a vehicle for entrenching, in virtual perpetuity, the effect of this exercise in illegitimate decision-making. The publicity that attends this power, particularly in the case of nominations to the Supreme Court, also creates a context in which scholars might call attention to the violations implicit in the original decision. Senate confirmation hearings might provide a fascinating, highly public forum to discuss the legitimacy of Bush's selection and the problematization of his prerogative that follows from it.

At the same time, it seems questionable for legal academics to focus exclusively on the political realm when there is important work to be undertaken in the academic context. Notwithstanding the drawbacks of traditional academic venues for exposing or protesting a "social practice" violation, there may still be forms of scholarly expression that underscore the exceptional character of the Court's intervention. Kim Scheppele has argued, for example, that judicial decisionmaking in *Bush v. Gore* – at both state court and Supreme Court levels – reflects a violation that might be remedied by recourse to "Rule of Law" amendments to the Constitution, an expedient

popularly elected institution that can control a runaway Court." Consequently, Ackerman argues, the Senate should exercise its power to block any new appointments to the Court, at least until Bush has won the 2004 election "fair and square." See Bruce Ackerman, *The question of Legitimacy*, in Bruce Ackerman ed. This means of protesting *Bush v. Gore* merits sustained attention, as the judicial appointments power is one of the few prerogatives of the President that might successfully be separated, or insulated, from the wave of bipartisan support for presidential prerogatives that has followed the attacks of September 11. This is true both because federal adjudication has generally been conceived as a domestic matter (a conception that may or may not persist as the controversy over the creation of secret military tribunals unfolds) and because judicial selection, particularly at the Court of Appeals and Supreme Court levels, has become sufficiently politically polarized that the levels of bipartisan collaboration that have emerged since September 11 seem unlikely.

that has been successful in several central European countries.⁶¹ Although Scheppele's work is grounded on a different conception of the Rule of Law than the one I develop here, her advocacy of a textual, Constitutional solution to the violations of *Bush v. Gore* underscores the seriousness of its departures in a way that is distinct from the usual run of academic critique. More centrally, there is the question – frontally raised but inconclusively answered by Post – of how to present this case to one's students. A shamed silence, followed by a return to business as usual seems unlikely to instill in students the substantive understanding or skeptical posture necessary to respond to such incursions in the future. It is crucial that legal academics continue to think about how to teach *Bush v. Gore*. My view is that the case should be presented not in the context of equal protection, but as an instrument for exploring the meanings of the Rule of Law.⁶² Through this emphasis, students could be introduced to the various theories of the Rule of Law, including a social practice

⁶¹ Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Rule of Law*, 149 *U. Pa. L. Rev.* 1361 (2001).

⁶² A closer question is how this case should be taught in a course focussing on voting rights. I am critical of Sunstein's article, *supra* note 22, which seemed to me to use a brief, largely suggestive discussion of the *Bush v. Gore*'s potential for influencing voting rights doctrine to blunt the force of the opinion's violations, at a time when commentators and public were still trying to assess the magnitude of the Court's departure. Once the defects of the opinion have been more fully aired, however, I do not necessarily see it as inappropriate for litigators to use the case broaden the scope of the right to vote. Thus I also think it can be appropriate for faculty members to include in their voting rights courses a systematic evaluation of its potential to affect voting rights law, in a course on voting rights (a discussion, I might add, that allows for the possibility of a negative conclusion on this question). Such treatment need not, moreover, be inconsistent with an effort to expose the opinion's Rule of Law failings. In my Voting Rights course this fall, I attempted this sort of synthesis. Using the Issacharoff, Karlan and Pildes' casebook, *The Law of Democracy* (2d ed. 2001), which includes a careful and nuanced examination of both the unfolding of the case and its implications for voting rights doctrine, we discussed the relation of the case to pre-existing voting rights law and its possible future applications. Our discussion often yielded skepticism about what kinds of analytic relations, in fact, existed, and about the political will of the federal courts to make good on the kinds of rights toward which they had gestured in *Bush v. Gore*. These questions then provided a segue into the second portion of the unit, in which I provided students with a series of supplemental readings that presented different accounts of the Rule of Law, and permitted us to discuss *Bush v. Gore* as a Rule of Law case. I could imagine that a

approach, and could debate the claims of violation that might be raised in connection with *Bush v. Gore*, *Dred Scott v. Sandford*, the Legal Tender Cases, and others. One motivation behind this strategy is to avoid normalizing the opinion, an outcome that might be accomplished by its pedagogical integration into pre-existing bodies of doctrine, as well as by the explicit justificatory efforts of scholars such as Michelman or Sunstein. Academics committed to the defense of the Rule of Law should resist this normalizing effort in any of the venues in which it appears. But teaching *Bush v. Gore* as a Rule of Law case is also a crucial means of educating the next generation of students, to be able to perform and defend their role in social practice lawmaking.

IV. CONCLUSION

The theoretical and political innovation of Margaret Jane Radin, and the more recent, ambivalent critiques of scholars such as Post and Balkin, may help legal academics to respond forcefully and creatively to the departures of *Bush v. Gore*. For the social practice view of constitutional lawmaking that is integral to each of these theories, it provides the analytic structure for describing the violation, as well as for framing the form and obligation of response.

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professor who actually saw doctrinal connections between *Bush v. Gore* and pre-existing equal protection doctrine might try something similar in a Constitutional Law class, but for me the connections strike me as too attenuated to merit such treatment.