

The logo is a large, stylized letter 'J'. The left vertical stroke of the 'J' is black, while the top horizontal bar and the right vertical stroke are blue. The 'J' has a classic serif font style with a curved bottom.

The Journal of Law

A Periodical Laboratory of
Legal Scholarship

Volume 1 • Number 1 • 2011

Opening Remarks

PUB. L. MISC.

Introducing Pub. L. Misc., by James C. Ho & Trevor W. Morrison
“Take Care” and Health Care, by James C. Ho
with miscellaneous public law documents

LAW & COMMENTARY

Three Invitations, by Ross E. Davies
Race, the Supreme Court, and the Judicial-Institutional Interest in Stability,
by Stuart Chinn
with commentary by Bruce Ackerman & Sanford Levinson

FANTASYLAW

2011 Draft Kit: A FantasyLaw Guide, by Alex B. Mitchell & Brian Rock

The JOURNAL OF LAW

A PERIODICAL LABORATORY OF LEGAL SCHOLARSHIP

Volume 1, Number 1

containing issues of

PUB. L. MISC.

LAW & COMMENTARY

and

CONGRESSIONAL RECORD, FANTASYLAW EDITION



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JL

THE JOURNAL OF LAW

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Congressional Record, FantasyLaw Edition: Alex B. Mitchell et al.

Advisers

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Yale

Diane Marie Amann
UC Davis

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Boalt Hall

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OPENING REMARKS

LIKE WATER FOR LAW REVIEWS

AN INTRODUCTION TO THE *JOURNAL OF LAW*

Ross E. Davies[†]

The *Journal of Law* looks a lot like a conventional law review, but it is really a bundle of small, unconventional law journals, all published together in one volume. Each journal is separated from the others by its own black-bordered title page. Look at this volume edge-wise and you will see. This structure saves money over separate publication. It also frees editors of the individual journals to spend more time finding and refining good material, and less time dealing with mundane matters relating to the printing and distribution of their work product. Thus the *Journal of Law*'s generic name: it is no one journal in particular, and it is not tied to any particular institution (like, say, the *Stanford Law Review*), subject (like the *Tax Law Review*), specialty (like the *Journal of Law & Economics*), or method (like the *Journal of Empirical Legal Studies*). The idea is that the *Journal of Law* will be an incubator of sorts, providing for legal intellectuals something akin to what business schools' incubators offer commercial entrepreneurs: friendly, small-scale, in-kind support for promising, unconventional ideas for which (a) there might be a market, but (b) there is not yet backing among established, deep-pocketed powers-that-be.¹

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

¹ Compare, e.g., Harvard Business School, *Harvard Launches Innovation Incubator*, www.hbs.edu/news/releases/innovationincubator.html (vis. Mar. 6, 2011), and Darden School of

The conventional law reviews that law schools support are, after all, like snowflakes. Microscopically speaking, each one is unique and beautiful in its own way. Practically speaking, they tend to be pretty much the same – difficult to distinguish absent identifying marks, especially when a large number are packed together, as in a ball or in a database.² But water (the main ingredient in snowflakes, along with air) is blessed with many opportunities to appear in different forms, while legal scholarship (the main ingredient in law reviews) must either crystallize into law review articles or risk eternal academic invisibility.³ The main objective of the *Journal of Law* is to provide legal scholarship with more opportunities to be more like water.

The *Journal of Law* comes, however, not to bury law reviews, but to praise them. The undeniable truth, regardless of where you stand in the wide range of positions on the merits of law reviews,⁴ is that the law review is the dominant life form in the world of legal academia. It is by far the most successful species of legal scholarship –

Business, *Incubator Hosts Record Numbers*, www.darden.virginia.edu/web/Media/Darden-News-Articles/2010/Incubator-Hosts-Record-Numbers/ (vis. Jan. 16, 2011), with Lockheed Martin, *Skunk Works*®, www.skunkworks.com/ (vis. Mar. 11, 2011) (“Skunk Works® Today” link leads to “Page Not Found” at www.lockheedmartin.com/404.html).

² MARIANA GOSNELL, ICE: THE NATURE, THE HISTORY, AND THE USES OF AN ASTONISHING SUBSTANCE 420-24 (2007); Harvard Law School, *Our Publications*, www.law.harvard.edu/about/publications.html (vis. Mar. 6, 2011) (16 journals).

³ Granted, it is a risk, not a certainty, because there are a few alternatives, most importantly books and blogs. But they have limitations. In academic law publishing, a book often is just a big law review article (or bundle of articles) published by professionals at a press instead of (or as well as) by students at law reviews. Compare, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001), with LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (Harvard University Press 2002); see also *Dilatatio ad Absurdum*, 4 GREEN BAG 2D 233 (2001). Acceptance of blogging as genuine legal scholarship (the definition of which is beyond the scope of this essay and probably the capacity of this author) is an open question, although its importance as a force in the legal academy is not. See notes 4-7 below and accompanying text.

⁴ See, e.g., Stephanie L. Plotin, *Legal Scholarship, Electronic Publishing, and Open Access*, 101 LAW LIBR. J. 31 (2009); Lawrence Solum, *The Journal of Legal Analysis & the Future of Peer Review*, LEGAL THEORY BLOG, lsolum.typepad.com/legaltheory/2007/07/the-journal-of-.html (July 11, 2007); Richard A. Epstein, *Faculty-Edited Law Journals*, 70 CHI.-KENT L. REV. 87 (1994). Law reviews have been admirably open to explorations of their own warts and beauty marks. See, e.g., 69 U. CHI. L. REV. 1 *et seq.* (Winter 2002); 47 STAN. L. REV. 1117 *et seq.* (Summer 1995).

the flowering pinnacle of legal-academic evolution. And so it is that in the richly blooming field of law reviews, the *Journal of Law* merely aspires to be a useful variety – or, more precisely, varieties. If the *Journal of Law* is to succeed, it will do so not by revolutionizing the development or dissemination of legal scholarship, but, rather, by gradually and constructively broadening the definition of what counts as a law review article and what counts as a law review.

But perhaps there is no need for greater variety in the forms of legal scholarship.

On the one hand, the enthusiasm that sometimes greets opportunities to diversify – blogging being the best recent example – suggests that there is a felt need among law professors and other legal intellectuals for more options in outlets for their scholarly thoughts.⁵

On the other hand, the reluctance that greets calls to include such material in, for example, promotion and tenure decisions suggests that while things other than law review articles (and books) might be interesting and even useful, the legal academy in general is not comfortable with funny-looking scholarship.⁶ After all, the commitment to the traditional form is so strong that almost anything generated in the *form* of a conventional law review article – even if it has little to offer in the way of *content* – will find its way into a law review.⁷ (What is a “conventional law review article”? Perhaps this will do for starters: a monograph dealing with a topic connected in some way to the law and containing (1) between 10,000 and 70,000 words, (2) more than 100 footnotes, (3) at least one theory, and (4) a byline featuring at least one law professor or powerful public official or private practitioner.)

⁵ See, e.g., Steven Keslowitz, *The Transformative Nature of Blogs and Their Effects on Legal Scholarship*, 2009 CARDOZO L. REV. DE NOVO 252.

⁶ Compare, e.g., Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 891 (2009), with Ellen S. Podgor, *Blogs and the Promotion and Tenure Letter*, 84 WASH. U.L. REV. 1109, 1110 (2006); see also Symposium, *Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025-1261 (2006); Robert S. Boynton, *Attack of the Career-Killing Blogs: When academics post online, do they risk their jobs?*, SLATE, Nov. 16, 2005.

⁷ *Editor's Preface*, 1 CONST. COMMENTARY 1, 1-2 (1984); David P. Currie, *Green Bags*, 1 GREEN BAG 2D 1 (1997); cf. Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 616 & n.114.

Or maybe – and this is, again, the predicate for the *Journal of Law* – there are some other paths along which law reviews might evolve: paths scattered with points at which something might look and quack enough like and yet unlike a conventional law review article to both (a) attract the respect such articles receive and (b) stretch, slightly, their definition. Over time, via the *Journal of Law* and other outlets, the legal academy might gradually inch its way into an environment in which more diverse forms of scholarship are respectable and therefore widely useable.⁸

Of course, if it turns out that all is right in the world of legal academic publishing (with no niches left for the journals of the *Journal of Law* to fill), or that the structure and culture of that world make evolution and diversification impossible, or that there is room and support for change but the *Journal of Law* is too poorly designed or managed to be a part of that change, then this project will flop. The market will speak.

THE INCUBATION

So, what will we be incubating? What novel forms or subjects or methods or whatever of legal scholarship will actually appear in the *Journal of Law*?

There will be four or five or six new journals and perhaps more in the short term (meaning in this, the first issue of the *Journal of Law*, and the next few issues). The initial three journals are listed below and described in greater detail in the introductions to their respective sections of this issue.

Over the long haul, the reader's guess is likely to be as good as ours. This is because the *Journal of Law* will incubate whatever promising ideas coming along. Anyone (or maybe only some people) who can convince the journal's management (see the masthead) that they have an idea that deserves a try will get a chance to put that idea into practice in the form of a dedicated, editorially freestanding journal-within-the-*Journal-of-Law*. Who can foresee what might turn up? Certainly not the proprietors of the *Journal of Law*.

⁸ See, e.g., Lawrence B. Solum, *Download It While It's Hot: Open Access and Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841 (2006).

That is pretty much all the *Journal of Law* is and will be: a bunch of experiments of indefinite character, content, and duration. Some of the experiments will fail, some might succeed. And among the successes some might become permanent parts of the *Journal of Law* while others might spin off into physically as well as editorially free-standing publications.

In this issue of the *Journal of Law* there are three journals:

- *Pub. L. Misc.* is a project of James C. Ho of Gibson, Dunn & Crutcher and Trevor W. Morrison of the Columbia University School of Law. Their plan is to provide a forum for the publication of a relatively neglected body of legal material: constitutional documents, recent and ancient, that originate outside of Article III of the U.S. Constitution.⁹
- *Law & Commentary* is an experiment in non-blind peer review in which signed reviews (by senior, influential scholars) are published side-by-side with the reviewed work.¹⁰ The first issue features an article by Stuart Chinn of the University of Oregon School of Law, with commentary by Bruce Ackerman of the Yale Law School and Sanford Levinson of the University of Texas School of Law.
- *The Congressional Record, FantasyLaw Edition*, is a student-edited journal (formerly an adjunct to the *Green Bag*) focusing on empirical analysis of the activities of federal legislators.¹¹

And we will be introducing at least one additional journal in the next issue of the *Journal of Law*:

- *Chapter One* is a project of Robert C. Berring of Boalt Hall, in which he reintroduces underappreciated classic law books by publishing the first chapter of a book in the company of one or two or a few good essays about it. His hope is that access to a

⁹ James C. Ho & Trevor W. Morrison, *Introducing Pub. L. Misc.*, 1 J.L. (1 PUB. L. MISC.) 13 (2011).

¹⁰ Ross E. Davies, *Three Invitations to Law & Commentary*, 1 J.L. (1 L. & COMMENT. 87 (2011).

¹¹ See *About FantasyLaw*, www.fantasylaw.org/index.php?nav=about (vis. Mar. 10, 2011).

convenient and unintimidating portion of a great book, combined with accessible analyses of it, will lure readers into the whole book, or at least to give them some direct familiarity with slices of that original work and some of the best thinking about it.

By giving scholars the opportunity to try out ideas like and unlike these – and especially the chance to do so without most of the costs, risks, and hassles associated with (a) getting institutional and financial support for developing them as freestanding enterprises and (b) doing the scut work of printing and distribution – the *Journal of Law* ought to increase the likelihood that good ideas (and maybe some bad ones) will get tested, rather than merely talked about.

Another benefit of this co-operative approach may be a reduction in, perhaps even a reversal of, the proliferation of law reviews. Enterprising scholars who work in the *Journal of Law* will not need to build a whole new law review edifice (or perhaps gamble on something more exotic) in order to test drive a new idea. If an idea tested in the *Journal of Law* turns out to be bad it will never become a failed investment in a whole new law review. Instead it will be in large part the *Journal of Law*'s less-costly investment, one that might or might not have a positive academic return.

Furthermore, it is also possible that the *Journal of Law* will end up as the home of good ideas that are currently manifesting unsuccessfully as conventional law reviews but that would do better in a different form. It is an amusingly perverse prospect, given that the *Journal of Law* is itself a new law review – physically speaking, that is – in a world already seen as overpopulated with law reviews.¹²

THE INK ON PAPER

For the time being, the *Journal of Law* will be a print journal, as well as an electronic one (we are at www.journaloflaw.us). At first blush this commitment to old-fashioned print might seem an

¹² See, e.g., Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928 (1990); cf. NORMAN MACLEAN, *YOUNG MEN AND FIRE* (1992) (describing the use of backfires to fight main fires).

odd choice for a publication so amply supplied with self-congratulatory feeling about its innovative tendencies. A print edition is, however, an essential part of the *Journal of Law*, at least for now, because our objective is to operate and appear as much like a traditional law review as possible in order to leave the editors of our journals as much latitude as possible to push boundaries in other directions that are important to them. And there are still powerful links between scholarly respectability and ink-on-paper publication. The evidence pervades legal academia: Is there a law school at which the flagship law review appears exclusively electronically?

As long as the most prestigious law reviews appear in print, doing without a print edition – an appealing prospect for environmental as well as financial reasons – is not a viable option for a journal that aspires to anything approaching comparable status. When will it be safe to abandon ink and paper? That is difficult to predict, but such a move must await leadership by leaders. This might take any of a number of forms, for example:

- *A movement by leading producers of scholarship.* Perhaps a public commitment by a critical mass of leading scholars that they will not place their scholarly work in print publications – a commitment subsequently honored for a period of time sufficient to convince observers of its durability. For example, if the faculty of the [insert names of prominent law schools of your choice] vowed to boycott print law reviews, and then delivered on that commitment, the [insert names of prominent law reviews of your choice] might abandon print, and they might be followed by many other faculties and journals.
- *Or a movement by leading disseminators of scholarship.* Top publications at leading law schools could go web-only. An impressive group of law librarians has called for something of this sort.¹³

¹³ See Durham Statement on Open Access to Legal Scholarship, cyber.law.harvard.edu/publications/durhamstatement (vis. Sept. 21, 2010):

On 7 November 2008, the directors of the law libraries at the University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, Harvard University, New York University, Northwestern University, the University of Pennsylvania, Stanford University, the University of Texas, and

For example, if the *Columbia Law Review*, the *Harvard Law Review*, the *University of Pennsylvania Law Review*, and the *Yale Law Journal* all abandoned print (we know they can coordinate because they do so to produce the *Bluebook*), then going web-only might well enhance by association the reputations of lesser journals that followed their lead. And the Ivy League snowball might become an avalanche. Or if student editors lack the vision or courage, faculty could take the lead by ceasing print production of important journals they edit themselves, such as the *Journal of Legal Analysis* (at Harvard), *Law & Contemporary Problems* (at Duke), the *Journal of Empirical Legal Studies* (at Cornell), *Law and History Review* (at the American Society for Legal History), and the *Supreme Court Review* and the *Journal of Legal Studies* (at Chicago).

- *Or a movement by important consumers.* Law schools could cancel their subscriptions to print journals, at least those from leading law schools.¹⁴ Or some other prestigious and influential institutions could do the same – perhaps the federal courts or a few prominent state-court systems or the Am Law 100. To give such an effort real bite – and credibility if it is based on concerns about the environment – the cancellations might also include electronic versions of journals that persist in producing print editions.
- *Or a movement by influential employers.* Judges sensitive to environmental concerns could refuse to hire law clerks who have served on the editorial boards of law reviews that produce print editions. How many successful law students would work

Yale University met in Durham, North Carolina at the Duke Law School. That meeting resulted in the ‘Durham Statement on Open Access to Legal Scholarship,’ which calls for all law schools to stop publishing their journals in print format and to rely instead on electronic publication coupled with a commitment to keep the electronic versions available in stable, open, digital formats.

See also Richard A. Danner, *The Durham Statement on Open Access One Year Later: Preservation and Access to Legal Scholarship*, DUKE LAW FACULTY SCHOLARSHIP, Paper 2145, scholarship.law.duke.edu/faculty_scholarship/2145 (vis. Sept. 21, 2010).

¹⁴ Signers of the Durham Statement on Open Access to Legal Scholarship (see note 13 above) can do this now, if their deans permit it.

on a journal if they knew that doing so would end their chances of landing a clerkship? Law schools could amend their promotion and tenure regulations to forbid consideration of works appearing in print. To be fair, measures of this sort would have to include transition periods: a fairly short one would be plenty for judicial clerkship candidates, given the rapid turnover in law review editorial boards, but a longer one (five years? ten years?) might be needed for those on tenure tracks.

None of these approaches would be certain to succeed, and it is possible that if a few big dogs were to give one a try, they might discover that they are actually tails. That prospect might itself be sufficient to explain why none has yet been tried.

Then again, inaction on all these fronts – which does seem to be the status quo – might quite reasonably be taken to indicate that there is some value to ink on paper that makes the financial and environmental costs worth bearing.¹⁵ (Although “[t]he economics of law reviews is obscure”¹⁶ and good information on the subject is hard to come by, thoughtful observers have argued that print editions are not moneymakers, at least for the law reviews themselves.¹⁷)

In any event, it might be a noble sacrifice by journals (or scholars) of inferior status to take the lead in abandoning print – while journals (and scholars) of superior status preserve their status in part by remaining in print – but such a sacrifice likely would not change the status of print or its importance to scholarly influence and ca-

¹⁵ See, e.g., AAUP Task Force on Economic Models for Scholarly Publishing, *Sustaining Scholarly Publishing: New Business Models for University Presses* (Mar. 2011); WILLIAM POWERS, HAMLET’S BLACKBERRY: A PRACTICAL PHILOSOPHY FOR BUILDING A GOOD LIFE IN THE DIGITAL AGE (2010); Jason J. Czarnecki, *What’s going on at SSRN?*, czarnecki.com/2010/10/19/whats-going-on-at-ssrn/ (vis. Mar. 19, 2011) (reproducing Gregg Gordon, *SSRN Announces Forthcoming “Purchase Bound Hard Copy” option for Free PDF documents in SSRN eLibrary*, Oct. 19, 2010)).

¹⁶ Dave Hoffman, *The Economics of Law Reviews*, CONCURRING OPINIONS, www.concurringopinions.com/archives/2007/05/the_economics_o_2.html (May 14, 2007; vis. Mar. 27, 2011).

¹⁷ See, e.g., Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 780-81 (2006); Dan Hunter, *Open Access to Infinite Content (or “In Praise of Law Reviews”)*, 10 LEWIS & CLARK L. REV. 761, 774-77 (2006).

reers.¹⁸ Indeed, to the extent that print becomes the exclusive province of the established and the prestigious, the occupants of that province will have all the more reason to stand pat. And aspirants to scholarly respectability (and promotion and tenure) will have all the more reason to shape their work and their behavior to appeal to the owners and operators of those printed law reviews.

And so, in conclusion and on behalf of the *Journal of Law*, I ask: Got any good ideas?¹⁹

POSTSCRIPT

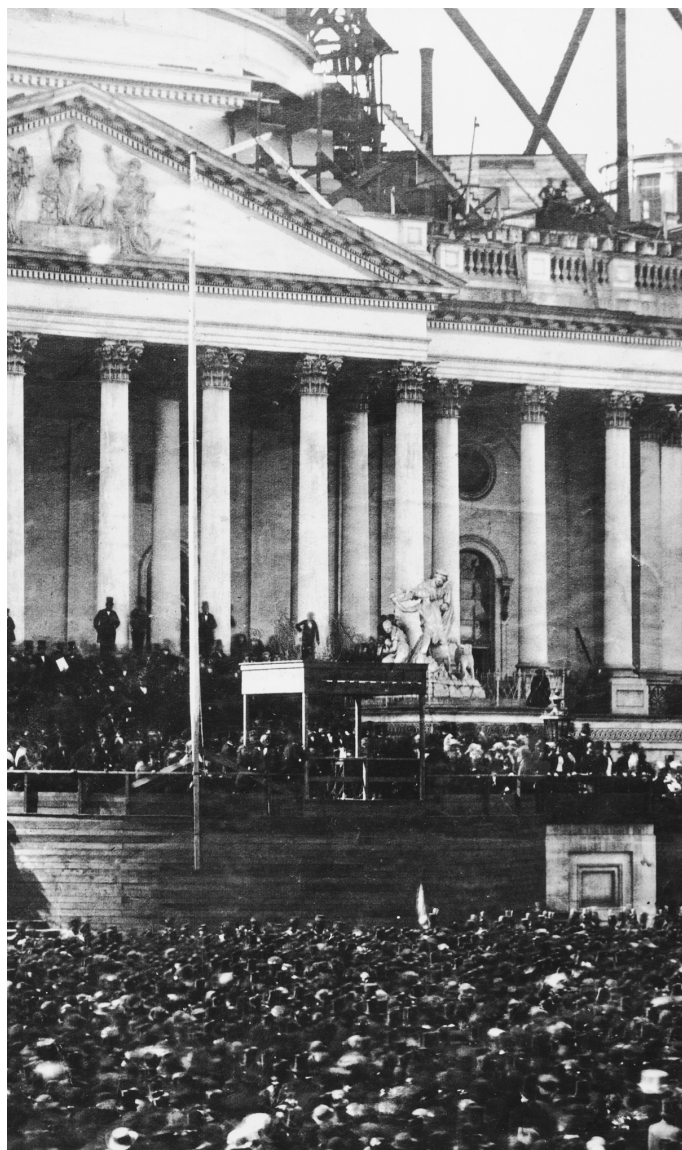
This is a resuscitated “Journal of Law.” A journal by that name was published in Philadelphia in 1830-31. It was one of many short-lived legal periodicals to come and go during the rugged early years of American law publishing.²⁰ Its slogan was, “Ignorance of the law excuseth no man.”²¹

¹⁸ See THE BLUEBOOK, Rule 18.2 (19th ed. 2010) (“*The Bluebook* requires the use and citation of traditional printed sources when available, unless there is a digital copy of the source available that is authenticated, official, or an exact copy of the printed source, as described in rule 18.2.1.”); Rita Reusch, *By the Book: Thoughts on the Future of Our Print Collections*, 100 LAW LIBR. J. 555, 558 n.15 (2008). On the other hand, a journal compelled to choose between print and electronic publication might well choose electronics. See Charlotte Brewer, *Only Words*, 32 WILSON Q. 16 (Autumn 2008).

¹⁹ Or a more interesting name for this journal? One thoughtful observer has suggested *The Red Bag*, an idea for which there is some support. Compare JOHN CORDY JEAFFRESON, A BOOK ABOUT LAWYERS 187-90 (1867) (noting ancient English traditions associating success at the bar and the privilege of carrying a red bag), with Donald R. Richberg, *The Rise and Fall of the Green Bag*, 1 GREEN BAG 2D 191 (1998), 18 GREEN BAG 465 (1906).

²⁰ See FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 202-20 (3d rev. ed. 1942; 1959 prtg.); Ross E. Davies, *The Original Law Journals*, 12 GREEN BAG 2D 187 (2009).

²¹ *The Journal of Law*, 12 GREEN BAG 2D 201 (2009).



PUB. L. MISC.

Volume 1, Number 1, 2011

PUB. L. MISC.

James C. Ho & Trevor W. Morrison, editors

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Pub. L. Misc. operates on the same terms as the *Journal of Law*. Please write to us at jho@gibsondunn.com and tmorri@law.columbia.edu, and visit us at www.journaloflaw.us. The cover of this issue shows the inauguration of President Abraham Lincoln (Article II) at the U.S. Capitol, which housed both Congress (Article I) and the Supreme Court (Article III). Library of Congress, Prints & Photo. Div., repro. no. LC-USZ62-22734 (Mar. 4, 1861).

INTRODUCING *PUB. L. MISC.*

James C. Ho[†] & *Trevor W. Morrison*^{*}

Two years before his death, David P. Currie completed work on what would become the last of his four-volume masterpiece, *The Constitution in Congress*. The series offers an extensive and rich treatment of constitutional debates in the political branches from the First Congress through the beginning of the Civil War. Coming on the heels of his acclaimed two-volume series on *The Constitution in the Supreme Court*, the later series was inspired by one central and profoundly important, yet too often unappreciated, insight: American constitutional law is practiced not just in courts of law by lawyers and judges, but also in the political branches by elected and appointed government officials.

To be sure, the idea that constitutional law exists outside as well as within the courts is not especially provocative today. But it still remains that too little attention is paid to extra-judicial constitutional analysis.

Part of the problem is a lack of visibility. For all their progress in recent years, our standard published reporters and databases still focus disproportionately on the collection and organization of judicial materials. Significant non-judicial materials are often far less readily accessible.¹

This should not be. Scholars routinely study correspondence by our Founding generation, including Presidents and leading members of Congress and the Constitutional Convention. For the same reason, modern correspondence between high-level executive and leg-

[†] Partner, Gibson, Dunn & Crutcher LLP.

^{*} Professor of Law, Columbia Law School.

¹ For some notable examples, see memory.loc.gov/ammem/amlaw/lwdg.html; www.gpo.access.gov/pubpapers/index.html; www.gutenberg.org/ebooks/11314; www.archivists.org/saagroups/cpr/.

islative officials and other similar documents are valuable sources of information and insight into our constitutional law and values. They deserve more sustained attention and study than they have received.

Introducing *Pub. L. Misc.* As students of the law – and especially of constitutional law as practiced in all three branches of government – we are pleased to announce a new forum for the publication of significant constitutional documents generated by the Article I and II branches of our nation’s government (and, where appropriate, their counterparts in states and localities).

We are particularly pleased to publish the inaugural edition of *Pub. L. Misc.* in the inaugural issue of the *Journal of Law*. And we are hopeful that *Pub. L. Misc.* will prove valuable (or least interesting) to legal scholars and commentators – as well as to the officials who practice constitutional law in the political branches.

We think providing this forum for examining the practice of constitutional law in the political branches can be helpful to a range of audiences. Government officials and their advisors might find the materials published herein relevant and helpful as they generate more of the same kind of materials themselves. Academic and journalistic commentators, on the other hand, might find these materials helpful when placing modern debates between the political branches in a larger context.

Even the casual political observer knows that participants in the political arena often incorporate constitutional arguments into their political rhetoric. The materials presented in *Pub. L. Misc.* might help provide a basis for scrutinizing such arguments for methodological consistency and intellectual integrity – that is, for “umpiring” constitutional rhetoric in the political branches. Hardly a day passes in our politics when one official or another doesn’t accuse a political adversary of somehow violating our cherished founding document. Rather than dismiss such rhetoric as purely political – fodder for political scientists, perhaps, but not for serious legal inquiry – we choose to take it seriously as constitutional argument. And we aim to do so in a scrupulously nonpartisan fashion.

Furthermore, it is our hope (you might even say, ambition) that this series will quickly become self-perpetuating – and that materials

potentially eligible for *Pub. L. Misc.* publication will begin to appear spontaneously at our electronic doorsteps for our editorial consideration.

There are countless lawyers of great skill and talent who populate the political branches of federal and state government across the country – and who craft *Pub. L. Misc.*-type materials on a routine basis. Based on our own experiences, as well as the experiences of our friends and colleagues who have practiced law at the highest levels of the political branches of government, we are confident that a rich treasure trove of materials exists, waiting to be discovered – and waiting to be compiled in an accessible and friendly forum such as this.

Debates about our Constitution and its enduring impact on our nation and our people are everywhere. You just have to look. We hope you will join us in the hunt.²

• • •

Editorial responsibility for any given edition of *Pub. L. Misc.* will rest with either one or sometimes both of us. Ho has sole responsibility for this first edition, and his introduction follows.

² We would like to acknowledge one important additional source of inspiration for *Pub. L. Misc.*, in addition to Professor Currie. The *Green Bag* has from time to time published precisely the kind of non-judicial material – both past and present – that we hope will become a regular staple of *Pub. L. Misc.* See, e.g., *Applying the War Powers Resolution to the War on Terrorism*, 6 *Green Bag* 2d 175 (2003) (publishing Congressional testimony by Deputy Assistant Attorney General John C. Yoo during the United States response to the 9/11 attacks); *Anticipatory Self-Defense*, 6 *Green Bag* 2d 195 (2003) (publishing an oft-cited but heretofore unpublished 1962 OLC opinion, authored by Assistant Attorney General Norbert A. Schlei during the Cuban Missile Crisis); *Irrecusable & Unconfirmable*, 7 *Green Bag* 2d 277 (2004) (publishing correspondence by Patrick Leahy, Joseph Lieberman, William Rehnquist, Edward Kennedy, and John Cornyn).



“TAKE CARE” AND HEALTH CARE

James C. Ho[†]

We begin our inaugural edition of *Pub. L. Misc.* with the Obama Administration’s recent decision not to defend the Defense of Marriage Act against constitutional attack. Given the sensitive and emotional nature of the issue, it is no surprise that the announcement has attracted strong reaction in various quarters, both positive and negative.

Some critics have claimed President Obama has exceeded the bounds of his role as President in interpreting the Constitution. Some have even taken to criticizing the President for violating his constitutional duty under Article II to “take Care that the Laws be faithfully executed.”

The Justice Department is often said to have a general “duty to defend” federal statutes against constitutional attack. But there is also significant historical evidence that the duty is not absolute – and includes room for executive discretion.

Some scholars may also recall discussions during the previous Presidential Administration regarding the use of Presidential signing statements to opine on the validity of federal statutes and to refuse enforcement of provisions deemed unconstitutional. We invite scholars to consider whether the Presidential decision to opine on the constitutionality of a federal statutory provision in an Executive Branch document is similar to or different from a Presidential directive not to defend such a provision in court documents.

In light of the current controversy, we publish in *Pub. L. Misc.* two documents from the U.S. Department of Justice – one during

[†] Partner, Gibson, Dunn & Crutcher LLP.

the Clinton Administration concerning the duty to defend, and another during the Bush Administration concerning Presidential signing statements.

• • •

Of course, just because something can be done doesn't necessarily mean it *should* be done. While some have criticized the President for refusing to defend DOMA, others have suggested that the shoe may someday be on the other foot – and that a future President might abandon the defense of any number of laws favored by the current one.

If there is higher profile constitutional litigation pending anywhere in the nation today, it may be the litigation surrounding the Patient Protection and Affordable Care Act. And there is, to be sure, no shortage of government officials who have stated quite emphatically their belief that the Act is unconstitutional – especially its so-called individual mandate provision.

But does that mean a future President would be within his or her right not to defend it? And even if it would fall within his or her constitutional authority to do so, would it be a proper exercise of good judgment? We look forward to scholarly discussion on that point as well.

To stir this particular pot, we publish in *Pub. L. Misc.* a series of documents from both sides of the debate from the community of state attorneys general – another potentially rich source of legal analysis that we hope will regularly add to the treasure trove of materials to be featured by *Pub. L. Misc.* We begin with two letters to Congress, authored by state attorneys general who argued that the legislation was unconstitutional months before it was even signed into law. And we end with an amicus brief later filed by other state attorneys general in support of the Act.

Professor Currie never got the chance to publish a series on *The Constitution in the States*. Perhaps he never would have. Even so, we are heartened to imagine him, somewhere, smiling – and perhaps even willing to endorse these efforts, if he could.

DUTY TO DEFEND – NATIONAL DEFENSE AUTHORIZATION ACT, 110 STAT. 186

Letter from Andrew Foïs to Orrin G. Hatch

March 22, 1996



U.S. Department of Justice

Office of Legislative Affairs

FILE

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 22, 1996

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

In your letter of February 21, 1996, you made several inquiries regarding the President's directive that the Department of Justice decline to defend section 567 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 328-29 (1996), in the event of a constitutional challenge to that provision in court. Section 567 amends 10 U.S.C. § 1177 to require the Department of Defense to separate from the armed services most members of the armed forces who are HIV-positive. The President instructed the Secretary of Defense and other executive branch officials to implement section 567, but further instructed the Attorney General not to defend the constitutionality of section 567 in litigation.

You have asked me to provide "any Justice Department legal opinions relied upon in deciding not to defend the constitutionality

of the H.I.V. provision,” as well as “any guidelines or criteria that the Justice Department used in reaching this decision.” Although the Department of Justice orally advised the President of the applicable legal standards to apply in evaluating the constitutionality of section 567, it did not provide the President any written advice.

After consulting with the Department of Justice, the President asked the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to assess the effect of section 567 on the needs and purposes of the armed services. As the President subsequently indicated in his Signing Statement, the Secretary and the Chairman advised the President that

the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government’s investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 Weekly Comp. Pres. Doc. 260, 261 (Feb. 10, 1996) (enclosed). [*2]

In his Signing Statement, the President stated that he agreed with the assessment of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff. Based on that assessment, the President “concluded that this discriminatory provision [section 567] is unconstitutional,” in that it “violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose.” *Id.* The President further stated that, “[i]n accordance with my constitutional determination, the Attorney General will decline to defend this provision.” *Id.*¹ In addition, the President in-

¹ For another case in which the Department declined to defend the constitutionality of a statute as a direct result of a Presidential determination that the enactment was unconstitutional, see Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (Senate Legal Counsel document No. 38) (notifying Congress that because President Bush had determined that the “must-carry” provisions of

structed the Secretaries of Defense, Veterans Affairs and Transportation to implement the Act in a manner that “ensure[s] that these [involuntarily discharged] service members receive the full benefits to which they are entitled.” Id.

You also have asked me to list “all previous instances when the Justice Department has refused to defend the constitutionality of a statute.” As far as we are aware, the most comprehensive catalogue of such cases is one previously compiled by the Senate Legal Counsel. The Senate Legal Counsel list, which is enclosed, indexes 45 communications and memoranda between Congress and the Department of Justice covering the years 1975-1993, detailing, inter alia, virtually all instances in that period in which either the Department has represented that it will decline to defend the constitutionality of a statute, or where the executive branch has determined that it will not enforce or implement a statute that it believes to be unconstitutional.² [*3]

As the documents compiled by the Senate Legal Counsel indicate, the Department has declared that it will decline to defend the constitutionality of a statute in a wide variety of circumstances. For example, in several of the cases listed by the Senate Legal Counsel,

the Cable Television Consumer Protection and Competition Act of 1992 were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court). See also Drew S. Days III, *In Search of the Solicitor General's Clients: A Drama with Many Characters*, 83 Ky. L.J. 485, 489-94 (1994-95) (discussing instances in which the President has instructed the Department of Justice to adopt certain legal positions).

² In recent correspondence postdating the Senate Legal Counsel's list, the Attorney General notified the President of the Senate and the Speaker of the House (i) that the Department of Justice has had a longstanding policy to decline to enforce the abortion-related speech prohibitions in 18 U.S.C. § 1462 and related statutes because such prohibitions plainly violate the First Amendment, and (ii) that, in light of this policy, the Department will not enforce the abortion-related speech prohibition in § 1462, as amended by section 507(a)(1) of the Telecommunications Act of 1996, and will not defend the constitutionality of that prohibition in two recently filed district court cases, See Letters from Attorney General Janet Reno to President of the Senate Albert Gore, Jr. and Speaker of the House Newt Gingrich (Feb. 9, 1996) (discussing Sanger v. Reno, Civ. No. 96-0526 (E.D.N.Y.), and American Civil Liberties Union v. Reno, Civ. No. 96-963 (E.D. Pa.)). This notification was based upon, and consistent with, a similar notification to Congress made by Attorney General Civiletti in 1981. See Letter from Attorney General Benjamin R. Civiletti to President of the Senate Walter F. Mondale (Jan. 13, 1981) (Senate Legal Counsel document No. 10).

the Department defended the constitutionality of a statute in district court, but declined to appeal an adverse decision because of dispositive precedent, the risk of producing damaging appellate precedent, or other litigation considerations. In a smaller group of cases, such as those described in footnote 2, supra, the President or the Department of Justice declined to enforce or implement a statute in the first instance, and the Department thereafter declined to defend the constitutionality of the statute in court.³

We are aware of several instances (some of which are reflected in the Senate Legal Counsel's list) analogous to the President's decision to enforce, but not defend the constitutionality of, section 567 of the Defense Authorization Act. In these instances, the executive branch enforced a statute in the first instance but the Department of Justice challenged, or explicitly declined to defend, the constitutionality of that statute in court. Such cases include the following:

(a) United States v. Lovett, 328 U.S. 303 (1946). As required by statute, the President withheld the salaries of certain federal officials. The Solicitor General, representing the United States as defendant, nonetheless joined those officials in arguing that the statute was an unconstitutional bill of attainder. Id. at 306. The Attorney General suggested that Congress employ its own attorney to argue in support of the validity of the statute. Congress did so, id., and the Court of Claims and the Supreme Court gave Congress's counsel leave to appear as amicus curiae on behalf of the enactment. The Supreme Court held that the statute was an unconstitutional bill of attainder.

(b) INS v. Chadha, 462 U.S. 919 (1983). Pursuant to a provision of the Immigration and Nationality Act, the INS implemented a "one-house veto" of the House of Representatives that ordered the INS to overturn its suspension of Chadha's deportation. Id. at 928.⁴ Nonetheless, when Chadha petitioned for review of the

³ In this category, see also, for example, Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1935).

⁴ See also Reply Brief for the Appellant [INS] in No. 80-1832. at 11-14 (explaining that the INS issued an order deporting Chadha, and "intended to enforce the law by subjecting Chadha to deportation" unless and until the court of appeals held the law unconstitutional).

INS's deportation order, the INS -- represented by the Solicitor General in the Supreme Court -- joined Chadha in arguing that the one-house veto provision was unconstitutional. *Id.* at 928, 939. Senate Legal Counsel intervened on behalf of the Senate and the House to defend the validity of the statute. *Id.* at 930 & n.5, 939-40. The Supreme Court invalidated the statutory one-house "veto" as a violation of the separation of powers. [*4]

(c) Morrison v. Olson, 487 U.S. 654 (1988). Pursuant to the Ethics in Government Act of 1978, the Attorney General requested appointment of an independent counsel to investigate possible wrongdoing of a Department official. *Id.* at 666-67. Despite the fact that the Department thus had "implemented the Act faithfully while it has been in effect,"⁵ the Solicitor General nevertheless appeared in the Supreme Court on behalf of the United States as amicus curiae to argue, unsuccessfully, that the independent counsel provisions of the Act violated the constitutional separation of powers.

(d) Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The FCC had a longstanding policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation. After the FCC initiated a review of this policy, *id.* at 559, a statute was enacted forbidding the FCC from spending any appropriated funds to examine or change its minority ownership policies, *id.* at 560, 578 & n.29. The FCC "[c]ompl[ie]d with this directive": it terminated its policy review and reaffirmed license grants in accord with the minority preference policy. *Id.* at 560. Nonetheless, the Acting Solicitor General, appearing on behalf of the United States as amicus curiae, argued that, insofar as the statute required the FCC to continue its preference policy, it worked an unconstitutional denial of equal protection. See Brief for the United States as Amicus Curiae Supporting Petitioner in No. 89-453, at 26-27. The Acting Solicitor General authorized the FCC to appear before the Court

⁵ Letter from Acting Attorney General Arnold I. Burns to President of the Senate George Bush at 2 (Aug. 31, 1987) (Senate Legal Counsel document No. 26).

through its own attorneys, “in order for the Court to have the benefit of the views of the administrative agency involved.” Id. at 1 n.2. FCC’s counsel, representing the Commission as Respondent, urged the Court to uphold the constitutionality of the FCC policy and the statutory enactment. Senate Legal Counsel also appeared on behalf of the Senate as amicus curiae to defend the constitutionality of the statute. The Court held that the statutorily mandated FCC policy was constitutional.

(e) Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied, 376 U.S. 938 (1964). A federal statute permitted the Surgeon General to condition federal funding for hospital construction on assurance by an applying State that the hospital facilities in question did not discriminate on account of race; but the statute explicitly instructed the Surgeon General to make an exception to this requirement where discrimination was accompanied by so-called “separate but equal” hospital facilities for all races. The Surgeon General issued a regulation that included such a “separate but equal” exception, id. at 961 & n.2 (quoting 42 C.F.R. § 53.112 (1960)), and subsequently approved federal funding to defendant hospitals, which were openly discriminatory, id. at 962-63, 966. The Department intervened on behalf of the United States in a private class action brought by black physicians, dentists and patients against the hospitals, and joined the plaintiffs in a constitutional “attack on the congressional Act and the regulation made pursuant thereto.” Id. at 962. The en banc court of appeals held [*5] that the statute and regulation violated the equal protection component of the Fifth Amendment’s Due Process Clause. Id. at 969-70.

(f) Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979). In this case, a statute created a program pursuant to which the Army could sell surplus rifles at cost, but only to members of the National Rifle Association. The Army, in compliance with the statute, denied plaintiff an opportunity to purchase a rifle at cost because he was not an NRA member. Id. at 1040. Nonetheless,

the Department of Justice concluded -- and informed the court -- that the NRA membership requirement violated the equal protection component of the Fifth Amendment's Due Process Clause because the discrimination against non-NRA members "does not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional." *Id.* at 1044. The Department reached this conclusion on the basis of advice from the Army that the membership requirement "serves no valid purpose" that was not otherwise met. *Id.*⁶ The district court afforded Congress an opportunity to "file its own defense of the statute should it choose to do so," *id.*, but Congress declined to act on this invitation. *Id.* The court permitted the NRA itself to intervene and argue on behalf of the statute's constitutionality. The district court concluded that the statute was subject to strict scrutiny (because it discriminated on the basis of the fundamental right of association) and invalidated the enactment. *Id.* at 1044-49.

(g) League of Women Voters of California v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The Public Broadcasting Act of 1967, as amended, prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office. The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge.⁷ The defendant FCC, through the Department of Justice, represented to the court that it would seek to impose sanctions on a licensee who violated the statute, if only for the purposes of "test litigation," 489 F. Supp. at 519-20; nevertheless, the FCC informed the court that it would not defend the statute's constitutionality, *id.* at 518. Senate Legal Counsel appeared in the case on behalf of the Senate as *amicus curiae*, *id.*, and successfully

⁶ See also Letter from Assistant Attorney General Barbara Alien Babcock to President of the Senate Walter F. Mondale (May 8, 1979) (Senate Legal Counsel document No. 3).

⁷ See Letter from Attorney General Benjamin R. Civiletti to Senate Legal Counsel Michael Davidson (Oct. 11, 1979) (Senate Legal Counsel document No. 6). See also FCC v League of Women Voters of California, 468 U. S. 364, 370-71 & n.8 (1984).

urged the trial court to dismiss the case as not ripe for adjudication in light of the unlikelihood that any enforcement action would transpire. While appeal of that decision was pending, a successor Attorney General reconsidered the Department's previous position and decided that the [*6] Department could defend the statute's constitutionality.⁸ The court of appeals accordingly remanded the case to the district court for consideration of the merits of the case. The Supreme Court ultimately held that the statute violated the First Amendment. FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

(h) Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.). Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the "must carry" provisions) require cable operators to carry on their systems a prescribed number of signals of local commercial and qualified non-commercial television stations. The Act was enacted over President Bush's veto. In his veto message, the President stated that one of the reasons for his veto was that the must-carry provisions were unconstitutional. See Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, Pub. Papers of George Bush 1751 (Oct. 3, 1992). Despite the President's conclusion, the FCC took steps toward implementing the must-carry provisions "in order to comply with the 1992 Act." 57 Fed. Reg. 56,298-99 (1992).⁹ However, in the litigation challenging the constitutionality of the must-carry provisions, the Department of Justice,

⁸ See Letter from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond and Ranking Minority Member Joseph R. Biden, Jr. (Apr. 6, 1981) (Senate Legal Counsel document No. 12) (reprinted as The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25 (1981)).

⁹ See also Standstill Order in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 2 ¶ 4 (Dec. 9, 1992) (FCC will take remedial action to address violations of section 5, albeit 120 days after filing of complaints); Defendants' Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in Turner Broadcasting Sys., Inc. v. FCC, Civ. No. 92-2247 (D.D.C.), at 10-11 (Nov. 10, 1992) (representing that FCC would implement section 4 regulations in April 1993 and that FCC will take remedial action to address violations of section 5, albeit 120 days after filing of complaints).

appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, “consistent with President Bush’s veto message to Congress.”¹⁰ The Department urged the court to permit adequate [*7] time to provide Congress the opportunity to defend the validity of the statute.¹¹ While preliminary proceedings were ongoing in the district court, the Clinton Administration reconsidered President Bush’s previous position and decided that the Department should defend the constitutionality of the must-carry provisions. The three-judge district court subsequently held that the must-carry provisions were constitutional. 819 F. Supp. 32 (D.D.C. 1993). The Supreme Court vacated and remanded that decision so that the district court could resolve genuine issues of material fact and apply its findings to the constitutional test articulated by the Court. 114 S. Ct. 2445 (1994). The three-judge panel resolved the factual disputes and once again concluded that the must-carry provisions pass constitutional muster. 910 F. Supp. 734 (D.D.C. 1995). The Supreme Court recently noted probable jurisdiction to review that decision. 116 S. Ct. 907 (1996).

In addition, it is worth noting several other cases in which the Department of Justice argued against the constitutionality of a statute in court, either where there was no occasion for the executive branch to enforce or implement the statute prior to litigation, or where the statute did not provide for any executive branch implementation.¹²

¹⁰ Defendants’ Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in *Turner Broadcasting Sys., Inc. v. FCC*, Civ. No. 92-2247 (D.D.C.), at 2 (Nov. 10, 1992). See also *id.* at 4; Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (Senate Legal Counsel document No. 38) (notifying Congress that because President Bush had determined that the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992 were unconstitutional, the Department of Justice could not defend the constitutionality of those provisions in court).

¹¹ Defendants’ Motion and Memorandum in Support Thereof for the Issuance of a Revised Briefing Schedule in this Case and its Related Cases in *Turner Broadcasting Sys., Inc. v. FCC*, Civ. No. 92-2247 (D.D.C.), at 5-8 (Nov. 10, 1992).

¹² See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (Attorney General and Solicitor General,

You also have asked me to provide “the guidelines used by the Justice Department to decide when it will defend the constitutionality of a statute and when it will not.” There exist no formal guidelines that the Attorney General, the Solicitor General and other Department officials consult in making such decisions. As indicated by the cases on the Senate Legal Counsel’s list, [*8] including those discussed above, different cases can raise very different issues with respect to statutes of doubtful constitutional validity; accordingly, there are a variety of factors that bear on whether the Department will defend the constitutionality of a statute.¹³

though representing the Attorney General and FEC in defending constitutionality of most parts of the Federal Election Campaign Act of 1971, also appeared for defendant Attorney General and for the United States as amicus curiae in declaratory judgment action, arguing against the constitutionality of the appointment of FEC members by members of Congress); In re Benny, 44 B.R. 581 (N.D. Cal. 1984), aff’d, 812 F.2d 1133 (9th Cir. 1987) (Department of Justice represented United States as intervenor in arguing that statute violated Appointments Clause by permitting Congress to appoint to new judgeships bankruptcy judges whose terms already had expired) (see Senate Legal Counsel document No. 15); Synar v. United States, 626 F. Supp. 1374, 1379 (D.D.C.), aff’d sub nom. Bowsher v. Synar, 478 U.S. 714 (1986) (Department of Justice appeared on behalf of defendant United States in declaratory judgment action to argue against the constitutionality of Gramm-Rudman-Hollings Act provision that gave Comptroller General a role in exercising executive functions under the Act) (see Senate Legal Counsel document No. 23); Hechinger v. Metropolitan Washington Airports Auth., 845 F. Supp. 902, 904 (D.D.C.), aff’d, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995) (Department of Justice appeared on behalf of United States as intervenor to argue that statute providing certain powers to Airport Authority violated separation of powers) (see Senate Legal Counsel document No. 37).

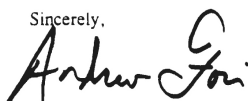
¹³ From time to time, various Attorneys General, Solicitors General, and Assistant Attorneys General have written or testified concerning the various factors and rules of thumb that they consider in deciding whether to defend the constitutionality of statutes. See, e.g., Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 9-10 (1975) (Statement of Assistant Attorney General Rex Lee) (Senate Legal Counsel document No. 1). Memorandum from Assistant Attorney General John M. Harmon to Assistant Attorney General Barbara A. Babcock and Deputy Assistant Attorney General James P. Turner, re: Section 208 -- Applicable Standards for Determining Whether or Not to Defend the Constitutionality of a Congressional Enactment (Feb. 2, 1978) (Senate Legal Counsel document No. 2); The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) (Letter from Attorney General Benjamin R. Civiletti to the Chairman of the Senate Subcommittee on Limitations of Contracted and Delegated Authority). The most recent example is an article by the current Solicitor General: Days, In Search of the Solicitor General’s Clients, *supra* note 1, 83 Ky. L.J. at 499-503.

FOIS TO HATCH, MAR. 22, 1996

Finally, pursuant to discussions between our respective staff counsel, I am enclosing a copy of a recent Opinion of the Assistant Attorney General for the Office of Legal Counsel.¹⁴ The OLC Opinion concerns a related matter that is not directly at issue in this case -- namely, the circumstances under which a President can and should decline to execute statutory provisions that he believes are unconstitutional. As noted above, the President in the instant matter instructed the relevant agencies to implement section 567 of the Defense Authorization Act.

I hope you find this letter helpful. Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Foia". The signature is fluid and cursive, with the first name "Andrew" written in a larger, more prominent script than the last name "Foia".

Andrew Foia
Assistant Attorney General

Enclosures

¹⁴ That Opinion has been published as Walter Dellinger, Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva, 48 Ark. L. Rev. 313 (1995).

DUTY TO DEFEND – DEPARTMENT OF JUSTICE OVERSIGHT

Letter from Richard A. Hertling to Patrick J. Leahy

January 18, 2007



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 18, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

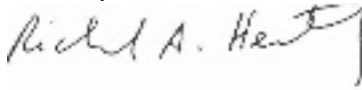
Dear Mr. Chairman:

Enclosed please find responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on July 18, 2006. The hearing concerned Department of Justice Oversight.

Several of the questions relate to the Terrorist Surveillance Program described by the President. Please consider each answer to those questions to be supplemented by the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

* * * *

[*100]

Presidential Signing Statements and Executive Nonenforcement

103. On June 27th, 2006, Deputy Assistant Attorney General Michelle Boardman testified before this committee on the disturbing frequency with which President Bush has disregarded portions of duly enacted laws through his use of signing statements. The American Bar Association convened a special Task Force on Presidential Signing Statements and the Separation of Powers Doctrine made up of respected legal scholars and professionals from across the ideological spectrum. The Task Force recently issued its report, indicating that the President's use of signing statements fundamentally flaunts the basic constitutional structure of our government. The President of the ABA, Michael Greco, has said that the report "raises serious concerns crucial to the survival of our democracy."

In light of the ABA report, do you still maintain that there are no differences between this President's practice with regard to signing statements and the practices of prior Presidents in this area? If so, please indicate the flaws in the ABA's methodology that led it to an erroneous conclusion.

ANSWER: The ABA Report did not accurately report either the history of signing statements or the signing statement practice of the current President. To give but one example, the Task Force sug-

gests that the Clinton Administration's position was that the President could decline to enforce an unconstitutional provision only in cases in which "there is a judgment that the Supreme Court has resolved the issue." ABA Task Force Report at 13-14 (quoting from February 1996 White House press briefing). But President Clinton consistently issued signing statements even when there was not a Supreme Court decision that had clearly resolved the issue. *See, e.g., Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) ("While I strongly support this legislation, certain provisions seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because these provisions appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as precatory."). Indeed, Assistant Attorney General Dellinger made clear early in the Clinton Administration that if "the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994).

The conclusions of the ABA Task Force Report have been publicly rejected by legal scholars across the political spectrum, including Dellinger, the former Assistant Attorney General for the Office of Legal Counsel during the Clinton Administration, and Professor Laurence Tribe of Harvard University. In addition, the Congressional Research Service ("CRS") recently reviewed the ABA Report and concluded that "in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or [*101] legal deficiencies adhere to the issuance of such statements in and of themselves." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1 (Sept. 20, 2006). Moreover, the CRS found that while there is controversy over the number of statements, "it is important to note that the substance of [President George W. Bush's] statements do not appear to differ substantively from those issued by either

Presidents Reagan or Clinton.” *Id.* at CRS-9; accord Prof. Curtis Bradley and Prof. Eric Posner, “Signing statements: It’s a president’s right,” *The Boston Globe*, Aug. 3, 2006 (“The constitutional arguments made in President Bush’s signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton’s statements.”).

The ABA Report was also mistaken in suggesting that the President has issued significantly more constitutional signing statements than his predecessors. Indeed, the ABA Report claimed that the President had “produced signing statements containing . . . challenges” to more provisions than all other Presidents in history combined. See ABA Task Force Report at 14-15 & n. 52. That was done by separately counting each provision mentioned in a signing statement rather than by counting only the number of bills on which the President had commented. We believe that the number of individual provisions referenced in signing statements is a misleading statistic, because President Bush’s signing statements tend to be more specific in identifying provisions than those of his predecessors. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns without enumerating the particular provisions in question. See, e.g., *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) (“to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority”; “This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration’s

objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities.” “Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS vs. Chadha*.”) (emphases added). Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President “has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and [*102] Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

Because the ABA report did not present any new factual information or constitutional analysis, the oral and written testimony of Deputy Assistant Attorney General Michelle Boardman continues to represent the position of the Administration on signing statements.

104. In 2002, Congress passed a law that requires the Attorney General to “submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice” either formally or informally refrains from “enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional.” 28 U.S.C. § 530D. This law requires

the Attorney General to inform Congress both in the case of a signing statement for a new law and in situations where the President declines to enforce existing laws.

At the hearing before the Senate Judiciary Committee on June 27, 2006, Ms. Boardman committed to providing the Committee with a full accounting of the Justice Department's compliance with this provision over the last four years. We have yet to receive a follow-up from Ms. Boardman consistent with that commitment, and have not received any response to our written questions highlighting and restating this request. As the Attorney General, you are specifically charged with fulfilling statutory reporting requirements outlined in 28 U.S.C. § 530D.

Please provide a full and complete list of any existing statutes, rules, regulations, programs, policies or other laws that the President has declined to enforce on constitutional grounds since January 20, 2001.

ANSWER: For a full accounting, please see our response to question 79. As set forth in our response to question 106, below, we disagree that section 530D "requires the Attorney General to inform Congress . . . in the case of a signing statement for a new law."

105. As the Attorney General, have you complied with the reporting requirements of 28 U.S.C. § 530D? Please provide a full accounting of all of the times that you have complied with this statute, along with copies of any transmittals to Congress that have been issued thus far.

ANSWER: Section 530D comprises three basic reporting provisions for the Department: a provision stating that the Attorney General or any officer of the Department shall report any formal or informal policy to refrain from enforcing or applying any Federal statute, rule, regulation, program, policy or other law within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional, or a policy to refrain from adhering to, enforcing, applying, or complying with a binding rule of decision of a jurisdiction respecting the interpretation, construction, or application of the Constitution, any statute, rule, regu-

lation, [*103] program, policy, or other law, *see* 28 U.S.C. § 530D(a)(1)(A); shall report determinations to contest affirmatively in a judicial proceeding the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law, or a decision to refrain on the grounds that the provision is unconstitutional from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of such a provision of law, *see id.* § 530D(a)(1)(B); and shall report certain settlements against the United States involving more than \$2 million or injunctive or nonmonetary relief that exceeds 3 years in duration, *id.* § 530D(a)(1)(C).

The Department takes the reporting provisions of section 530D very seriously. It is the practice of the Department to provide Congress with quarterly reports under 28 U.S.C. § 530D(a)(1)(C). Copies of those reports are attached; note that we have not yet located a copy of the report for the first quarter of 2004, but will provide a copy of that report when we do. The original of that report is in the possession of several Members of Congress, the Senate Legal Counsel, and the General Counsel of the House of Representatives.

To ensure compliance with the reporting provisions of section 530D(a)(1)(A), the Department periodically sends to components a reminder of the reporting provisions of section 530D(a)(1)(A) and a solicitation of relevant information. We are not aware of any Department policy adopted since January 20, 2001, that implicates section 530D(a)(1)(A)(I). See our response to question 79. We do not understand your question to ask us to identify such policies adopted by previous Administrations that were the subject of formal congressional notice or public notice at the time of adoption and that this Administration has continued to implement.

Finally, the Solicitor General has sent reports to Congress pursuant to section 530D(a)(1)(B) with respect to the following provisions of law.

11 U.S.C. § 106. In *In re: Robert J. Gosselin*, No. 00-2255 (1st Cir.), the Solicitor General declined to intervene to defend the constitutionality of this provision, and notified Congress about it in a letter dated October 25, 2001. A copy of that letter is at-

tached. Section 106 abrogates state sovereign immunity in certain bankruptcy matters, and, at the time of the Solicitor General's letter, the Third, Fourth, and Fifth Circuits each had held that section 106(a) violated the Eleventh Amendment because Congress lacked the power validly to abrogate state sovereign immunity under the Bankruptcy Clause of the Constitution, U.S. Const., art. I, § 8, cl. 4. *See generally Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* [*v. Florida*, 517 U.S. 44 (1996)] makes clear that Congress may not abrogate state sovereign immunity pursuant to Article I powers."). In the letter, the Solicitor General noted that in 1997 and 1998, his predecessor had declined to file a petition for certiorari in the Fourth and Fifth Circuit cases and notified Congress of that decision.

In *Tennessee Student Assistance Corp. v. Hood*, No. 02-1606, the Supreme Court granted certiorari in a case presenting the question whether 11 U.S.C. § 106 violated the Eleventh Amendment of the Constitution. In a letter dated November 26, 2003, the Solicitor General notified Congress that he had decided against [*104] intervening to defend the challenged provision, on the ground that no valid basis existed on which the provision could legitimately be defended. We are seeking to obtain a copy of that letter. The Court did not reach the question in *Hood* because it concluded that the facts of that case did not implicate the State's Eleventh Amendment immunity. *See Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). The Court again granted certiorari to address that question in *Central Virginia Community College v. Katz*, No. 04-885 (S. Ct.). In a letter dated August 3, 2005, the Solicitor General again notified Congress that he had decided against intervening in the case to defend the constitutionality of 11 U.S.C. § 106(c). A copy of that letter is attached. *See also Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006).

18 U.S.C. 2257. In *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005), the district court largely declined to

enjoin a federal record-keeping statute (18 U.S.C. § 2257) and implementing regulations requiring the producers of sexually explicit material to keep records showing that depicted sexual performers are adults. The court, however, preliminarily enjoined a particular regulatory provision, 28 C.F.R. § 75.2(a)(1), requiring producers to keep a copy of the depictions of live Internet “chat rooms,” reasoning that such a requirement would likely be unduly burdensome in light of applicable First Amendment considerations. The Solicitor General notified Congress of his determination not to appeal the adverse portion of the district court’s ruling. We are seeking to obtain a copy of that letter. Note that after the decision of the district court, Congress amended the law in the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. v, and the Department is preparing a proposed revision to the regulation to reflect the amendments made to the statute.

29 U.S.C. § 2612(a)(1)(D). Following the Supreme Court’s 2001 decision in *Bd. of Trustees of Univ. of Alabama v. Garrett*, and a series of adverse decisions from the courts of appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, the Solicitor General notified Congress on December 20, 2001, in connection with *Bates v. Indiana Department of Corrections*, No. IP01-1159-C-H/G (S.D. Ind.), that he would no longer intervene in cases to defend the abrogation of Eleventh Amendment immunity effected by the individual medical leave provision of the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2612(a)(1)(D), as “appropriate legislation” within the meaning of section 5 of the Fourteenth Amendment. The letter noted that “[t]he Supreme Court’s analysis and holding in *Garrett* have left the Department with no sound basis to continue defending the abrogation of Eleventh Amendment Immunity” in cases of this sort. At the same time, the Solicitor General stated that the Department would continue to defend the constitutionality of the *substantive* medical leave provision, and that “no corresponding decision has been made to discontinue defense of the abrogation of Eleventh Amendment immunity for cases arising

under the parental and family leave provisions of the Act.” Indeed, the Department later successfully defended the abrogation of Eleventh Amendment immunity in the family care provisions of the FMLA. See *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003). A copy of that letter is attached. [*105]

42 U.S.C. § 14011(b). Section 14011(b), which was enacted as part of the Violence Against Women Act (“VAWA”), states that a victim of a sexual assault that was criminally prosecuted in state court may apply to a federal court for an order requiring the criminal defendant to undergo a test for HIV infection. In *In re Jane Doe*, 02-Misc.-168 (E.D.N.Y), the victim of an alleged sexual assault sought an order under section 14011 requiring the criminal defendant to be tested for HIV infection. In light of *United States v. Lopez*, 514 U.S. 549 (1995), and the Supreme Court’s more recent decision in *United States v. Morrison*, 529 U.S. 598 (2000), which held that Congress lacked authority under the Commerce Clause to enact another provision of VAWA that provided a federal civil remedy for victims of gender-motivated violence, 42 U.S.C. § 13981, the Solicitor General determined not to defend the provision. We are seeking to obtain a copy of the letter notifying Congress.

Pub. L. No. 108-199, div. F, tit. II, § 177, 118 Stat. 3 (2004). In *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004), the Solicitor General determined not to appeal, in light of First Amendment and Spending Clause concerns, a decision holding unconstitutional a congressional appropriations provision placing a condition on transportation grants that precluded local transport authorities from permitting display of advertising or other messages advocating the legalization or medical use of marijuana. By a letter dated December 23, 2004, a copy of which is attached, the Solicitor General notified Congress of that decision.

Regulations implementing 42 U.S.C. § 6971(a). *State of Florida v. United States*, No. 01-12380-HH (11th Cir.), involved Department of Labor regulations used to resolve certain whistle-

blower complaints. In that case, a state employee filed an administrative complaint alleging prohibited retaliation in employment. The State of Florida then filed suit in federal district court seeking an injunction against the administrative proceedings. The district court enjoined the administrative proceedings on the ground that the claimant's claims were barred by the Eleventh Amendment. The government filed an appeal and the Eleventh Circuit affirmed, relying on *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), which held that "state sovereign immunity bars [the federal agency involved in that case] from adjudicating complaints filed by a private party against a nonconsenting State." Similarly, *Ohio EPA v. United States*, No. 01-3237 (6th Cir.), involved a former employee of the Ohio EPA who claimed he had been retaliated against. The district court there granted the state partial relief from administrative proceedings, and held that future proceedings could go forward "only if" the federal Government itself joined the action, apparently to overcome Eleventh Amendment concerns. In light of the Supreme Court's decision in *South Carolina State Ports Authority*, the Solicitor General notified Congress in an August 21, 2002 letter that he had decided not to file a petition for a writ of certiorari in *State of Florida*, and to dismiss the Government's appeal in *Ohio EPA*. A copy of that letter is attached. [*106]

Other: Notification letters also were sent to Congress in the following instances, although the intervention and review decisions at issue did not reflect any judgment by the Department that provisions were constitutionally infirm.

2 U.S.C. § 441b. In *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173 (D.C. Cir. 2001), the court of appeals held that, in light of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), section 441b could not be constitutionally applied to the National Rifle Association with respect to payments made during one of the years in question. In a letter dated December 21, 2001, the Solicitor General notified Congress that he had decided against seeking certiorari in that case "primarily because I

do not believe that it meets the principal criteria that the Supreme Court applies in deciding whether to grant certiorari,” because the decision “does not squarely conflict with the decision of other courts of appeals on an issue on which the FEC lost.” The letter also detailed several other considerations counseling against seeking certiorari. The letter explicitly noted that the decision “[wa]s not based on any determination that Section 441b is constitutionally infirm.”

8 U.S.C. § 1226(c). Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), prohibits the Attorney General, except in limited circumstances, from releasing aliens who have committed specified offenses and are removable from the United States. Two courts of appeals, and district courts in various circuits, held in habeas corpus proceedings that this provision violated due process because it does not provide for individualized bond hearings. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002). The Department appealed some of the adverse district court decisions in cases that became moot for various reasons. In those mooted appeals, the Department requested that the appellate court vacate the adverse district court judgment and remand the case to the district court with instructions to dismiss the case as moot. The Department succeeded in obtaining such a vacatur and remand order in only a few cases; in the majority of cases, the courts of appeals simply dismissed the appeal. Because the filing of such appeals involved a significant expenditure of government resources and because the individual district court cases had no binding effect on other cases, the Solicitor General determined not to file a motion for vacatur and remand routinely in all section 1226(c) appeals that became moot. In a letter dated January 23, 2002, a copy of which is attached, the Solicitor General notified Congress of that decision, and of his decision not to pursue an appeal in two related district cases, one of which he determined was an unsuitable vehicle for appellate consideration of the constitutionality of section 1226(c) and the other of which had no continuing effect. The Solicitor General continued to de-

find the constitutionality of the statute, and succeeded in persuading the Supreme Court that the statute was constitutional in *Demore v. Kim*, 538 U.S. 510 (2003).

8 U.S.C. § 1229b(b)(1)(A). The Solicitor General decided not to file a petition for a writ of certiorari in *Ramirez-Landeros v. Gonzales*, 148 Fed. Appx. 573 (9th Cir. 2005), in which the Ninth Circuit held, in an unpublished decision, that the [*107] Board of Immigration Appeals' denial of eligibility for cancellation of removal to an alien violated her constitutional right to equal protection. The Ninth Circuit's decision did not state that it was holding a provision of the statute unconstitutional, but rather that the BIA's application of its own adjudicatory precedent to the petitioner violated the alien's right to equal protection. The Solicitor General determined that the decision did not merit filing a petition for a writ of certiorari, because it was unpublished and did not create a conflict with any other court of appeals, and because the court had remanded to the BIA for further proceedings. Noting that "it is unclear whether the court's ruling is of the sort for which a report to Congress is contemplated by 28 U.S.C. 530D," the Solicitor General nevertheless submitted a letter informing Congress of his action on December 23, 2005, because he "thought it would be appropriate to bring this matter to [Congress's] attention." A copy of the letter is attached.

Pub. L. No. 108-21, § 401(I), 117 Stat. 650 (2003). The Solicitor General decided not to appeal the district court's opinion in *United States v. Robert Mendoza*, No. CR 03-730 DT, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004), holding that section 401(I) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 unconstitutionally interfered with judicial independence and violated the constitutional separation of powers. In a letter dated May 11, 2004, the Solicitor General indicated that his decision was based on the unusual facts of that case: section 401(I) had never gone into effect (because the Department had implemented a statutory al-

ternative procedure instead), the district court had sentenced the defendant within the Sentencing Guideline range, and other cases appeared to be better vehicles for defending the constitutionality of section 401(I). The letter noted that the decision not to appeal “does not reflect a determination on the part of the Executive Branch that Section 401(I) is unconstitutional,” and observed that “the government has vigorously defended the provision’s constitutionality.” A copy of the letter is attached.

- 106. At a minimum, this statute requires the submission of a report to Congress every time a signing statement is issued. If there have been no transmittals, please indicate why you believe you can ignore the plain meaning of duly enacted provisions of law.**

ANSWER: Signing statements are publicly issued documents published in the *Federal Register*, but the statute, 28 U.S.C. § 530D, does not require a separate submission to Congress when the President issues a signing statement. The President’s signing statements that raise points of constitutional law generally do not “establish[] or implement[] a formal or informal policy to refrain” from enforcing a statute on constitutional grounds. 28 U.S.C. § 530D(a)(1)(A). Instead, they typically state in general terms that a particular provision will be construed consistent with the President’s duties under the Constitution. In addition, a signing statement is a statement of the President, not an Executive Order or a memorandum that might fall under 28 U.S.C. § 530D(e). Therefore, not until the Department of Justice or the Attorney General has occasion to make an enforcement decision would the requirements of 28 U.S.C. § 530D apply. If the time comes when a potential constitutional violation would be realized by a statute’s enforcement, Congress then would receive a report under the statute. [*108]

- 107. When you testified before Congress on July 18, 2006, Senator Leahy referred to 750 distinct provisions of law that have been disclaimed by this President through the use of signing statements. At the time, you testified under oath that the statistic of more than 700 was incorrect and had been disclaimed by the Boston Globe. Specifically, you**

said, “[t]hat’s not true. That number is wrong”, and later that “the Boston Globe retracted that number.”

A follow-up article in the Boston Globe on July 19th entitled “Bush Blocked Probe, AG Testifies” disputes your claim, indicating that the Globe stands by its claim that the president has challenged more than 750 laws. Christopher Kelly, one of the foremost scholars on the topic, claims that 807 challenges have been issued to individual provisions of law by this President through July 11, 2006. The ABA Taskforce report indicates that the President has challenged over 800 provisions of law; more than the roughly 600 total challenges issued by every previous president combined. In addition, most estimates are likely to be on the low end since the vague and sweeping language in many of these statements could theoretically touch on a wide range of provisions in a given bill. The statement issued in conjunction with the Consolidated Appropriations Act of 2004 contains 116 specific constitutional challenges. Contrast this with the 95 total constitutional challenges issued by the Reagan Administration, which supposedly accelerated the pace of constitutional challenges in signing statement.

Why did you claim that the Boston Globe retracted its estimate?

ANSWER: On May 4, 2006, the Boston Globe issued a correction of its misleading use of phrases such as “750 laws.” The correction, a copy of which is attached, reads: “Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills.” Although inartfully stated, this correction reveals that the Globe intends in these articles to refer to 750 individual provisions, as included in 125 bills, and does not intend to refer to 750 individual bills or “laws enacted since he took office.” We believe that counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush’s signing statements tend to be more specific in identifying provisions than those of his

predecessors. As noted in response to questions 78 and 103 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns without enumerating the particular provisions in question.

Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President “has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office. [*109]

108. As you know, it is possible to issue multiple challenges to discrete provisions of law in a single signing statement. Aside from the question of how many physical statements have been issued, what is your best estimate of how many discrete provisions of law have been challenged by this President through his use of signing statements? Please also provide the source and methodology you have used to provide us with that number.

ANSWER: The Department has not counted the individual provisions mentioned by the President in his signing statements and it is not sensible to do so. In our extensive review of the statements of this and prior Presidents, it became apparent that this President is much more specific in detailing the provisions that could raise constitutional concern than other Presidents have been. Where other Presidents often referred generally to “several provisions” that raised constitutional concerns, this President specifically lists each provision. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns. *See, e.g., Statement on*

Signing Consolidated Appropriations Legislation for Fiscal Year 2000 (Nov. 29, 1999) (“to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority”; “This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration’s objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities.” “Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS vs. Chadha*.”) (emphases added). The precision of President Bush’s statements is a benefit, not a detriment, to Congress and the public. Thus, even if one wanted to count the number of specific provisions each President noted and compare them one to another, the statements of prior presidents do not allow for such a comparison, as discussed above.

* * * *

POTENTIAL CONSTITUTIONAL PROBLEMS WITH THE “NEBRASKA COMPROMISE”

*Letter from Henry McMaster, Rob McKenna, Mike Cox, Greg Abbott, John Suthers,
Troy King, Wayne Stenehjem, Bill Mims, Tom Corbett, Mark Shurtleff, Bill
McCollum, Lawrence Wasden, and Marty Jackley to Nancy Pelosi and Harry Reid*

December 30, 2009



December 30, 2009

The Honorable Nancy Pelosi
Speaker, United States House of Representatives
Washington, DC 20515

The Honorable Harry Reid
Majority Leader, United States Senate
Washington, DC 20510

The undersigned state attorneys general, in response to numerous inquiries, write to express our grave concern with the Senate version of the Patient Protection and Affordable Care Act (“H.R. 3590”). The current iteration of the bill contains a provision that affords special treatment to the state of Nebraska under the federal Medicaid program. We believe this provision is constitutionally flawed. As chief legal officers of our states we are contemplating a legal challenge to this provision and we ask you to take action to render this challenge unnecessary by striking that provision.

It has been reported that Nebraska Senator Ben Nelson's vote, for H.R. 3590, was secured only after striking a deal that the federal government would bear the cost of newly eligible Nebraska Medicaid enrollees. In marked contrast all other states would not be similarly treated, and instead would be required to allocate substantial sums, potentially totaling billions of dollars, to accommodate H.R. 3590's new Medicaid mandates. In addition to violating the most basic and universally held notions of what is fair and just, we also believe this provision of H.R. 3590 is inconsistent with protections afforded by the United States Constitution against arbitrary legislation.

In *Helvering v. Davis*, 301 U.S. 619, 640 (1937), the United States Supreme Court warned that Congress does not possess the right under the Spending Power to demonstrate a "display of arbitrary power." Congressional spending cannot be arbitrary and capricious. The spending power of Congress includes authority to accomplish policy objectives by conditioning receipt of federal funds on compliance with statutory directives, as in the Medicaid program. However, the power is not unlimited and "must be in pursuit of the 'general welfare.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). In *Dole* the Supreme Court stated, "that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Id.* at 207. It seems axiomatic that the federal interest in H.R. 3590 is not simply requiring universal health care, but also ensuring that the states share with the federal government the cost of providing such care to their citizens. This federal interest is evident from the fact this [*2] legislation would require every state, except Nebraska, to shoulder its fair share of the increased Medicaid costs the bill will generate. The provision of the bill that relieves a single state from this cost-sharing program appears to be not only unrelated, but also antithetical to the legitimate federal interests in the bill.

The fundamental unfairness of H.R. 3590 may also give rise to claims under the due process, equal protection, privileges and immunities clauses and other provisions of the Constitution. As a practical matter, the deal struck by the United States Senate on the "Ne-

braska Compromise” is a disadvantage to the citizens of 49 states. Every state’s tax dollars, except Nebraska’s, will be devoted to cost-sharing required by the bill, and will be therefore unavailable for other essential state programs. Only the citizens of Nebraska will be freed from this diminution in state resources for critical state services. Since the only basis for the Nebraska preference is arbitrary and unrelated to the substance of the legislation, it is unlikely that the difference would survive even minimal scrutiny.

We ask that Congress delete the Nebraska provision from the pending legislation, as we prefer to avoid litigation. Because this provision has serious implications for the country and the future of our nation’s legislative process, we urge you to take appropriate steps to protect the Constitution and the rights of the citizens of our nation. We believe this issue is readily resolved by removing the provision in question from the bill, and we ask that you do so.

By singling out the particular provision relating to special treatment of Nebraska, we do not suggest there are no other legal or constitutional issues in the proposed health care legislation.

Please let us know if we can be of assistance as you consider this matter.

Sincerely,



Henry McMaster
Attorney General, South Carolina




Rob McKenna
Attorney General, Washington

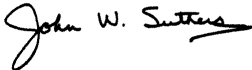


Mike Cox
Attorney General, Michigan

[*3]



Greg Abbott
Attorney General, Texas



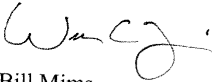
John Suthers
Attorney General, Colorado



Troy King
Attorney General, Alabama



Wayne Stenehjem
Attorney General, North Dakota



Bill Mims
Attorney General, Virginia



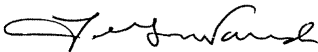
Tom Corbett
Attorney General, Pennsylvania



Mark Shurtleff
Attorney General, Utah



Bill McCollum
Attorney General, Florida



Lawrence Wasden
Attorney General, Idaho



Marty Jackley
Attorney General, South Dakota

POTENTIAL CONSTITUTIONAL PROBLEMS WITH H.R. 3590

Letter from Greg Abbott to Kay Bailey Hutchison and John Cornyn

January 5, 2010



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2010

The Honorable Kay Bailey Hutchison
United States Senate
284 Russell Senate Office Building
Washington, DC 20510-4304

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, DC 20510

RE: Potential Constitutional Problems with H.R. 3590

Dear Senators Hutchison and Cornyn:

I write in response to your December 23, 2009, letter and our recent communications about potential constitutional problems with H.R. 3590, the so-called Patient Protection and Affordable Care Act. Like you, I am very concerned about the constitutionality of this legislation.

Last week, twelve state attorneys general and I authored a letter to Speaker Pelosi and Majority Leader Reid expressing our deep concern with the legality of H.R. 3590's so-called Nebraska Compromise. I write to expand upon the concerns presented in that let-

ter, and to address additional potential legal problems with H.R. 3590. The bill's supporters are moving quickly for passage. Because time is of the essence, I wanted to bring to your attention several constitutionally problematic aspects of the measure. One potential legal problem has been termed the Nebraska Compromise, while another concerns the constitutionality of the individual mandate imposed by the health care bill.

I. NEBRASKA COMPROMISE

If enacted, the Senate version of H.R. 3590 would impose billions of dollars of new Medicaid obligations on 49 states while singling out only one state for special treatment. The increased Medicaid expenses imposed on Nebraska—and all other states—by H.R. 3590 will be fully funded, in perpetuity, by taxpayers from all states except Nebraska.

By all accounts, the Nebraska Compromise serves no legitimate national interest. And neither Nebraska nor the Congress has justified the expenditure by articulating any unique need or problem in the Cornhusker State which this provision purports to redress. That is because it was added simply to purchase the vote of a single senator—to the detriment of the 49 other states.

Even by Washington D.C. standards, the Nebraska Compromise is a uniquely contemptible and corrupt bargain. Even the worst, most wasteful of pork barrel spending can typically find at least some attenuated connection to some broader national interest, such as economic development or to encourage interstate travel. But the Nebraska Compromise is nothing more than a pure political pay-off—a naked transfer of wealth to one state from the 49 other states.

Not only does the Nebraska Compromise offend basic principles of fairness and equality, it violates fundamental principles of nondiscrimination that are at the heart of the U.S. Constitution. [*2]

A. Congress' Power to Tax & Spend for the General Welfare of the United States

Congress' power to tax and spend is not unlimited. Congress may spend federal taxpayer dollars only to "provide for the common

defense and general welfare of the United States.” U.S. Const. art. I, § 8, cl. 1. This provision means what it says. As the U.S. Supreme Court has repeatedly observed, federal spending must be for the general national interest—not the specific interest of just one single state. For example, in *United States v. Butler*, 297 U.S. 1, 67 (1936), the Court, quoting President James Monroe, asked: “Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not.” Instead, the *Butler* court wrote, “the powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare.”

Similarly, in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950), the Court noted that “Congress has a substantive power to tax and appropriate for the general welfare,” but that this power is “limited . . . by the requirement that it shall be exercised for the common benefit as distinguished from some mere local purpose.” Importantly, these principles are still applicable—and important—today. As the Court noted in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), “conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.”

The unique, localized and differentiated treatment of Nebraska runs counter to these principles.

B. Equal Sovereignty

If the Nebraska Compromise is indeed nothing more than a blatant transfer from federal taxpayers in 49 states to a single state, it plainly does not serve the “general Welfare.” To the contrary, the compromise constitutes blatant discrimination against every other state.

Just months ago, eight Justices of the U.S. Supreme Court reaffirmed that federal legislation that “differentiates between the States” offends “our historic tradition that all the States enjoy ‘equal sovereignty’—and that although “distinctions can be justified in some cases,” any “departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic

coverage is sufficiently related to the problem that it targets.” *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009).

Similarly, Justice Powell wrote for a unanimous Court in *United States v. Ptasynski*, 462 U.S. 74, 81, 84-85 (1983), that Congress may not “use its power over commerce to the disadvantage of particular States” by imposing taxes on some states but not others—unless Congress is acting on the basis of “geographically isolated problems,” and not “actual geographic discrimination.” And as I noted above, the Nebraska Compromise was not based upon a particularized—or even articulated—need but rather an arbitrary and capricious backroom deal.

C. Due Process

Although some issues of grave constitutional concern to Texans may not be susceptible to challenge by the states—even if individuals can mount legal challenges—the states do have standing to challenge federal spending programs that impose unfair or discriminatory burdens on states, including the Nebraska Compromise. *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987). Individual citizens, of course, also have the right to challenge federal laws that discriminate against them for no rational reason on the basis [*3] of geography—as well as laws that infringe upon the rights and protections they are guaranteed under the U.S. Constitution.

So unless the Congressional leadership can come up with some reason why some plausible national interest is served by forcing the other 49 states to pay for the Medicaid expenses of just a single state, the Nebraska Compromise presents serious constitutional concerns that can be raised by both states and individuals. Accordingly, the State of Texas is prepared to challenge the constitutionality of the Nebraska Compromise if H.R. 3590 is passed and this unconstitutionally arbitrary discriminatory provision is not removed.

II. INDIVIDUAL MANDATE

If passed, Section 1501 of H.R. 3590 would establish a federal government mandate that has never before been imposed on the

American people. It would require all citizens to buy something—in this case insurance—or face a tax penalty. According to the non-partisan Congressional Budget Office: “the imposition of an individual mandate [to buy health insurance]...would be unprecedented. The government has never required people to buy any good or service as a condition of lawful residence in the United States.” The CBO added that an individual mandate could “transform the purchase of health insurance from an essentially voluntary private transaction into a compulsory activity mandated by law.”

For the first time Congress is attempting to regulate and tax Americans for doing absolutely nothing. H.R. 3590 attempts to tax and regulate each American’s mere existence. This unprecedented congressional mandate threatens individual liberty and raises serious constitutional questions.

A. Federalism, Enumerated Powers and the Tenth Amendment

The framers of our constitution intended to limit the reach of a centralized national government. As James Madison wrote in *Federalist* #45: “The powers delegated by the proposed Constitution to the federal government are few and defined.” In *Federalist* #46, Madison added reasoning to that principle: “Ambitious encroachments of the federal government...would be signals of general alarm.”

Accordingly, the constitutional framers gave Congress only certain specifically enumerated powers—and then promptly added the Tenth Amendment to confirm that all other powers are reserved to the states or to the people.

B. Commerce Clause

The authors of H.R. 3590 seem aware that their constitutional authority for enacting the individual mandate has been seriously questioned. In response, they have crafted the bill to invoke the Commerce Clause as the constitutional authority for Congress to impose the individual mandate. This may expose the legislation to legal challenge.

Under Article I, Section 8, Congress clearly has the authority to regulate commerce. That would include regulations governing insurance and health care. But, the power to “regulate Commerce . . . among the several States” is of course not unlimited. Indeed, within the last fifteen years, the U.S. Supreme Court has struck down two federal statutes on the ground that they exceeded Congress’ power under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). [*4]

The *Lopez* Court sorted the commerce power into three categories, and asserted that Congress could not go beyond these three categories: (1) regulation of channels of commerce, (2) regulation of instrumentalities of commerce, and (3) regulation of economic activities that “affect” commerce. 514 U.S. at 559.

The individual mandate is constitutionally suspect because it does not fall within any of these categories. The mandate provision of H.R. 3590 attempts to regulate a non-activity. The legislation actually imposes a financial penalty upon Americans who choose *not* to engage in interstate commerce—because they choose *not* to enter into a contract for health insurance.

In other words, the proposed mandate would compel nearly every American to engage in commerce by forcing them to purchase insurance, and then use that coerced transaction as the basis for claiming authority under the Commerce Clause.

Congress’ own independent, non-partisan research agency, the Congressional Research Service, expressed doubts about the Commerce Clause applicability in a report that was issued last July: “Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance...It may be argued that the mandate goes beyond the bounds of the Commerce Clause.”

If there are to be *any* limitations on the federal government, then “Commerce” cannot be construed to cover every possible human activity under the sun—including mere human existence. The act of doing absolutely nothing does not constitute an act of “Commerce” that Congress is authorized to regulate.

III. STATE EMPLOYEES HEALTH INSURANCE PLANS

In Senator Hutchison's December 23, 2009, letter, concerns were raised about H.R. 3590's potential interference with the State's ability to regulate its own workforces. The senator raises a valid and important concern under the Tenth Amendment, which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As then-Justice Rehnquist made clear in his opinion for the Court in *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress. One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions."

Unfortunately, Chief Justice Rehnquist's opinion is no longer good law because the Court overruled *National League of Cities* by a 5-4 vote in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). But depending upon the level of intrusion imposed by whatever bill, if any, is ultimately enacted into law, there may be an opportunity to revisit *National League of Cities*. The O'Neill Institute for National and Global Health Law at Georgetown University, which supports the congressional health care legislation, has acknowledged that a "federal employer mandate covering state and local government workers appears consistent with existing Constitutional decisions but still might be susceptible to challenge under the Tenth Amendment."

Consistent with the O'Neill Institute's conclusion, Justice O'Connor's dissent in *Garcia* expressed her "belief that this Court will in time again assume its constitutional responsibility." That time may be now, under the current structure of the health care legislation. [*5]

IV. TRANSPARENCY CAN REDUCE LITIGATION

Although litigation has been mentioned in this letter, it should always be a last best option rather than an initial impulse. Unfortu-

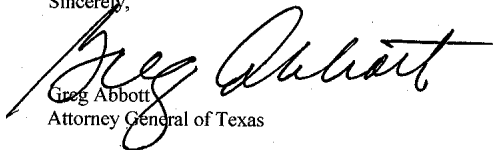
nately, the haste with which the legislation is proceeding, and its utter lack of transparency, may ultimately require litigation in order to ensure the legislation comports with constitutional protections.

Given the serious legal questions surrounding the health care legislation, American taxpayers are disserved by the congressional leadership's plan to eschew publicly accessible conference committee hearings in favor of closed meetings in the Capitol's backrooms. Although basic prudence dictates the bill's proponents should take additional time to thoroughly consider any constitutional issues in a transparent and open forum, the Capitol Hill newspaper *Roll Call* reported yesterday that congressional leaders do not plan to use the ordinary conference committee process to resolve differences between the House and Senate versions of the bill.

President Obama previously acknowledged the importance of this transparency when he said he was committed to "not negotiating behind closed doors, but bringing all parties together, and broadcasting those negotiations on C-SPAN so that the American people can see what the choices are." Holding conference committee hearings would ensure the public is properly informed about the legislation's impact and would allow constitutional experts on both sides to weigh in throughout the legislative reconciliation process.

But because H.R. 3590 will not be reconciled in the open—where it would be subjected to additional constitutional scrutiny—we will continue to monitor this legislation for developments that unlawfully discriminate against the State of Texas or are inconsistent with the U.S. Constitution and the principles of federalism. Additionally, we will continue working with the bipartisan coalition of state attorneys general—including the group recently convened by Florida Attorney General Bill McCollum—that has coalesced to monitor and review the constitutional issues associated with this legislation.

Sincerely,



Greg Abbott
Attorney General of Texas

CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE

Brief by Kamala D. Harris (additional counsel listed in brief) before Henry E. Hudson

March 7, 2011

11-1057 & 11-1058
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMONWEALTH OF VIRGINIA,
ex rel. Kenneth T. Cuccinelli, II,
in his Official Capacity as Attorney General of Virginia,
Plaintiff-Appellee/Cross-Appellant,

v.

KATHLEEN SEBELIUS,
Secretary of the Department of
Health and Human Services,
in her Official Capacity,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia
No. 3:10-cv-188
The Honorable Henry E. Hudson, Judge

AMICUS CURIAE BRIEF OF THE STATES OF
CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII,
IOWA, MARYLAND, NEW YORK, OREGON, AND
VERMONT IN SUPPORT OF APPELLANT

HARRIS TO HUDSON, MAR. 7, 2011

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
TRAVIS LeBLANC
Special Assistant Attorney General
DANIEL J. POWELL
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102
Telephone: (415) 703-5830
Email: daniel.powell@doj.ca.gov

Attorneys for Amici Curiae
State of California

Additional Counsel:

GEORGE C. JESPER
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut
(860) 808-5270

Attorneys for Amicus Curiae
State of Connecticut

JOSEPH R. BIDEN, III
Attorney General Of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

Attorneys for Amicus Curiae
State of Delaware

DAVID M. LOUIE
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

Attorneys for Amicus Curiae
State of Hawaii

TOM MILLER
Attorney General of Iowa
1303 East Walnut Street
Des Moines, Iowa 50319
(802) 828-3181
Attorneys for Amicus Curiae State of Iowa

DOUGLAS F. GANSLER
Attorney General of Maryland
WILLIAM F. BROCKMAN
Deputy Solicitor General
JOSHUA N. AUERBACH
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
Telephone: (415) 703-5830
Email: jauerbach@oag.state.md.us
Attorneys for Amici Curiae
State of Maryland

(Other counsel listed on next page)

ERIC T. SCHNEIDERMAN
Attorney General of New York
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020

Attorneys for Amicus Curiae
State of New York

JOHN R. KROGER
Attorney General of Oregon
1162 Court Street NE
Salem, Oregon 97301
(503) 378-6002

Attorneys for Amicus Curiae
State of Oregon

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609
(802) 828-3173
Attorneys for Amicus Curiae State of Vermont

[*Editors' note:* Table of Contents and Table of Authorities omitted.]

[*1] INTEREST OF THE AMICI STATES

Amici,¹ the States of California, Connecticut, Delaware, Hawaii, Iowa, Maryland, New York, Oregon, and Vermont² have a vested interest in protecting the health, safety, and welfare of their citizens, interests that are advanced through the Patient Protection and Affordable Care Act of 2010³ (“ACA”). Moreover, as sovereign States, Amici have a vital interest in ensuring that constitutional principles of federalism are respected by the federal government, as they are here.

As part of their responsibility to help provide access to affordable care for their citizens, Amici have engaged in varied, creative, and determined state-by-state efforts to expand and improve health insurance coverage in their States and to contain healthcare costs. Despite some successes, these state-by-state efforts have fallen short. As a consequence, Amici have concluded that a national solution, embracing principles of cooperative federalism, is necessary. [*2]

California’s dire situation illustrates the problems facing Amici. In 2009, more than 7.2 million Californians—nearly one in four people under the age of 65—lacked insurance for all or part of the year. More than 5.5 million Californians who could not afford private insurance were enrolled in government-sponsored health plans, which will cost the State a projected \$42 billion in the next fiscal year. Of those funds, \$27.1 billion comes from the General Fund, which faces a \$25 billion deficit.

Oregon and Maryland too are grappling with the spiraling cost of medical care and health insurance. Despite a variety of legislative efforts to increase access to insurance coverage, 21.8% of Oregonians and 16.1% of Marylanders lack health insurance. The Urban Institute has predicted that without comprehensive healthcare re-

¹ Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a).

² Although Massachusetts has filed a brief detailing its unique experience with its health care reform, it agrees with the arguments set forth in this brief.

³ The ACA refers to the Patient Protection and Affordable Care Act, Public Law 111–148 and the Healthcare and Education Reconciliation Act of 2010, Public Law 111–152.

form, 27.4% of Oregonians and 20.2% of Marylanders will lack health insurance by 2019. In 2009, Oregon spent \$2.6 billion on Medicaid and the Children's Health Insurance Program. Without comprehensive healthcare reform, the cost is expected to double to \$5.5 billion by 2019.

The ACA provides important tools for the States, in partnership with the federal government, to provide their citizens needed access to affordable and reliable healthcare. The law strikes an appropriate—and constitutional—balance between national requirements that will expand [*3] access to affordable healthcare while providing States with flexibility to design programs that achieve that goal for their citizens. Amici urge this Court to reverse the decision of the district court and uphold this necessary law.

STATUTORY BACKGROUND

The ACA represents a reasonable means of grappling with the United States' healthcare crisis. The minimum coverage provision, which requires non-exempt adults to maintain adequate health coverage, is but one part of a comprehensive healthcare reform law intended to increase Americans' access to affordable healthcare. The ACA relies in large part on an expansion of the current market for health insurance, building upon existing state and federal partnerships to improve access to and the quality of healthcare in the United States.

Although the minimum coverage provision requires individuals to purchase health insurance, most people will continue to receive coverage through their employer or through expanded access to Medicaid. The ACA expands the number of employers who offer insurance to their workers by requiring businesses with more than fifty employees to begin providing health insurance in 2014. ACA § 1513. Small businesses have already started taking advantage of the significant tax breaks intended to encourage [*4] such expansion, including some of the 333,000 businesses eligible in the Fourth Circuit. ACA § 1421.⁺ The ACA also expands access to Medicaid to

⁺ http://www.irs.gov/pub/newsroom/count_per_state_for_special_post_card_notice.

individuals who earn less than 133 percent of the federal poverty level, and funds 100 percent of the cost until 2017. ACA § 2001(a). California was one of the first States to obtain a waiver from the federal government that allows it to offer this expanded coverage to Californians prior to 2014.⁵

Finally, for those individuals who do not obtain health insurance from their employer or from government-run plans, the ACA makes affordable coverage more readily available. It eliminates annual and lifetime caps on health insurance benefits so that individuals maintain coverage during a catastrophic illness. 42 U.S.C. § 300gg-11. The ACA authorizes States to create health insurance exchanges that will allow individuals, families, and small businesses to leverage their collective bargaining power to obtain more competitive prices and benefits. 42 U.S.C. § 18031. Maryland, for instance, has already received two grants totaling \$7.2 million to support its [*5] implementation of this provision.⁶ The ACA provides tax incentives for low-income individuals to purchase their own insurance through insurance exchanges. ACA § 1401. Starting in 2014, the ACA prohibits insurance companies from refusing to cover individuals with preexisting conditions. 42 U.S.C. § 300gg-3. A significant number of individuals who are uninsured are unable to purchase insurance or are required to pay higher premiums due to a preexisting condition, which can include common illnesses such as heart disease, cancer, asthma, or even pregnancy.⁷ The ACA will thus dramatically increase the availability of insurance for previously uninsurable individuals.

One component of these comprehensive reforms is the minimum coverage provision, which requires that an applicable individual maintain “minimum essential coverage” each month. ACA § 1501. Minimum essential coverage includes Medicare or Medicaid, an employer-sponsored plan, or a plan offered through a health in-

pdf (last accessed Feb. 27, 2011).

⁵ California Department of Healthcare Services, *California Bridge to Reform: A Section 1105 Waiver* (Nov. 2010).

⁶ <http://www.healthcare.gov/center/states/md.html> (last accessed Feb. 27, 2011).

⁷ Karen Pollitz, Richard Sorian, and Kathy Thomas, *How Accessible is Individual Health Insurance for Consumers in Less-Than-Perfect Health?* (Report to the Kaiser Family Foundation June 2001).

surance exchange. *Id.* As discussed below, the minimum coverage provision is important for two [*6] reasons. First, it ensures that individuals take responsibility for their own care rather than shifting those costs to society. Second, the elimination of caps on benefits and the requirement that insurance companies insure individuals with preexisting conditions are unsustainable if participants in the healthcare market are allowed to postpone purchasing insurance until an acute need arises.

SUMMARY OF ARGUMENT

Under the Commerce Clause, Congress has the authority to enact the minimum coverage provision, as it substantially affects interstate commerce and is essential to the proper application of the ACA. The Supreme Court has recognized three broad categories of activities Congress may regulate consistent with its authority “to regulate commerce,” including (1) “the use of the channels of interstate commerce,” (2) “the instrumentalities of interstate commerce,” and (3) “activities having a substantial relation to interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). Although the Supreme Court has in the past addressed the scope of “activities” that Congress may regulate, it has never suggested that a distinction between activity and inactivity exists or that it is a relevant inquiry for purposes of the Commerce Clause. [*7]

Rather, the minimum coverage provision is included in Congress’s power to regulate activities that substantially affect interstate commerce. Exercising this power, Congress may regulate economic activities that, in the aggregate, have a substantial effect on interstate commerce. *See Gonzalez v. Raich*, 545 U.S. 1, 17 (2005). In addition, Congress may regulate noneconomic activity so long as the regulation is “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561. The minimum coverage provision is a justifiable exercise of Congress’s Commerce Clause authority because (1) the aggregate effect of maintaining a minimum level of insurance coverage has a substantial effect on commerce, and (2) the comprehensive solution to health

insurance reform would be undercut without the minimum coverage provision.

Moreover, the minimum coverage provision is also justified by the Necessary and Proper Clause. Not only is the minimum coverage provision necessary, it is a proper exercise of federal authority that does not alter the essential attributes of state sovereignty. Indeed, identical arguments were made and rejected when Congress first began regulating conditions of labor and when it passed the Social Security Act. [*8]

ARGUMENT

I. CONGRESS POSSESSES THE AUTHORITY UNDER THE COMMERCE CLAUSE TO ENACT THE MINIMUM COVERAGE PROVISION

A. As a Threshold Matter, the Distinction between Activity and Inactivity is Illusory and Has No Basis in Commerce Clause Precedent.

Regardless of whether the minimum coverage provision is seen to regulate activity or “inactivity,” it is within Congress’s power to regulate interstate commerce. In arguing that the minimum coverage provision is outside the bounds of the Commerce Clause, Virginia does not question the substantial effects that the failure to purchase insurance has on interstate commerce, but rather argues that the decision not to purchase health insurance is “inactivity” that could not be regulated by Congress. (Dist. Ct. Paper No. 89 at 16.) The supposed distinction between “activity” and “inactivity,” however, is illusory, and has no basis in Supreme Court jurisprudence.

Many regulated activities could conceivably be characterized as “inactivity,” illustrating the false distinction between the two. For instance, the failure to comply with draft registration requirements, 50 U.S.C. App. 451 *et seq.*, can be viewed as inaction or as an affirmative act of disobedience. The failure to appear for federal jury duty as required by 28 U.S.C. § 1854(b) can likewise be characterized as “inactivity” rather than as [*9] an affirmative action to evade jury service. As Justice Scalia has observed, “[e]ven as a legislative matter...the intelligent line does not fall between action and inac-

tion.” *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 296 (1990) (Scalia, J., concurring). Judge Kessler of the United States District Court for the District of Columbia reached a similar conclusion in granting the government’s motion to dismiss a related suit:

It is pure semantics to argue that an individual who makes a choice to forego health insurance is not “acting,” especially given the serious economic and health-related consequences to every individual of that choice. Making a choice is an affirmative action, whether one decides to do something or not do something. To pretend otherwise is to ignore reality.

Mead v. Holder, 2011 WL 61139, *18 (D.D.C. Feb. 22, 2011). The distinction between activity and inactivity carries no analytical weight and does not furnish a proper basis for determining the scope of congressional power.

The distinction between activity and inactivity also has no basis in Commerce Clause jurisprudence. Virginia notes that Supreme Court cases construing the limits of the Commerce Clause power refer to economic *activity*, and concludes from this observation that Congress can regulate only activity, not inactivity. (Dist. Ct. Paper No. 89 at 5, 13, 16.) That argument improperly elevates descriptive statements into a holding. The Court’s [*10] discussions of “economic activity” in those cases were not focused on whether the law at issue regulated activity rather than inactivity, but on whether the activity was economic or noneconomic in nature.⁸ See, e.g., *United States v. Morrison*, 529 U.S. 598, 610 (2000) (“Both petitioners and Justice Souter’s dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez* shows that the noneconomic, criminal nature

⁸ Similarly, some argued that Congress could not regulate local manufacture prior to transit because Supreme Court decisions discussing the Commerce Clause had, prior to that point, addressed only the regulation of goods in transit. The Court ultimately rejected the distinction between the two. As Robert Stern observed, “the Court talked about movement because that was all that was needed to talk about to decide the cases before it,” and not because it meant to limit the scope of federal power.” Mark A. Hall, *Commerce Clause Challenges to Healthcare Reform*, 159 U. Penn. L. Rev. at ____ (forthcoming June 2011), available at: <http://ssrn.com/abstract=1747189> (quoting Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 Harv. L. Rev. 1335, 1361 (1934)).

of the conduct at issue was central to our decision in that case.”). Thus, the proper question is not whether the decision refusing to purchase health insurance is “action” or “inaction,” but rather whether, in the aggregate, such decisions substantially affect interstate commerce. There can be no doubt that they do. [*11]

B. Decisions Whether to Purchase Health Insurance Have a Substantial Effect on Interstate Commerce That Congress May Directly Regulate.

The decision whether to maintain health insurance coverage has a “substantial relation to interstate commerce,” *Lopez*, 514 U.S. at 558, and is a permissible exercise of Congress’s Commerce Clause authority. In deciding to regulate activities that have a substantial effect on interstate commerce, Congress may consider the aggregate effects of those activities. “When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.” *Raich*, 545 U.S. at 17. This Court need not determine whether the decision to purchase health insurance substantially affects interstate commerce when considered in the aggregate, but “only whether a ‘rational basis’ exists for so concluding.” *Id.* at 22 (quoting *Lopez*, 514 U.S. at 557). Here, Congress had a rational basis for concluding that individuals’ decisions not to purchase health insurance, but rather to pay (or attempt to pay) for their medical care only at the time such care is delivered has a substantial effect on interstate commerce.

As Secretary Sebelius demonstrates in her brief (p. 31-33), the minimum coverage provision has a substantial effect on interstate commerce. Everyone requires healthcare at some point. Individuals who [*12] lack health insurance, however, shift two-thirds of the cost of their care to state and local officials, amounting to \$43 billion nationally in 2008 at a cost of \$455 per individual or \$1,186 per family each year in California.⁹ Maryland has developed a unique regulatory framework that seeks to ensure that such cost-shifting

⁹ 42 U.S.C. § 18091(a)(2)(F); Peter Harbage and Len Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Healthcare System* (New America Foundation, Dec. 2006).

occurs as equitably as possible. The State's Health Services Cost Review Commission, a hospital rate-setting body, authorizes the State's hospitals to impose a fee on all patients to reimburse hospitals for the costs associated with providing care to the uninsured. In 2009, when Maryland hospitals provided a total of \$999 million in uncompensated care, 6.91% of the charge for any visit to a Maryland hospital reflected a Commission-approved add-on charge to reimburse the hospital for the cost of providing uncompensated care. In other words, a fixed and substantial portion of every Maryland hospital-patient's bill reflects the shifting of costs from supposedly "inactive" individuals to the patient population as a whole.

Requiring individuals to possess health insurance ends this cost-shifting, lowering the costs of healthcare for everyone and reducing the costs to the States of providing such care. The minimum coverage provision will greatly reduce the need to compensate hospitals for uncompensated care, [*13] either directly as Maryland does, or indirectly as is the case in California and most States. The direct impact on interstate commerce described in the Secretary's brief is sufficient to justify Congress's exercise of its Commerce Clause authority.

C. The Minimum Coverage Provision Regulates an Essential Part of a Larger Economic Activity.

The minimum coverage provision is also justified as "an essential part of a larger regulation" of the health insurance industry. *Lopez*, 514 U.S. at 561. It cannot be doubted that Congress has the constitutional authority to regulate the health insurance industry. *See United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944) (Congress possesses Commerce Clause authority to regulate insurance). Indeed, Congress has regulated the health insurance market for decades. *See* Employee Retirement Income Security Act of 1974 (ERISA) (Pub. L. 93-406); Consolidated Omnibus Budget Reconciliation Act (COBRA) (Pub. L. 99-272); Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. 104-191).

The market for medical services is national in scope, and accounts for 17 percent of the United States's gross domestic product,

or \$2.5 trillion.¹⁰ [*14] Congress found that spending for health insurance exceeded \$850 billion in 2009. 42 U.S.C. § 18091(a)(2). As Congress recognized, medical supplies, drugs, and equipment used in the provision of healthcare routinely cross state lines. 42 U.S.C. § 18091(a)(2)(B). Many hospital corporations operate in numerous states: the Hospital Corporation of America, for instance, operates 164 hospitals and 106 freestanding surgery centers in 20 states.¹¹ Moreover, Congress found that the majority of health insurance is sold by national or regional companies. 42 U.S.C. § 18091(a)(2)(B).

As Secretary Sebelius explains in her brief (p. 34–39), the minimum coverage provision is an essential part of the ACA’s attempt to provide healthcare access to individuals with preexisting conditions, a group that is among the hardest of the uninsured to cover. The requirement that companies insure individuals with preexisting conditions creates a moral hazard: individuals could simply wait until they are sick to purchase health insurance. Left unmitigated, this “adverse selection” creates an insurance pool that poses an extremely high risk from an insurer’s perspective, since individuals who are ill or at high risk of becoming ill will disproportionately purchase health insurance while healthy individuals will remain outside the system. To prevent insurance companies from being forced to raise [*15] premiums to account for this risk, Congress enacted the minimum coverage provision, which prevents freeloaders from refusing to pay for insurance when they know they can buy it when it is needed.

This provision has the additional effect of reducing the need to shift the cost of uncompensated care given to those without insurance onto the States and responsible individuals who have health insurance. *See supra* at 12–13. As a result of the minimum coverage provision, California will no longer be forced to pay the 5-7 percent of public hospitals’ operating expenses that resulted from treating uninsured individuals.¹² Nor will Maryland be forced to add a 7 per-

¹⁰ Center for Medicare & Medicaid Services, 2009 National Health Expenditure Data, table 3.

¹¹ <http://www.hcahealthcare.com/about/> (last accessed March 5, 2011).

¹² California HealthCare Foundation, *California’s Healthcare Safety Net: Facts and Figures* at 19

cent surcharge to all hospital bills to cover such uncompensated care. The minimum coverage provision will help reduce the almost \$43 billion spent nationally on uncompensated care, 42 U.S.C. § 18091(a)(2)(F), and is necessary to the proper functioning of the requirement that insurance companies insure those with preexisting conditions. It is the sort of noneconomic regulation that is essential to a larger regulation of economic activity (the health insurance market generally) that Congress may regulate. *Lopez*, 514 U.S. at 561. [*16]

D. The Minimum Coverage Provision is a Necessary and Proper Means to Regulate the Health Insurance Market.

Congress's authority under the Commerce Clause is augmented by the Necessary and Proper Clause, which allows Congress to "make all laws which shall be necessary and proper for carrying into execution" the powers enumerated in the Constitution. U.S. Const., Art. I, § 8. As Justice Scalia has explained, the Necessary and Proper Clause authorizes Congress to "regulate even those intrastate activities that do not substantially affect interstate commerce" as well as "noneconomic local activity" where necessary to make a regulation of interstate commerce effective. *Raich*, 545 U.S. at 35, 37 (Scalia, J., concurring). Thus, even if the requirement that an individual maintain a minimum level of coverage were not considered economic, it is still within Congress's power since it is necessary to lower the cost of health insurance and to effectuate the ban on denying coverage based on preexisting conditions. In rejecting application of the Necessary and Proper Clause, the district court concluded that the minimum coverage provision was not "tethered to a lawful exercise of an enumerated power" and that the provision "is neither within the letter nor the spirit of the Constitution." (Dist. Ct. Paper No. 161 at 24.) This conclusion reflects a [*17] misunderstanding of the purpose and function of the Necessary and Proper Clause.

(Oct. 2010).

1. The Minimum Coverage Provision Furthers Congress's Exercise of Its Commerce Clause Authority.

The minimum coverage provision is in fact tethered to a valid exercise of congressional authority: Congress's power to regulate commerce. It is beyond dispute that the ACA *as a whole*, which regulates the \$2.5 trillion national healthcare market, is within Congress's Commerce Clause power. Under the Necessary and Proper Clause, Congress "possesses every power needed to make that regulation effective." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19 (1942). Such power is necessarily *in addition to* whatever enumerated power Congress possesses. It is axiomatic that Congress possesses the authority to use all appropriate means adapted to legitimate ends. *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819). To suggest that Congress must possess some enumerated power to justify the exercise of authority under the Necessary and Proper Clause would render that clause meaningless.

Rather, the appropriate inquiry is whether "the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *United States v. Comstock*, 130 S. Ct. 1949, 1957 [*18] (2010). In making this determination, courts must give Congress "a large discretion as to the means that may be employed in executing a given power." *Lottery Case*, 188 U.S. 321, 355 (1903). The end here is clearly legitimate: to reduce the expense of healthcare, which in 2008 accounted for approximately \$2.5 trillion, or 17.6%, of the nation's economy, and to expand access to health insurance as the federal government has been doing since the passage of the Social Security Act in 1965. So too are the means reasonably adapted to this legitimate end. As explained above, *supra* at 14-15, the minimum coverage provision helps eliminate the problem of adverse selection created by expanding the insurance pool and results in reduced insurance premiums and lower costs of healthcare.

2. The Minimum Coverage Provision is a “Proper” Exercise of Congressional Authority

In addition to being necessary, the minimum coverage provision is also proper. Virginia’s primary argument as to why the Necessary and Proper Clause does not apply is that the power to enact the minimum coverage provision “would alter the federal structure of the Constitution by creating an unlimited federal power indistinguishable from a national police power.” (Dist. Ct. Paper No. 89, at 5–6.) This concern dramatically overstates the authority being claimed by the federal government, and [*19] dramatically understates the extent to which the federal government already regulates a significant portion of the health insurance market.

In *Comstock*, the Supreme Court rejected a Tenth Amendment limitation on the Necessary and Proper Clause much along the lines of what Virginia urges here. The Supreme Court concluded that the “powers ‘delegated to the United States by the Constitution’ include those specifically enumerated powers listed in Article I along with the implementation authority granted by the Necessary and Proper Clause. Virtually by definition, these powers are not powers that the Constitution ‘reserved to the States.’” *Comstock*, 130 S. Ct. at 1962.

Justice Kennedy concurred, expressing his view that “whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause” should be a consideration in determining whether a power is properly within the federal government’s reach. *Id.* at 1967–68. Justice Kennedy identified three examples where the Necessary and Proper Clause should be limited: instances “in which the National Government demands that a State use its own governmental system to implement federal commands”; “in which the National Government relieves the States of their own primary responsibility to enact laws and policies for the safety and well being of their citizens”; or [*20] “in which the exercise of national power intrudes upon functions and duties traditionally committed to the State.” *Id.* at 1968. None of these apply here.

a. The Minimum Coverage Provision Does Not Require States to Implement Federal Commands.

First, the Act does not commandeer the States to implement a federal program. To the contrary, the ACA provides States substantial ability to experiment with their own methods of improving their citizens' access to affordable healthcare. Indeed, the ACA is a prime example of cooperative federalism that the Supreme Court has concluded is within Congressional authority. *New York v. United States*, 505 U.S. 144, 167 (1992). For instance, the ACA gives States broad latitude to establish health insurance exchanges in a manner that States determine best meet the needs of their citizens, subject to minimum federal standards. 42 U.S.C. § 18041(b). Even those standards may be waived if a State wishes to provide access to health insurance in a different way. *Id.* § 18052. Or a State may decline to establish an exchange at all. *Id.* § 18041(c).

Similarly, the ACA allows States great latitude in establishing basic health programs for low-income individuals who are not eligible for Medicaid. States may implement new coverage programs for individuals and families with incomes between 133% and 200% of the poverty line. 42 [*21] U.S.C. § 18051. If a State chooses to implement these programs, their citizens would be able to choose a plan under contract with the State instead of one offered in the insurance exchange. *Id.* The State would receive federal funds to operate such a program equal to 95% of the subsidies that would have gone to providing coverage for this group in the exchange. *Id.* § 18051(d)(3). States may also enter into healthcare choice compacts in which two or more States establish such a program. *Id.* § 18053. Or again, a State may choose not to establish such a program and instead allow their citizens to access health insurance exchanges operated by the federal government.

b. States Maintain Primary Responsibility to Protect their Citizens.

Second, the ACA does not relieve States of their primary responsibility to enact laws and policies for the safety and well-being of their citizens. States may choose to enact further reforms to im-

prove over the federal reforms contained in the ACA, much as Massachusetts has done with its landmark healthcare reform law that has served as a model for many of the reforms instituted by the ACA. Indeed, the ACA gives States *additional* authority to regulate insurance companies. Under the authority to review any increases in the premiums set by insurance companies, California passed a law requiring all premium filings to be reviewed and certified by an [*22] independent actuary to ensure that premium costs are accurately calculated. Cal. Stats. 2010, Ch. 661.

c. The ACA Does Not Intrude in an Area Typically Committed to State Control

Third, the ACA does not intrude in an area that has historically been committed solely to the States. While States retain wide latitude to regulate the standards of medical care and the provision of health insurance, the federal government has maintained a presence in the health insurance arena for decades. A prime example is Medicaid, through which the state and federal governments cooperate in order to extend coverage to children, pregnant mothers, and the disabled who are below the federal poverty level. 42 U.S.C. § 1396a(a)(10)(A)(i). Using federal and state funds, States administer Medicaid according to a plan that is approved by the Secretary of Health and Human Services. *Id.* § 1396a(b). States, within federal guidelines, determine which benefits the State will offer, how much doctors are paid, and how the program will operate. Congress's continued involvement in the health insurance market is nothing new.

Aside from Medicaid, Congress has regulated large aspects of the insurance market since the passage of ERISA in 1974. ERISA regulates the provision of employer-sponsored health plans, and limits the ability of insurance companies to deny coverage to individuals with preexisting [*23] conditions. 29 U.S.C. § 1181. ERISA also sets minimum standards for certain aspects of employer-sponsored health insurance, such as requirements for minimum hospital stays following the birth of a child, and parity in mental health and substance abuse benefits. *Id.* §§ 1185(a), 1185a. Congress has twice

revisited its regulation of health insurance since then. Passed in 1986, COBRA requires that employers continue to offer health insurance to individuals and their dependents that otherwise might be terminated, such as if an individual loses his or her job. *Id.* §§ 1161 *et seq.* HIPAA, passed in 1996, set federal requirements for maintaining the privacy of medical information, 42 U.S.C. §§ 1320d-1 *et seq.* and further limited the exclusion of individuals with preexisting health conditions, 29 U.S.C. § 1181.

Since the establishment of Medicaid in 1965 and the passage of ERISA in 1974, the federal government has been actively involved in the regulation of the health insurance market. While the ACA represents an expansion of the federal government's presence, it is not a usurpation of an area traditionally left to state regulation alone.

d. Federal Intervention is Needed to Reform the Health Insurance Market.

Because of the national scope of healthcare and its importance to the national economy, States are unable to solve the problem of the uninsured [*24] without the assistance of the federal government. Most people obtain their healthcare through their employers, and States' attempts to reform the healthcare market come at great risk: a state's requirement that employers offer health insurance could lead to businesses moving to other States. Similarly, the regulation of insurance practices by a single State may make insurance companies reluctant to offer policies there. That is an especially powerful concern when a single insurance company provides coverage for the majority of individuals in a State, such as in Alabama, where the largest carrier has a 96% market share.¹³ Moreover, a State that offered especially generous benefits could see individuals move to that State to take advantage of those benefits, increasing the State's financial burden. When Congress regulates the insurance industry on a national basis, these problems are greatly reduced.

¹³ Letter from United States Government Accountability Office to Sen. Snowe, *Private Health Insurance: 2008 Survey Results on Number and Market Share of Carriers in the Small Group Health Insurance Market* (Feb. 27, 2009).

Similar motivations caused Congress to regulate the labor market in the early 20th century. The Supreme Court initially determined that such efforts were outside Congress's Commerce Clause powers in a series of decisions that have since been discredited. *See, e.g., Bailey v. Drexel* [*25] *Furniture Co*, 259 U.S. 20 (1922) (invalidating congressional efforts to regulate child labor). The Court ultimately recognized that interstate competition would render efforts by individual States inadequate, and that national standards were needed. *United States v. Darby*, 312 U.S. 100, 122–23 (1941). Like decisions invalidating Congress's attempts to reform labor practices, arguments that the minimum coverage provision are not within Congress's Commerce Clause powers represent a myopic view of that authority.

States' efforts to regulate the health insurance market illustrate the need for congressional action. Maryland, like many states, has undertaken substantial efforts to address these problems, and it has made significant gains. In 2008, Maryland dramatically expanded its Medicaid program, raising the eligibility ceiling for parents and caretakers of dependent children from 30% to 116% of the federal poverty level. As a result of this expansion, the State's Medicaid program now provides coverage to approximately 74,000 Marylanders who would otherwise lack insurance. In 2002, the State created the Maryland Health Insurance Plan (MHIP), which provides coverage to Marylanders who are ineligible for Medicare or Medicaid and who have been deemed medically uninsurable by private [*26] carriers. Today, MHIP insures about 20,000 Maryland residents who would be assured of access to health insurance under the ACA starting in 2014.

While Maryland's efforts have been beneficial, these programs have come at a high cost, and have only reduced, not removed, the barriers to affordable care. Despite the State's expansion of its Medicaid program and its introduction of MHIP, 16.1% of Marylanders still lack health insurance, similar to the figure for the country as a whole. In 2009, the State's hospitals provided \$999 million in uncompensated care to those without insurance. Moreover, the expansion of Maryland's Medicaid program to a substantial number of

additional low-income parents is expected to cost the State \$498 million in the 2012 fiscal year. To provide benefits to MHIP's high-risk pool of enrollees, MHIP charges premiums substantially higher than those charged in the private market, and, in addition, the State imposes a 0.8% assessment on the net patient revenues of all Maryland hospitals to support MHIP. In the face of unexpectedly high demand for coverage and the high cost of claims, MHIP was forced, between 2006 and 2010, to increase premiums by about 40% for most of its membership and to institute new benefit caps and to lower existing ones. Notwithstanding the Plan's objective to provide insurance for otherwise uninsurable individuals, in 2007 MHIP was compelled to begin excluding coverage for benefits for [*27] preexisting conditions during the first six months of an enrollee's participation in the Plan.

Maryland's efforts illustrate the limits of States' ability to grapple with the national healthcare crisis, and the role that cooperative federalism can play in helping States increase their citizens' access to affordable health insurance. The ACA provides additional funds for Maryland to expand its Medicaid program, and allows for waivers should Maryland, or any other State, seek to do more. The ACA's prohibition on insurance companies' practice of excluding individuals with preexisting conditions reduces the need for MHIP and for the surcharge hospitals pay to support the Plan.

e. Upholding the Minimum Coverage Provision Will Not Provide the Federal Government with a General Police Power.

Sustaining the power of Congress to require individuals to maintain adequate health insurance would not give the federal government a general police power. First, existing precedent provides constraints on congressional power that preclude Congress from exercising a national police power now and in the future. Regardless of whether the authority to enact the minimum coverage provision is found in the Commerce Clause or the Necessary and Proper Clause, a decision sustaining its constitutionality would be based on the fact that the provision either directly affects interstate com-

merce or that [*28] it is *necessary* to support such a direct regulation. A ruling that acknowledges this direct link to interstate commerce poses no risk that the federal government will occupy traditional areas of authority reserved to the States.

Second, in advancing the “slippery slope” argument, Virginia seeks a decision striking down an existing, validly-enacted statute on the basis of the possible future enactment of an unconstitutional statute. This is not a valid basis for challenging the ACA’s constitutionality. The mere potential that Congress could attempt to enact an unconstitutional law in the future is an insufficient reason to invalidate the ACA today. Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985).

Third, for all of the controversy surrounding the ACA, it is not fundamentally different from other federal programs that have been in existence for decades. The federal government has helped provide access to health insurance for large segments of the population through Medicare and Medicaid. It has regulated the provision of healthcare through employer-sponsored plans through ERISA, which governs how most Americans obtain health insurance. The ACA is conceptually no different from Social Security, which is in effect a federally-required retirement-insurance program. In both instances, Congress requires payment over time to avoid [*29] the social and economic costs of individuals who are unable or unwilling to prepare for retirement or for a catastrophic illness.

Indeed, the Social Security Act was also challenged as an incursion on States’ prerogatives.¹⁴ The Supreme Court’s rejection of that argument is so compelling in the context of the debate over the ACA that it bears repeating:

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it ef-

¹⁴ Congress also possesses the authority to enact the minimum coverage provision under Congress’s taxing power: only taxpayers are subject to the tax penalty imposed for failure to maintain a minimum level of coverage; the penalty is calculated by reference to an individual’s income and is included in that individual’s tax return; the IRS collects the penalty and enforces the minimum coverage provision; and the \$4 billion in projected annual revenues are used to fund other provisions of the ACA. Cf. *Sozninsky v. United States*, 300 U.S. 506 (1937); *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

fectively. Congress, at least, had a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. . . . Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. . . . A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all. [*30]

Helvering v. Davis, 301 U.S. 619, 644 (1937). The same thing could be said of the healthcare crisis currently gripping the States and the nation. The ACA no more intrudes on state sovereignty than did the Social Security Act.

As States, Amici are fiercely protective of their sovereignty, and have a vital role in ensuring that the balance of power between the state and federal governments reflected in the Constitution is rigidly maintained. The ACA does nothing to disturb that balance. Rather, it provides States with the necessary tools to ensure that their citizens have access to affordable medical care in a healthcare market that is truly national in scope.

II. THE MINIMUM COVERAGE PROVISION IS SEVERABLE FROM THE REMAINDER OF THE AFFORDABLE CARE ACT¹⁵

For the reasons set forth above, Amici strongly believe that the minimum coverage provision is well within Congress's powers under the Commerce Clause, and that it does not interfere with traditional areas of State sovereignty. Should this Court conclude that Congress lacked authority to enact the minimum coverage provision, however, it should affirm the decision of the district court severing that provision and provisions making reference to it from the

¹⁵ The arguments in this portion of the brief address the cross-appeal in No. 11-1058.

ACA. “The standard for determining the severability of an unconstitutional provision is well [*31] established: ‘[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a matter of law.’” *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)). In making this determination, the Court must determine whether the remainder of the ACA is capable of functioning independently. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987).

Although the ban on denying coverage based on a preexisting condition is dependent on the minimum coverage provision, the vast majority of the ACA can function as intended by Congress without it. California has taken a lead in implementing many of these provisions even before the minimum coverage provision takes effect in 2014, showing that these provisions, and many others, can operate independently. For instance, California has enacted legislation implementing the ACA’s ban on denying coverage of children based on preexisting conditions, as well as its requirement that insurance plans cover dependent children who are 25 or under. 2010 Cal. Stat., Ch. 656 and 660. California has also passed legislation that prohibits a person’s health insurance policyholder from canceling insurance once the enrollee is covered unless there is a [*32] demonstration of fraud or intentional misrepresentation of material fact. 2010 Cal. Stat., Ch. 658.

The ACA contains numerous provisions aimed at improving the quality of healthcare that do not depend on the minimum coverage provision. For instance, Title V of the ACA provides new incentives to expand the number of primary care doctors, nurses, and physician assistants through scholarships and loan repayment programs. Title IV of the ACA, on the other hand, contains provisions aimed at preventing illness in the first instance. It requires insurance companies to offer certain preventive services, and authorizes \$15 billion for a new Prevention and Public Health Fund, which will support initiatives from smoking cessation to fighting obesity. 42 U.S.C. § 300u-11. The ACA also includes \$4 billion in funding for two pro-

grams aimed at moving Medicaid beneficiaries out of institutions and into their own homes or other community settings.¹⁶ One of these programs was enacted during George W. Bush's presidency, and was reauthorized by the ACA. ACA § 2403. Recently, the Department of Health and Human Services announced the first round of grants totaling [*33] \$621 million, including over \$22 million allocated to West Virginia.¹⁷ Since this program was in effect before the ACA was enacted, it can clearly exist independently of the minimum coverage provision.

Finally, the ACA contains important consumer protections that will assist Amici in their duty to protect individuals from abusive practices of insurance companies. In addition to barring the practice of insurance companies rescinding coverage, the ACA allows consumers to appeal coverage determinations, and establishes an external review process to examine those decisions. California has already implemented a provision that expands consumer assistance programs and has received \$3.4 million to enhance the capacity of existing consumer assistance networks and to provide assistance with filing complaints and/or appeals of adverse coverage decisions.¹⁸ California has also received a \$1 million grant to implement a provision of the ACA that grants States the authority to review premium increases. Each of these provisions is completely independent of the minimum coverage provision, as the district court recognized. Accordingly, [*34] should this Court invalidate the minimum coverage provision, it should leave the vast majority of the ACA intact.

CONCLUSION

The decision of the district court should be reversed.

¹⁶ <http://www.hhs.gov/news/press/2011pres/02/20110222b.html> (last accessed Feb. 27, 2011).

¹⁷ See note 15.

¹⁸ <http://www.healthcare.ca.gov/Priorities/ImproveQualityandSecurityofPrivateInsurance.aspx> (last accessed Feb. 27, 2011).

HARRIS TO HUDSON, MAR. 7, 2011

Dated: March 7, 2011 Respectfully submitted,
KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
TRAVIS LEBLANC
Special Assistant Attorney General

S/ Daniel J. Powell

DANIEL J. POWELL
Deputy Attorney General
Attorneys for Amici Curiae
State of California

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“Nebraska Compromise” – Potential Constitutional Problems with	McMaster, Henry, et al.	Pelosi, Nancy; Reid, Harry	2009-12-30; 1 J.L. (1 Pub. L. Misc.) 47

LAW & COMMENTARY

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“Chinn offers a helpful trichotomy: the Court’s first task will be *to delimit* the scope of the new principles, and thereby define what is living and what is dead in the constitutional legacy left by the past. Later on, it will elaborate *order-creating* opinions that give more affirmative meaning to the new constitutional principles; these principles will, of course, sometimes conflict with others derived from earlier constitutional moments, requiring the Court to confront a third, and more standard, task: writing opinions that seek to *resolve the tensions* between constitutional principles inherited from different eras of our constitutional development.”

Bruce Ackerman, page 186

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THREE INVITATIONS TO *LAW & COMMENTARY*

Ross E. Davies[†]

If *Law & Commentary* survives, it will be due to some combination of its approaches to: (a) peer review and article selection; and (b) commentary on the featured works it publishes. Please stay with me for a quick survey of our plans. You might be inspired to pitch in.

PUBLIC PEER REVIEW

We begin with an unusual approach to peer review: Each article we publish is and will be accompanied by at least two signed review essays by senior, leading scholars in relevant fields. Imagine a symposium issue in which a panel of top scholars selects (in collaboration with an editor) one of the best not-yet-published works in the panelists' area of expertise, and then they write substantial comments to be published side-by-side with that work. That is, roughly speaking, what every issue of *Law & Commentary* will be.

The contributions made by those leading scholars are at the core of this project: (1) they lend their knowledge of the relevant field and their connections within it to the identification and solicitation of excellent new work; (2) they lend their good names – their reputations – to the selection and publication of that work by publicly endorsing it; and (3) they add to the substantive quality of the work by providing their own explanations and extensions of it in signed companion essays.

There are two interrelated concerns motivating this version of peer review. First, there is the difficulty junior scholars – and also

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

senior scholars working in areas outside their established specialties – sometimes have placing first-class articles in appropriate journals and generally drawing attention to their best work. Second, there is the difficulty consumers of legal scholarship can have identifying which articles – out of the many thousands published every year in the many hundreds of law reviews – most merit their attention. Articles placed in a few leading law journals (the flagship law reviews at prominent law schools and premier faculty-edited journals) will enjoy wide notice. But there are not many slots in those journals, and few of those few go to the work of relatively junior or unknown scholars.

So, for the underappreciated scholar and the people who ought to be reading that scholar's best work, an additional, accessible, credible signal of quality might well be a big help. But such signals are hard to come by. Currently, probably the best approach is to work with a highly regarded senior co-author in the relevant field. But even in this modern era of growing appreciation for collaboration in the legal academy, scholars tend to work with peers, not juniors or non-specialists.¹ So far, it has been the rare senior scholar who has had the ability, the inclination, and the opportunity to pursue his or her scholarly agenda – and fully share authorial credit for the resulting work product – with such people.²

Law & Commentary's peer review process is designed to provide signals comparable to, perhaps even better than, co-authorship, and at lower cost to the participants. All it requires is cooperation by two or three well-known, top-drawer legal scholars in (1) the selection of an underappreciated work and (2) the preparation of signed reviews – each something of a cross between a positive peer review letter and a critical symposium comment.

¹ See Paul H. Edelman & Tracey E. George, *Six Degrees of Cass Sunstein: Collaboration Networks in Legal Scholarship*, 11 GREEN BAG 2D 19 (2007); Paul H. Edelman & Tracey E. George, *Sunstein 1s and 2s*, in 2008 GREEN BAG ALM. 473 Paul H. Edelman & Tracey E. George, *Mr. Sunstein's Neighborhood*, in 2009 GREEN BAG ALM. 344.

² See, e.g., Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. (2009); Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551 (2004); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

THREE INVITATIONS

This approach is based on two kinds of optimism about the intellectual and collegial capacities of legal scholars. Optimism that there are more good articles out there than the average reader currently gets to see, and optimism that there are prominent senior legal scholars who can and will invest in bringing that scholarship the attention it merits.

Here is an outline of how the process works:

1. *The Writing.* A junior scholar, or an established scholar entering a new field, writes an excellent article.

2. *The Proposing.* A mentor to or colleague of that scholar – believing that the article is or is likely to be under-placed in the law reviews – suggests to *Law & Commentary* that the article should be published here. This is, really, the first stage of article selection: Self-selection. No one is going to turn down placement in a top student- or faculty-edited law journal in favor of *Law & Commentary*, and so pieces that do land in such publications will never appear on this journal's radar. In addition, no self-respecting mentor or colleague is going to invest time or reputation in pitching an article to *Law & Commentary* unless he or she (a) believes that the article is good enough to appear here, and (b) is willing to go to the trouble of spelling out grounds for that belief. *Law & Commentary* is, one might say, the journal of error-correction in article selection – a home for articles that should be appearing in top journals but for some reason unrelated to the quality of the work are not.

3. *The Reviewing.* If the article measures up to our internal standards, we invite at least two senior scholars in relevant fields to comment on the article. The gist of the invitation is this: Please read this article. If you think it is an excellent piece of legal scholarship and are willing to write for publication a short essay explaining exactly (a) what makes the article worth reading, and (b) what would make it better, as well as (c) elaborating your own views on the subject, please let us know and we will get to work. If not, you need not explain why, unless you want to, in which case we will keep your comments confidential. This is, as a practical matter, the second stage of article selection: If two senior scholars with sterling qualifications invest in evaluating an article, and then do the serious

though relatively small-scale work they are invited to perform, then neither the author of the article nor *Law & Commentary* is likely to have a good excuse for backing out. On the other hand, if we cannot come up with two suitable scholars who are willing to make the investment, that is a pretty good sign that the article, although possibly quite good, is not quite right for *Law & Commentary*.

4. *The Editing*. When all pieces are complete, an editor edits. Given the intense early screening for work of the highest quality, and the caliber of the reviewers, the editorial work is unlikely to be an overwhelming burden. (It wasn't for this issue.)

5. *The Posting and Publication*. The package of article-plus-reviews is posted in citable form on *Law & Commentary*'s website (accessible via www.journaloflaw.us), sent to a printer for ink-on-paper publication and distribution, and generally released to the wide world.³

Obviously, this is different from traditional double-blind peer review – a secret process in which author and reviewer do not know each other's identities during the review process, and the reviewer's identity and comments remain confidential – but not as different as might appear at first blush. Practically speaking, the extent of actual as opposed to conceptual blindness and secrecy in traditional peer review varies widely, from near-total opacity to near-total transparency.⁴ This variation should come as no surprise given the great di-

³ See generally Ross E. Davies, *Like Water for Law Reviews*, 1 J.L. 1 (2011).

⁴ Something similar might be said about variation in the scope and rigor of peers' reviews. And then there is the fact that a central authority shrouded in secrecy – an authority exercising power over process design and implementation, decisionmaker appointment, and information dissemination – does not always inspire confidence among people observing or subject to such an authority, even though its members may sincerely believe in their own wisdom and capacity to do right. See Brief of Legal Scholars and Historians as Amici Curiae in Support of Petitioner, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Such concerns might be especially salient in cultures where some in positions of authority are known (or perceived) to be engaged in (or blind to) sneaky mistreatment of relatively weak peers in contexts other than peer review. Cf. Scott Jaschik, *A Call to Shun*, INSIDE HIGHER ED, www.insidehighered.com/news/2011/03/30/philosophers_consider_what_to_do_about_sexual_harassment (Mar. 30, 2011; vis. Apr. 2, 2011). Surely, though, defects in design and failures in execution are grounds for fixing, not abandoning, peer review processes. See, e.g., DAVID SHATZ, PEER REVIEW: A CRITICAL INQUIRY (2004); DARYL E. CHUBIN & EDWARD J. HACKETT, PEERLESS SCIENCE: PEER REVIEW & U.S. SCIENCE POLICY ch. 4 (1990); *Information for Authors*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, www.pnas.org/site/misc/iforc.shtml (vis. Mar. 11, 2011); Joanne Meyerowitz, *History's Ethical Crisis*:

versity of academic disciplines, institutions, publications, editors, and scholars. *Law & Commentary*'s mostly public peer review certainly falls near the transparent end of the spectrum when it comes to positive and mixed reviews (after all, we will be printing a couple of them, signed, with every featured article), but it tends toward the opaque end on negative reviews (which, recall, need not consist of anything more than an ambiguous refusal to comment at all, and will never consist of more than comments confidentially shared by the reviewer).

We are, by the way, not at all alone in our efforts to shape and diversify peer review to meet the needs of our discipline – especially by increasing transparency, flexibility, and accountability in peer participation. In the humanities, for example, the influential *Shakespeare Quarterly* experimented with “a public phase of external vetting” via “online open reviewing” at MediaCommons Press for some submissions to its Fall 2010 issue,⁵ and it has since used the same process for some other reviews.⁶ In her forthcoming book, *Planned Obsolescence: Publishing, Technology, and the Future of the Academy*, Kathleen Fitzpatrick of Pomona College describes similar projects (with mixed results) in the sciences.⁷

Like the *Shakespeare Quarterly* and other innovators, *Law & Commentary* has adopted unorthodox methods in pursuit of goals we

An Introduction, 90 J. AM. HIST. 1325 (2004). As the Shatz and Chubin & Hackett books show, peer review in faculty-edited journals (like editorial processes in student-edited law reviews) has been the subject of considerable commentary, thoughtful scholars naturally being interested in the institutions and processes through which their own work is publicized and immortalized. Studies of peer review have had little to say about legal scholarship, however, probably because its history of peer review is mostly short and meager.

⁵ See Katherine Rowe, *From the Editor: Gentle Numbers*, 61 SHAKESPEARE Q. iii, v (Fall 2010); see also mediacommons.futureofthebook.org/mcpress/ShakespeareQuarterly_NewMedia/ (vis. Mar. 18, 2011) (archived open peer review for Fall 2010 *Shakespeare Quarterly*).

⁶ See, e.g., Sarah Werner, *Shakespeare and Performance Open Review*, SHAKESPEARE Q. FORUM, shakespearequarterly.wordpress.com/2011/02/15/shakespeare-and-performance-open-review/ (vis. Mar. 18, 2011).

⁷ See KATHLEEN FITZPATRICK, *PLANNED OBSOLESCENCE: PUBLISHING, TECHNOLOGY, AND THE FUTURE OF THE ACADEMY* ch. 1, mediacommons.futureofthebook.org/mcpress/planned-obsolescence/ (vis. Mar. 18, 2011) (MediaCommons Press edition; print edition forthcoming from NYU Press, autumn 2011); see also *Nature's peer review debate*, www.nature.com/nature/peerreview/debate/ (vis. Mar. 7, 2011); Christen Brownlee, *Peer Review Under the Microscope*, SCIENCE NEWS, Dec. 16, 2006 at 392-93.

share, we are sure, with all journals that use some kind of peer review: (1) honest, impartial evaluation of scholarship; (2) investment by scholars in improving and promoting each other's good work without regard to status or identity; (3) publication of the best work possible in the best form and forum possible; and (4) preservation of human dignity and collegial relations. We hope and expect that the processes described above and below (and refined as experience instructs) will achieve those ends in ways that fit well within the culture of the legal academy. Put yourself in the shoes of a participant in *Law & Commentary's* process and consider how you would behave. We like to think that it would be a challenging and constructive experience.⁸

In this issue, Stuart Chinn's article and the accompanying reviews by Bruce Ackerman and Sanford Levinson provide fine examples of the kinds of work we hope to publish. The article is good, and the reviews are by scholars whose expertise in relevant fields and standing in the profession are sufficient to justify your attention to the article they are commenting on. In addition, the reviews are worthy little essays in their own right, not saccharine raves about the brilliance or intellectual promise of the author or book-blurbish superficial endorsements of the general thrust of the article.

COMMENTS & RESPONSES

Finally, there is the aftermath of publication. We encourage scholars of all sorts to comment on articles appearing in *Law & Commentary*. We will print comments that are of publishable quality,

⁸ Although meddling in retention, promotion, and tenure is not on *Law & Commentary's* agenda, we suspect that our processes could have some benefits in that area. Put yourself in the shoes of a law school's tenure committee. A junior member of your faculty who is up for tenure has published an article in *Law & Commentary*. The committee thus at the outset already has at least two detailed statements by competent commentators on the record regarding the strengths and weaknesses of one of the candidate's major works. In addition, the committee can reach out to those reviewers for additional comments, and the reviewers can simply add to their published remarks, rather than doing an entire write-up from scratch. This might well reduce the overall cost of the tenure process, without reducing the quality or quantity of available data. Or put yourself in the shoes of the candidate, who will have the benefit of at least some constructive, substantive attention to his or her work in the public eye, rather than merely in a permanently confidential, single-use tenure file.

and we will give authors the opportunity to respond, also in print. Comments and authors' responses will be subject to the standards that apply to the reviews accompanying the original article.

The idea here almost goes without saying: Good scholarship benefits from criticism, praise, and extension.⁹ We hope this comment-and-response approach will help the good ideas published here attract useful commentary and present commentators and authors with opportunities to refine and expand their ideas in print.¹⁰

THE THREE INVITATIONS

By now it should be clear that *Law & Commentary* is not a revolutionary organ. We are not seeking to overturn or restructure the order of things in the legal academy. Faculty-edited law journals (in which commitments to some version of peer review are not uncommon) are a rising force that should continue to gain influence and readership. Student-edited law reviews – love 'em or hate 'em – are here to stay, and the best of them will continue to compete with and often prevail over faculty-edited journals in the pursuit of the best work to publish. *Law & Commentary* is simply another vehicle for optimizing the production and distribution of legal scholarship.

All of which brings us to you, the scholar-reader. First, we invite you to consider *Law & Commentary* for publication of your own underappreciated, excellent work. Second, we encourage senior scholars (in the academy, in private practice, in government, and on the bench) to help their juniors and colleagues both by bringing their work to our attention and by reviewing it in our pages. And

⁹ Much good material of this sort is showing up at a fine faculty-edited web-only journal – *Jotwell: The Journal of Things We Like (Lots)*, jotwell.com – and in many manifestations of an interesting development in student-edited law reviews – the web-based adjunct to the established print journal. To name just a few: the *Yale Law Journal*'s "YLJ Online" (formerly the "Pocket Part"), the *Virginia Law Review*'s "In Brief," the *Texas Law Review*'s "See Also," the *University of Pennsylvania Law Review*'s "PENNumbra," the *Northwestern University Law Review*'s "Colloquy," the *Harvard Law Review*'s "Forum," and the *Columbia Law Review*'s "Sidebar." See *Ereviews*, 9 GREEN BAG 2D 103 (2006).

¹⁰ See Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4, 5-9 (2006), www.thepocketpart.org/2006/09/06/volokh.html; Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L.J. POCKET PART 53, 56-58 (2006), www.thepocketpart.org/2006/09/20/leiter.html.

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third, we encourage all scholars to submit short, constructive comments on works published here.

Thank you for your attention. ☐

RACE, THE SUPREME COURT, AND THE JUDICIAL-INSTITUTIONAL INTEREST IN STABILITY

Stuart Chinn[†]

What factors influence judicial behavior? This is a familiar and important question for legal scholars and political scientists for at least three reasons: first, it carries significance for predicting case outcomes and more general legal developments; second, it implicates important considerations and constraints for normatively-minded scholars interested in advocating for particular legal outcomes; and, finally, it implicates important historical concerns regarding past developments in the law and why it was that in times past, certain legal outcomes materialized while others did not.

Relevant to all three of these concerns, the goal of this Article is to identify and flesh out a specific determinant of judicial behavior that has escaped sustained scholarly attention in the recent literature. Stated simply, my thesis is that in the aftermath of transformative reforms that dismantle social hierarchies, the Supreme Court

[†] Assistant Professor, University of Oregon School of Law. For helpful feedback and comments, I am grateful to Rachel Barkow, Jack Beerman, Mitch Berman, Ian Farrell, Willy Forbath, Mark Graber, Alon Harel, Dick Markovitz, David Mayhew, Scot Powe, Dan Rodriguez, and Mark Tushnet. Particular thanks are owed to Bruce Ackerman, Sandy Levinson, and Stephen Skowronek. Finally, thanks to Jennifer Nicholls, who provided outstanding research assistance, to Lyndsay Byrne, who provided some very helpful last-minute assistance, and to Ross Davies. Copyright © 2011 Stuart L. Chinn. *Editor's note:* For commentary on this article, see Bruce Ackerman, *Beyond Presentism*, 1 J.L. (1 L. & COMMENT.) 185 (2011); Sanford Levinson, *Contingency v. Structures in Explaining Judicial Behavior*, 1 J.L. (1 L. & COMMENT.) 191 (2011).

possesses an institutional interest in “stability.” That is, in the peculiar context of post-reform periods, the Court has been inclined to stabilize, delineate, and clarify the boundaries between competing governing authorities and competing sets of rights within the recently-transformed policy domain. Furthermore, I make the additional claim in this Article that this judicial-institutional interest in stability has manifested itself in three specific types or “modes” of adjudication that recur in American constitutional history.

The potential significance of this finding for those interested in the historical development of the law is obvious: if my claim is correct, and there are indeed broad recognizable patterns in Supreme Court rulings rooted in an institutional concern with stability, this would suggest an underlying dynamic that could explain prominent shifts in judicial behavior and in the law. The potential value of this finding would, at least in one sense, serve to contribute to a long and distinguished scholarly conversation over the fundamental mechanisms that shape American political and legal history.

Indeed, historically-oriented scholars have, for decades, sought to periodize, divide, and conceptualize the tangled mass of events in American history according to certain fundamental mechanisms and analytical categories. Walter Dean Burnham, for example, was one of a group of prominent mid-twentieth century scholars who sought to periodize American history according to the logic of “critical realignment,” or the recurrence of certain critical elections that reshaped and reoriented political party dynamics for thirty year periods.¹ This is the sort of analytical framework that one also commonly finds in high school history textbooks, where American history is divided into the Jeffersonian Era (inaugurated by the election of 1800), the Jacksonian Era (inaugurated by the election of 1828), and so forth.

Relatedly, Bruce Ackerman has put forth a periodization of American legal history marked by a different logic: the successive entrenchment and repudiation of different “constitutional regimes”

¹ See, e.g., WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 10 (1970). For a critique of the critical realignment genre, see DAVID R. MAYHEW, *ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE* 103-04 (2002).

over time. In partial convergence with the critical realignment scholars, Ackerman identifies a Founding Regime, a Reconstruction Regime, and a New Deal Regime.² And, finally, Karen Orren and Stephen Skowronek have more recently sought to conceptualize American political history as fundamentally characterized by an ever-present logic of “intercurrence.” Instead of periodizing history as a succession of different governing regimes, each dominant within a certain period of time, Orren and Skowronek assert that at any given moment in time, the polity is always composed of multiple governing regimes that are specific to different areas of public policy – each operating according to different governing principles.³ Dovetailing with the intellectual concerns of these scholars, the historical implication of my claim is that, perhaps, a similar fundamental logic might be at work in the actions of the Supreme Court – at least with respect to the small, but highly significant subset of transformative periods in American history where there was a dismantling of social hierarchy.

Perhaps less obviously, my claim also has bearing for those interested in both normative inquiries and legal controversies on the horizon. One possible upshot of my claim of a judicial-institutional interest in stability is the rather bleak suggestion that we can consistently expect the Court to exhibit hostility to liberal expansions of open-ended dismantling reforms. Due to its institutional predisposition toward promoting stability in the aftermath of these dismantling reforms, curtailment – rather than expansion – should be the default expectation of Court-observers during these periods. Thus, regardless of whether one may be in favor of, or opposed to, expansions of transformative reforms at a given moment in time, the claim offered here is that one’s normative goals and political strategies should be cognizant of these institutional biases of the Court.

² 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACERKMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

³ KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 112-18 (2004).

Furthermore, as I elaborate below, I put forth the case that the Court's inclination towards stability during these particular moments manifests itself in specific types or modes of Supreme Court adjudication that recur in *a particular sequence or order*. If my claim about these adjudicative modes is correct, this should also have relevance for those interested in achieving certain normative goals, and for those interested in attempting to predict or speculate on future Court rulings. Indeed, since one of my historical case-studies encompasses the Supreme Court's constitutional equal protection rulings on race in the post-Civil Rights Era, I discuss recent cases like *Grutter v. Bollinger*⁴ and *Parents Involved in Community Schools v. Seattle School District No. 1*,⁵ and offer some brief commentary on the likely character of future Supreme Court rulings on race and constitutional equal protection in light of the historical theory explored here.

I begin in Part I with a brief survey of some of the leading theories of judicial behavior and legal change among political scientists and legal scholars in the more recent literature. I offer a general critique of many of these theories by arguing that none of them are precise enough to offer explanations as to why the Court adopts certain modes of adjudication at particular moments in supporting its conclusions. In light of these critiques, I flesh out my own theory of judicial behavior in Part II where I first offer a brief account of how dismantling reforms have historically reshaped social relations in American politics. I then elaborate on my core claim that in the aftermath of social hierarchy-dismantling reforms, the Supreme Court has been motivated by a judicial-institutional interest in promoting stability within the domain of reform. I continue in Part II with a discussion of how this judicial-institutional interest in stability manifests itself in distinctive modes of adjudication, and how each of these modes functions to promote stability in different ways in the aftermath of a dismantling. The modes of adjudication that I identify are, in turn, *delimiting rulings*, *order-creating rulings*, and *tension-managing rulings*. Finally, I conclude Part II with a brief discussion on the scope of my theory of judicial behavior.

⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁵ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

In Parts III, IV, and V, I substantiate my theory with a discussion of two historical case-studies: the Supreme Court's rulings on race in the aftermath of Reconstruction, and the Supreme Court's race and equal protection rulings in the aftermath of the Civil Rights Era. The question I ask is: if the Court had an interest in stability, would such an interest match up with the types of rulings that the Court did, in fact, issue in these historical eras? As I argue in these Parts, an institutional-interest explanation fares very well in accounting for the rulings from these historical eras.

To facilitate comparative analysis, my case-study discussion is keyed to fleshing out these distinctive modes of adjudication. In Part III, I examine the delimiting rulings from both historical eras — *The Slaughter-House Cases*,⁶ *United States v. Cruikshank*,⁷ *The Civil Rights Cases*,⁸ *Milliken v. Bradley*,⁹ *Washington v. Davis*;¹⁰ in Part IV, I examine the order-creating rulings from both eras — *Plessy v. Ferguson*,¹¹ *Williams v. Mississippi*,¹² *City of Richmond v. J.A. Croson Co.*,¹³ and *Adarand Constructors, Inc. v. Peña*;¹⁴ and in Part V, I address two tension-managing rulings — *Buchanan v. Warley*,¹⁵ and *Grutter v. Bollinger*.¹⁶ Finally, in Part VI, I bolster the historical case for my theory of judicial behavior by comparing it against both an appointments theory of judicial behavior and a political-cultural theory of judicial behavior.

I. INFLUENCES UPON JUDICIAL BEHAVIOR

One dimension of the debate over the determinants of judicial behavior takes place at the level of basic motivations. When discussing rulings in constitutional law, scholars have argued that

⁶ *The Slaughter-House Cases*, 83 U.S. 36 (16 Wall.) (1873).

⁷ *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁸ *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁹ *Milliken v. Bradley*, 418 U.S. 717 (1974).

¹⁰ *Washington v. Davis*, 426 U.S. 229 (1976).

¹¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹² *Williams v. Mississippi*, 170 U.S. 213 (1898).

¹³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹⁵ *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹⁶ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

judges are fundamentally motivated by, among other things, their base political preferences or “attitudes,”¹⁷ “high” political principles,¹⁸ or more politically-informed types of legalism.¹⁹ I wish to largely bypass this debate, however, because if one is interested in either explaining the nature of past legal developments, or in predicting the nature of future judicial rulings, I believe there is an unhelpful amount of agreement and overlap among these various perspectives.

At this level of inquiry, what is at stake in the debate over judicial behavior is the foundational question of whether constitutional law is at its core, constituted by “law” or “politics.” And while this is undoubtedly an important legal and theoretical question, the scholarly division implied by this debate is nevertheless overshadowed by convergence on a simple point *regarding legal and political development* – which I assume most would find uncontroversial – that ideas and the beliefs of judges (whatever their source) matter in shaping judicial outcomes. To put it more simply: consider in turn the responses of an “attitudinalist” political scientist and a typical constitutional legal scholar to the query of “what are the likely future developments for affirmative action and constitutional equal protection?” The former may tend to use the words “partisanship” and “political preference,” while the latter may speak more in terms of “princi-

¹⁷ Political scientists working from an “attitudinal” approach conceptualize judges as single-minded seekers of their policy preferences. In the leading work within this genre, Segal and Spaeth state: “Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993). They accordingly go on to offer the finding that their attitudinal model accurately predicted seventy-four percent of the votes of Supreme Court justices in the context of search and seizure cases. *Id.* at 229-31. Scholars working within a rational choice-institutionalism perspective also start from the assumption of conceptualizing judicial actors as primarily seekers of policy goals. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9-10 (1998). In general, this scholarly tradition of emphasizing judicial behavioral influences “external” to the law extends back to at least the Progressive Era. *See, e.g.*, Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 217 (2002).

¹⁸ *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045, 1061-64 (2001).

¹⁹ *See, e.g.*, ACKERMAN, *FOUNDATIONS*, *supra* note 2; ACKERMAN, *TRANSFORMATIONS*, *supra* note 2.

ples” of constitutional equality, but it seems highly unlikely that either scholar would fail to recognize the developmental significance of either a somewhat ambivalent polity, or a history of closely-divided Supreme Court votes, on these particular issues. Again, if our focus were on judicial outcomes and matters of legal and political development, both narratives would likely converge to a considerable extent.

If, however, questions of judicial behavior are interrogated with less of a focus on the origins of judicial beliefs, and with more of a focus on development itself, a second dimension to this issue opens up. Assuming, for the sake of argument, that judges usually tend to be motivated by some mix of beliefs both “internal” and “external” to the law,²⁰ a related yet distinct question is: what influences on judicial behavior cause legal doctrine to shift and change at precise moments in time? To an extent, one’s views on the underlying foundation of judicial beliefs will have bearing on one’s answer here as well. Yet by linking the question of judicial behavior to the phenomenon of legal development, we are able to pursue the former while also partially bracketing inquiries into the source or origin of judicial beliefs. Instead, one is able to examine the significance of at least some potential determinants of judicial behavior by seeking out and comparing the relative validity of alternative pathways of influence upon judges. This alternative query thus seeks to identify the mechanisms through which the beliefs and ideas (whatever their source), represented on the Supreme Court, may change at different moments in time.

Here I can offer only a selective summary of some of the most important answers to this question within the diverse, prevailing literature.²¹ My focus is on what I take to be the three most prominent theories of judicial behavior and constitutional change: they are, in turn, an appointments thesis, a political-structural thesis, and

²⁰ The term “externalist,” as it relates to judicial behavior, has been prominently and specifically associated with politically-based explanations for the “switch in time” of the New Deal-era Court. See, e.g., Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999).

²¹ A very valuable and much more extensive survey of recent work in judicial behavior is Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005).

a social-cultural thesis. It is within this debate that I would situate my thesis of a judicial-institutional interest in stability as a supplement and corrective, because while all three perspectives on judicial behavior are undoubtedly valuable, they all share a similar shortcoming in explaining Supreme Court adjudication in the aftermath of dismantling reforms.

First, with respect to the appointments thesis: regardless of whether one thinks judges are primarily motivated by base political preferences on the one hand, or more abstract principles, values, or ideologies on the other, one interested in studying constitutional or legal development would undoubtedly want to focus on those dynamics that accordingly prompted shifts in the representation of those preferences, values, or ideologies on the Court. Thus, within studies of judicial behavior, there has long been a focus on the appointments mechanism as a primary engine of constitutional development. In a canonical public law article in 1957, for example, Robert Dahl noted that due to the appointments mechanism, “[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”²² This perspective has very recently been given a more updated and sophisticated treatment by Balkin and Levinson, who emphasize political party dynamics and the appointments mechanism as a primary engine of constitutional development.²³

A second genre of scholarship, which might be loosely grouped under the heading of a “political-structural thesis” of judicial behavior, focuses on how shifts in judicial behavior may be prompted by broader political influences that may be more attenuated, or less direct, than the appointments mechanism.

For example, scholarship within the genre of “rational choice-

²² Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

²³ Their theory of judicial appointments as instances of “partisan entrenchment” by the political party of the sitting President is, they assert, “the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.” Balkin & Levinson, *supra* note 16, at 1068; *see also id.* at 1064-66; Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 490-93 (2006).

institutionalism” begins with the assumption of conceptualizing judicial actors as primarily seekers of policy goals. These scholars emphasize, however, that judicial behavior is *not* simply driven by naked political preferences. Instead, they argue that judicial preferences may be mediated and altered by constraints either external to a court (e.g., congressional or presidential preferences) or constraints internal to a court (e.g., the distribution of preferences on a given policy issue within a multi-member court). Thus, while attitudinal political scientists assume that judicial behavior would be wholly driven by a judicial actor’s policy goals, the rational choice-institutionalist would emphasize how judicial behavior is driven by a combination of both policy goals and the “strategic” considerations of judicial actors. Instead of being just direct maximizers of their policy goals, judicial actors in the rational choice-institutionalist scheme anticipate the constraints imposed by either other actors or the larger institutional environment, and adjust their behavior accordingly.²⁴ A scholar working within this analytical framework would, thus, expect changes in judicial rulings to result not just from membership changes to the Court, but also from changes in the institutional constraints – both internal and external to the Court – that may impose themselves upon the Court’s members.²⁵

Another work within this genre of political-structuralism is Bruce Ackerman’s theory of constitutional dualism, which focuses upon regime politics as a key influence upon judicial behavior. In partial sympathy to the rational choice-institutionalist perspective noted above, Ackerman also does not see judicial behavior as wholly

²⁴ EPSTEIN & KNIGHT, *supra* note 15, at 10-18; William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994) (asserting a positive theory of “law as equilibrium,” where judicial outcomes tend to track the equilibrium of interests between the three branches of the federal government); *see also* Keith E. Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601 (2000) (reviewing SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999) and THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell W. Clayton eds., 1999)).

²⁵ *See* EPSTEIN & KNIGHT, *supra* note 15, at 12-17 (discussing how alternative routes of judicial action become more or less attractive to individual judges, depending upon the broader strategic context in place).

driven by the internal logic of the law itself. Yet, he does not see judicial actors as merely responding to personal policy preferences either. Rather, the judicial actors in his historical case-studies are driven by judicial values that are both legalistic and politically-informed: Ackerman's judicial actors adhere to "higher lawmaking" legal precedents that are themselves legitimated by transformative regime politics.²⁶ As a theory of constitutional change then, Ackerman sees the major shifts in constitutional doctrine as being driven by changes in regime politics; when a new regime legitimately displaces the old regime, the Court recognizes this – and its jurisprudence accordingly shifts.

The regime approach to judicial behavior has also been pressed by historically-oriented political scientists as well. For example, Mark Graber has noted that the Supreme Court occupies a recurrent role in constitutional history in engaging in judicial policymaking on matters that cross-cut and fracture the dominant governing majority. He argues that the Supreme Court has historically played this role at the behest of elected politicians in this dominant national coalition, who find these cross-cutting issues too difficult for legislative resolution.²⁷ In addition, Keith Whittington has examined instances of judicial activism in constitutional history, and has found that such interventions have, in many contexts, aided the interests of the dominant governing coalition. One implication of Whittington's work is that the demands of the governing regime may often play a role in both prompting and supporting judicial activism.²⁸ The explanation of judicial behavior that emerges from both Graber and Whittington – if only implicitly – is that the Court has exhibited a recurrent willingness to respond to the interests and needs of the

²⁶ ACKERMAN, FOUNDATIONS, *supra* note 2; ACKERMAN, TRANSFORMATIONS, *supra* note 2. There are also elements of Ackerman's theory that are in sympathy with the appointments thesis. See Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988). Yet, at least by my reading of his work, the appointments mechanism is just one component of a larger and more complex higher lawmaking process that is, for him, the more crucial determinant in shifting judicial behavior and legal doctrine.

²⁷ Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993).

²⁸ Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

dominant governing regime.²⁹ Accordingly when new governing regimes come to the fore, or when new interests or problems arise for a dominant governing regime, this is precisely when we might expect to see shifts in judicial behavior.

Finally, a third broad category of scholarship speaks to what I call a “social-cultural thesis” of judicial behavior. Scholars working within this genre also emphasize the importance of forces external to the law, including political forces, in explaining judicial behavior. Yet they diverge to an extent from the above-noted works by also seeking to explain how shifts in judicial values and behavior are prompted by more diffuse social or cultural mechanisms, as opposed to more clearly-defined institutional mechanisms like the appointments mechanism or inter-branch dialogues. For example, Michael Klarman’s comprehensive treatment of race and legal development from the late nineteenth century to the mid-twentieth century emphasizes how legal outcomes in that policy domain were significantly shaped by the broader social and political values that happened to be dominant in society – subject to the qualification that elite opinion, as opposed to mass opinion, disproportionately influenced judicial outcomes. When those broader values shifted, so did the doctrine.³⁰ Likewise, in Reva Siegel’s article on the “de facto Equal Rights Amendment,” she argues that major shifts in constitutional doctrine concerning gender equality in the seventies were driven by social movement-led changes within “constitutional culture” that occurred at the same time.³¹ While it seems unlikely either of these authors

²⁹ In all likelihood, the efficacy of the appointments mechanism in creating Supreme Courts sympathetic to the dominant governing regime is something both Graber and Whittington would concur with. Graber is more implicit on what is driving judicial behavior in the cases-studies he examines, but it seems rather plausible he would be sympathetic to the idea of other political-structural influences driving judicial behavior. Whittington is more explicit, and he identifies, in addition to the appointments mechanism, other structural factors that are likely to push the Court to a more sympathetic posture toward dominant governing coalitions including “the departure of current judges,” “the expansion of the judiciary as a whole” and “the structure of court jurisdiction.” *Id.* at 584.

³⁰ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 4-6, 446-54 (2004).

³¹ Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323-31, 1362-66, 1406-09 (2006). Other works within this genre include, for example, LUCAS A. POWE, JR., THE WARREN

would be hostile to the claims of appointments or political-structural scholars, they are pressing a distinct perspective, however, in emphasizing a broader array of influences upon judicial behavior.

All three general perspectives on judicial behavior are undoubtedly valuable, and I make no claim that any one of them is falsified by the historical evidence I bring to bear in my case-study discussion. The common complaint I might level at all three is that while they may have some value in explaining judicial behavior in certain circumstances, they are also largely unhelpful, and sometimes even irrelevant, at other times. Indeed, the latter is often the case when it comes to explaining the recurrent shifts in Supreme Court behavior in post-dismantling periods.

The appointments, political-structural, and social-cultural theories of judicial behavior enjoy their greatest explanatory value when broader political, institutional, and social forces can be clearly delineated, and when the links can be cleanly drawn between those forces and the judicial approval or disapproval of a challenged action. A focus on the constraints imposed by societal and political forces upon judicial action could allow one to make convincing claims that these forces allowed for a given practice to be upheld, or virtually demanded that a given practice be struck down by the Supreme Court. Indeed, these sorts of accounts have been put forth about several of the specific cases I mention in later portions of this Article.

But assume that broader political, institutional, and social forces cannot be so easily delineated; assume, as will commonly be the case in the aftermath of major reforms, that there may be a continuing flux and ambiguity with respect to where the preponderance of public opinion lies on an issue, or with respect to how severe certain institutional constraints may be on Supreme Court justices. Furthermore, consider the possibility that the links between these “externalist” forces – that is, political, institutional, and social forces “external” to the law – and the supposedly corresponding shift in

COURT AND AMERICAN POLITICS 485-501 (2000); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347 (2003).

judicial behavior may not be so clear; perhaps the timing between event and changed judicial behavior may be separated by several years, or perhaps the Court's behavior shifts only in certain respects and not in others. And finally, perhaps most importantly, assume that our judicial behavioral concern extends beyond whether a Court merely said "yes" or "no" in a given dispute, and that we are trying to understand or explain the Court's use of distinctive modes of adjudication – that is, *how* it said "yes" or "no" in specific cases. In all of these types of situations, the value of the three conventional approaches to explaining shifts in judicial behavior is likely to be qualified, if not minimal. If, for example, one succeeded in demonstrating how appointments, politics, or cultural forces led the Supreme Court to say "yes" rather than "no" in a given case, it would seemingly remain a very tall order for anyone to demonstrate that those same forces also dictated the Court's choice of one *form* of judicial approval over another.

The task might not be impossible. One could imagine a set of circumstances where an appointments or social-cultural account sought to prove that these forces demanded not just a particular outcome of judicial approval or disapproval, but also a particular mode of legal resolution. Yet for good reason, one tends to find few arguments within this literature that make such claims. Rather, the scholarly focus has tended to remain on explaining judicial behavior by demonstrating congruence between judicial results and prevailing public sentiment. And the reason for this more limited focus on results, rather than modes of adjudication, is not difficult to identify: given prevailing ambiguities about public or political sentiment that are likely to persist at the margins of controversial issues in most cases, and given the less than direct relationship between broader externalist forces and judicial behavior that will often be the case, most circumstances will not be amenable to supporting claims about judicial behavior that reach all the way down to explain modes of adjudication. To the contrary, even if we allowed that judicial decisions are influenced and constrained by appointments, politics, and culture, those influences will generally still allow for, and be consistent with, a decent range of judicial decisions and modes of adju-

dication in any given case. As such, these external influences will generally not have sufficient weight to explain why the Court chose one such action, or one mode of adjudication, from among several viable options.

A more modest, and more accurate, assessment of the important role that these factors play in shaping legal outcomes would emphasize not how they always serve as a primary determinant of behavior, but rather how they serve as a *boundary condition* for judicial behavior. At a given moment in time, I would concur that these externalist forces likely play a very significant role in demarcating the boundaries of feasible judicial action at that time.³² For insight into the determinants of judicial action *within* those boundaries, however, one will generally have to look elsewhere.³³

³² Recognition of this more limited role of externalist forces in determining judicial behavior remains, by my estimation, only a minor note within this literature – when it is noted at all. Still hints of this view can be found in Klarman’s analysis of *Buchanan v. Warley*, KLARMAN, *supra* note 28, at 79-83, and in Balkin and Levinson’s concession that the more that the dominant political issues of the day depart from the dominant issues at the time of a Justice’s appointment, the less explanatory power partisan entrenchment theory can offer in explaining that Justice’s behavior, Balkin & Levinson, *supra* note 16, at 1070-71. Both of these discussions treat externalist constraints – whether societal impulses or the appointments process – as boundary conditions that influenced, but did not wholly determine, the substance of judicial behavior. In a very recent review essay of Klarman’s book and several other works within this genre of scholarship, Thomas Keck levels a critique similar to mine in arguing that these accounts tend “to overstate the influence of external political pressure on the Court.” Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511, 528 (2007). *See id.* at 528-36.

³³ One might also claim that judicial attitudes or idiosyncratic preferences may account for not just judicial conclusions, but also the specific modes of adjudication adopted by the Court in a given case. One following this line of argument could see it as a corollary of the appointments thesis: “this mode of adjudication was employed in dispute A because of the political preferences of prior appointees Judge B, Judge C, and Judge D.” As will be fleshed out further with the case-studies, substantiating this kind of argument is going to be a very difficult task in many contexts. Alternatively, one could press a similar line of argument by explaining the appearance of particular modes of adjudication with reference to the peculiar idiosyncrasies and contingencies of either particular judges or particular cases (independent of any appointments connection). To adopt this line of argument, however, would be to more or less abandon any ambition for larger, structural explanations of judicial behavior. Before conceding to this view, the plausibility of alternatives has to be evaluated, and the primary claim of this Article is that certain modes of adjudication can be explained with reference to a judicial-institutional interest in stability.

II. JUDICIAL-INSTITUTIONAL INTERESTS

Let me propose that a focus on judicial-institutional interests may offer a better analytical framework for understanding shifts in judicial behavior and constitutional doctrine in post-dismantling periods, relative to an appointments, political-structural, or social-cultural theory of judicial behavior. Before substantiating this claim with reference to specific historical case-studies, however, it is necessary to first spell out the contours of the claim itself. I begin in Section A by laying some conceptual groundwork in elaborating on the peculiarities of both “dismantling” reforms and the political context that is created in the aftermath of such reforms. My claim of a judicial-institutional orientation toward stability is confined to this particular context. In Section B, I set out the core claim of the Article by first clarifying what I mean by a “judicial-institutional interest,” and also offering a theory as to why the judiciary may have a particular interest in stability. In Section C, I expand upon the core claim in discussing how the judicial-institutional interest in stability manifests itself in specific modes of adjudication that recur – in precise order – in the context of post-dismantling periods. Finally, I conclude this Part in Section D with a brief comment on the broader applicability of the theory.

A. *Dismantling and Recalibration*

For any stable set of social relations to exist and become entrenched – such as slavery, or Jim Crow, or the post-Civil Rights order in race relations – at least two conditions usually have to be met. First, there have to be clearly delineated *boundaries of authority* between competing institutions in that social domain. Second, and relatedly, there also has to be a relatively settled allocation of *well-defined rights and responsibilities* in that social domain as well, in order to govern the interactions between private individuals, and between individuals and the state.

However, when democratic reforms have periodically arisen to dismantle hierarchical social relations – such as the demise of slavery with the Reconstruction Amendments and the unraveling of Jim

Crow by *Brown* and the civil rights statutes of the sixties – the primary consequence of these reforms was to *destroy* some set of governing authority and some set of rights. Furthermore, a secondary consequence was to create tremendous uncertainty in their wake as to where the new boundaries would lay with respect to competing governing prerogatives and competing sets of rights within the transformed social domain. Indeed, given the expansive breadth of these types of reforms, and given the fact that something of the old order will always survive even the most transformative of changes,³⁴ post-dismantling uncertainties over the scope of authority and rights are unavoidable. The necessity of having to negotiate new boundaries between competing rights and competing governing authorities – some of which will be rooted in the legitimacy of reform, and some of which will be rooted in the legitimacy of the old order – becomes apparent and pressing almost the moment after a dismantling occurs.³⁵

In short, heightened uncertainties and instability come with the territory of engaging in dismantling reforms. The wholesale dismantling of social relations simply cannot be foisted upon the larger matrix of governance to then fit seamlessly with other preexisting institutional authorities.³⁶ Rather, new governing principles have to be reconciled with enduring governing principles that constituted aspects of the old order. Finely crafted boundary lines between different institutional authorities and competing sets of individual rights will have to be reconstructed and recalibrated in the aftermath of a dismantling to determine just how much authority and just how many legal entitlements have been shifted by recent reforms.³⁷

To put the point more concretely, upon the enactment of the

³⁴ ORREN & SKOWRONEK, *supra* note 3, at 22-24; see Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2292-95 (1999).

³⁵ ORREN & SKOWRONEK, *supra* note 3, at 127-29.

³⁶ Most of this discussion, including my concept of post-reform recalibration, follows up on insights from Orren and Skowronek on the “plenary” nature of authority. That is, when political reforms are enacted, this usually entails a disruption and rearrangement of preexisting institutions and individual rights. Or, as Orren and Skowronek state, “Plenary authority means that changing any aspect of politics entails bumping against authority already in existence” *Id.* at 23; see also *id.* at 20-24, 127.

³⁷ *Id.* at 127-29.

Fifteenth Amendment, and upon the enactment of the Voting Rights Act of 1965, all political actors involved may have felt quite confident that they had seen the end of slavery and Jim Crow, respectively. But as to the question of what the new, post-dismantling social order would actually look like, it would have been very difficult for anyone to predict in 1870 or 1965, with complete accuracy, the precise contours of the subsequent Jim Crow and Anti-Classification racial orders. The boundaries between competing governing authorities and competing sets of rights were hardly settled by 1870 or 1965, and indeed, it would require decades of political contestation and negotiation before those lines stabilized.

In other work, I have elaborated on the unique pathways of development that are prompted by dismantling reforms, and the name I use for these post-dismantling political processes is “institutional recalibration.”³⁸ The processes of institutional recalibration speak to this task of critical readjustment and accommodation between old governing principles and new principles embodied in dismantling reforms, as the latter eventually become integrated within an enduring, resilient, already-established institutional and legal fabric.

Thus, it is against this backdrop of heightened uncertainty that the judicial behavior of post-dismantling periods has to be evaluated. Ultimately, my claim of a judicial-institutional interest in stability is a corollary of this political developmental claim on the existence of processes of recalibration in the aftermath of reform. The judicial interest in stability functions to help bring about clarity in delineating new boundaries for governing authority and rights – and, thus, the judiciary plays a central role in recalibrating the scope of the initial dismantling reforms.

B. The Judicial-Institutional Interest in Stability

Within the peculiar context of post-dismantling periods, my core claim is that the Supreme Court possesses an institutional interest in promoting stability with respect to authority rela-

³⁸ Stuart Chinn, *After Reform* (November 3, 2010) (unpublished book manuscript) (on file with author).

tions and individual rights. The Court is institutionally inclined during these periods to stabilize, clarify, protect, and police the boundaries between distinct institutional authorities — such as federal vs. state and local authority in the 1870s and the 1970s; and, likewise, it is inclined to demarcate and stabilize the boundaries between competing individual rights that have been directly affected by reform — such as the rights of Southern whites vs. the newly-created rights of freedmen in the late nineteenth century, or the rights of segregationists vs. the rights of integrationists in the mid-twentieth century.

In drawing attention to this particular determinant of judicial behavior, I am building upon other literatures that have similarly emphasized the efficacy of certain judicial-institutional goals in explaining behavior. Some scholars, for example, have emphasized the significance of common judicial goals such as enhancing or maintaining the power and prestige of a judge's home institution, limiting workloads, maximizing salary and leisure, and maintaining an individual judge's respect and standing within the legal and broader community. Judges on lower courts might possess additional, common motives such as securing reelection or elevation to a higher court as well.³⁹ Other scholars have also emphasized a second class of judicial institutional interests that influence judicial behavior, but that are actually unique to judicial actors. This is, of course, a familiar idea that is displayed in *The Federalist Papers*: Hamilton notes, for example, that the provision for life tenure for federal judges would structurally ensure judicial independence from the legislature, and from

³⁹ LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 43 (2006) (emphasizing the significance — as a judicial motive — of securing or maintaining the esteem of certain audiences that are valued by a given judge); Lawrence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RES. Q. 749, 752 tbl.1 (1994); Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission*, 7 J. L. ECON. & ORG. 183 (1991) (emphasizing the interest of federal district judges in limiting their workloads, enhancing their peer recognition among other judges, and enhancing their potential for promotion); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUPREME CT. ECON. REV. 1, 2 (1993) ("I present a simple model in which judicial utility is a function mainly of income, leisure, and judicial voting."); see also Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917, 961-64 (2005).

occasional “ill humors” among the broader polity.⁴⁰ But in more recent years, political scientists influenced by “historical institutionalist” approaches⁴¹ have also advanced this perspective. They have employed an historical methodology toward illuminating and explicating distinctive institutional goals that influence and shape the preferences and interests of the actors residing within those institutions.⁴² Most relevant for our purposes, some have also emphasized such an historical-institutional approach in discussing the peculiar nature of some judicial goals and practices.⁴³

More in line with this latter perspective, I conceptualize the judicial-institutional preoccupation with stability as a distinctive or unique judicial concern, stemming from the peculiarities of that institution. This stabilizing inclination grows directly out of the interaction between the peculiar uncertainties that pervade the political and legal context in a post-dismantling period, and the peculiar commitment or duty of the Court to promote basic legality values

⁴⁰ THE FEDERALIST NO. 78, at 384 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

⁴¹ Generally, historical institutionalists have adopted a more historical and interpretative approach to examining the role of institutions in shaping politics and political action. See, e.g., ORREN & SKOWRONEK, *supra* note 3; PAUL PIERSON, *POLITICS IN TIME* (2004); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS* (Sven Steinmo et al. eds., 1992).

⁴² See, e.g., STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1997); Stephen Skowronek, *Order and Change*, 28 *POLITY* 91, 94 (1995) (“Thus, institutions do not simply constrain or channel the actions of self-interested individuals, they prescribe actions, construct motives, and assert legitimacy. That indeed is how institutions perpetuate the objectives or purposes instilled in them at their founding; this is what lies at the heart of their staying power.”).

⁴³ The key work in this regard is Rogers Smith’s essay, Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism,” and the Future of Public Law*, 82 *AM. POL. SCI. REV.* 89 (1988); see also John Brigham, *The Constitution of the Supreme Court*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* 15, 15-26 (Cornell W. Clayton & Howard Gillman eds., 1999); Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretative Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 65 (Cornell W. Clayton & Howard Gillman eds., 1999). For valuable surveys of a number of historical-institutionalist approaches to the study of law and courts, beyond the present focus on distinctive judicial-institutional interests, see *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES*, *supra* note 41, and *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST INTERPRETATIONS*, *supra* note 41, and *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch eds., 2006).

of notice, settlement, and predictability in the law. That is, the post-dismantling context presents a situation of extreme levels of uncertainty with regard to how authority will be allocated, and how clashing rights will be reconciled, once institutions crucial to the old order have been removed.

Adding to the urgency or demand for settlement is the nature of how these uncertainties are presented to the Court: as these post-reform uncertainties enter the legal arena, they assume the *form of adjudication*, with discrete parties giving voice to rights claims grounded in the new authority of reform, while other parties are, at the same time, grounding their claims in the legitimacy of older, resilient authorities that have remained un-reformed. When presented in the form of adjudication, post-reform controversies over the scope of clashing governing authorities and clashing rights are put into starker relief, as judges are forced to directly confront questions such as “what remains of federalism and state autonomy after the Fourteenth Amendment?” – questions that, although perhaps pondered in the abstract during the moment of reform, become concrete and pressing once the dismantling has been carried out and discrete claimants arise demanding legal relief.⁴⁴

⁴⁴ I should note at this point where I depart from the related and important claims of Bruce Ackerman. Ackerman very notably attributes a “preservationist” orientation to the Supreme Court as a means of explaining many of the more conservative actions taken by Supreme Court Justices in his historical examples, ACKERMAN, FOUNDATIONS, *supra* note 2, at 86-87, 139-40, 303-04. As such, he characterizes many important Supreme Court rulings as examples of “intergenerational synthesis” where judges weave together “higher lawmaking” precedents. While I am in sympathy with Ackerman’s use of the synthesis idea – an idea that is certainly appropriate for describing the core judicial function of adjudicating competing authorities – this theory of judicial behavior remains unnecessarily confined to his chosen moments of higher lawmaking; that is, the set of commitments eligible to be synthesized, according to the Ackerman model, are those that he identifies as having enjoyed validation and endorsement during the Founding, Reconstruction, or the New Deal.

As my case-studies suggest, however – especially so in the case of the sixties – the various institutional authorities involved in the post-reform cases I discuss cannot be tied so neatly to one of Ackerman’s three constitutional moments. Neither the reform principles that dismantled Jim Crow, nor the commitment to traditional legislative prerogatives that figured prominently in the recalibration of civil rights in the seventies, are significant in Ackerman’s historical narrative for any of his three eras of higher lawmaking. Furthermore, Ackerman’s preservationist theory of the Court is qualified by his secondary commitment to an appointments theory of judicial behavior as well. In claiming a stability-

In such a context of uncertainty, core judicial values to provide settlement, notice, and predictability in the law – grounded in the judicial commitment to the rule of law itself – inescapably press the Court to fulfill a function of making judgments in discrete cases as to how clashing governing authorities and clashing sets of individual rights are going to be reconciled. The Court can do nothing less than to at least recognize and give voice to the plausibility of rights claims grounded in the authority of the old order – even if it may not find those claims legitimate in all cases. At the same time, judicial deference to the legitimacy of recent reforms requires the Court to concede the plausibility of rights claims grounded in the new dismantling reforms as well. Questions of which sets of authorities, or which sets of rights, must either give way or be upheld are the types of questions confronted by the Court in a post-dismantling context. And in such contexts, the natural judicial impulse to uphold legality values and to decisively settle uncertainties, to set clear rules of the road to guide citizen conduct and lower court adjudication, to indeed do nothing less than to try and maintain the very integrity and rationality of the relevant laws, will press the Court to assume a stabilizing role.⁴⁵

This is not to minimize the role that externalist forces will always have on the Court and judicial behavior. A judicial-institutional

promoting role for the Court, however, I believe this is a dynamic that operates independently of appointments considerations, and I suspect that I am identifying judicial behavioral tendencies that may have broader applicability than Ackerman's theory.

⁴⁵ Relatedly, this is why I limit the claim of a judicial-institutional interest in stability to the post-dismantling context. In short, it is difficult to imagine a context that is more likely than this one to present deep problems of blurred and problematized boundaries of governing authority. Indeed, even in periods of judicial dismantling and reform, as with the Warren Court and *Brown*, it is at least possible for such uncertainties to be obscured or temporarily ignored due to supreme judicial self-confidence in engineering change, or to willful judicial ignorance and over-confidence that post-reform adjustments might be largely seamless. Within the *Brown* Court itself, for example, concerns about Southern resistance to desegregation seems to have also been mixed with a degree of optimism that the South could fall into line if the Court proceeded gradually. KLARMAN, *supra* note 28, at 315-16. Klarman notes that "[a]mong the justices, only Black seemed to appreciate that white southerners were 'going to fight this' no matter what the Court said . . ." *Id.* at 316. In the post-reform context, however, the necessity for boundary-drawing is staring justices in the face in the form of concrete disputes; the gritty work of recalibration precludes any such wishful thinking.

commitment to stability, by itself, will not outweigh decisive political and social forces pressing, say, for *destabilizing* legal and political order. Yet, the judicial inclination toward stability becomes politically efficacious when it functions in tandem with other prominent determinants of judicial behavior. While appointments influences or social-cultural influences may impose boundary constraints on the scope of plausible judicial actions, the judicial-institutional interest in stability is the primary determinant of judicial behavior within boundary constraints. If social-cultural constraints dictate that a Court is only able to choose among a limited set of options, the judicial-institutional interest in stability dictates the Court's choice among those options.

Furthermore, given that boundary constraints will *not* be constant over time, this also suggests that the importance of judicial-institutional interests in explaining judicial behavior may be greater at certain times relative to others. Consider that in the immediate aftermath of reform, boundary constraints will be quite loose. Social and political pressures may be particularly in flux, and may not offer any clear indication of where public or elite opinion lies with respect to the primary problems of post-reform recalibration. Furthermore, political pressures exerted through the appointments mechanism may also be weak; the new reform coalition may lack sufficient internal consensus on the problems of post-reform recalibration, or the reform coalition may not have had sufficient time and opportunity to make the necessary appointments to the Court for reshaping its ideological composition. In the immediate post-reform context, the weakness of boundary constraints may allow for greater judicial independence, and correspondingly, may also allow for the judicial-interest in stability to be more efficacious in shaping legal development. The Court's concern with stability may, at these times, dictate both the judicial outcome and the *mode of adjudication*.

In those circumstances further removed from the moment of reform, however, boundary constraints may be more efficacious. Social and political fault-lines may have hardened. The reform coalition may have had sufficient time to reach preliminary conclusions on the problems of post-reform recalibration, and furthermore,

may have had the opportunity to make significant additions to the Court to reflect party sentiment. During these times, boundary conditions may afford the Court a more limited range of options. As a result, the judicial interest in stability may be of somewhat lesser importance in explaining judicial behavior compared to externalist forces. In these latter instances, while the judicial institution-interest in stability may still be responsible for dictating the mode of adjudication chosen by the Court, it may not necessarily dictate the judicial outcome.

C. Modes of Adjudication

A singular judicial commitment to stability could call for different types of judicial action – and different modes of Supreme Court adjudication – depending upon the particular context and form of instability or uncertainty confronting the Court at a given moment in time. In this Section, I expand upon the core claim articulated in Section B by identifying and fleshing out three distinctive modes of adjudication that promote the goal of stability, though in different ways. For each mode of adjudication, I note a distinctive kind of uncertainty that exists in the post-dismantling political context, and I discuss how the mode functions to promote stability in response to it. Furthermore, I note distinctive forms of argument for each mode of adjudication that help us to distinguish it from others, and, finally, I offer some commentary as to why these modes have historically proven to be efficacious in promoting stability.

1. Delimiting Judicial Rulings

If one of the effects of a dismantling is to problematize the lines of governing authority and the scope of rights within a given social context, one of the kinds of uncertainty prompted by such an event is what I would label a problem of “external boundary drawing.” That is, in the aftermath of a dismantling, one kind of uncertainty stems from the question of how far reform principles are going to *intrude* upon related policy domains and social contexts that are external to the area of reform. Thus, in the immediate aftermath of the Reconstruction reforms, the problem of external boundary

drawing lay in the uncertainty over just how far these reforms would displace and disrupt federalism; likewise, in the aftermath of the mid-twentieth century assault on Jim Crow, an analogous uncertainty resided in just how much the traditional prerogatives of non-judicial institutions, particularly local governmental institutions, would be disrupted or displaced by the judicial transformation of constitutional equal protection. These types of questions speak to the absence of stable boundaries between competing institutional authorities and rights at the outer edges of reform.

In response to this peculiar type of uncertainty, a Court inclined to promote the goal of stability can be expected to engage in “delimiting rulings” that definitively articulate and demarcate the outer limits of the change effectuated by recent dismantling reforms. Delimiting rulings function to offer clear, bright-line determinations about when and where reform principles must give way to older, resilient authorities and rights; they are the principled statements that establish the terms upon which old will be reconciled with new. As a result, when legal controversies probe the outer limits of reform, the judicial impulse toward stability and promoting legality values presses the Court to issue rulings that are bound to look stingy and curtailing to reformers with more expansive ambitions for change.⁴⁶

With respect to the textual arguments employed in delimiting rulings, the Supreme Court has followed an historical pattern of “indirect curtailment”⁴⁷ in engaging in this mode of adjudication; it

⁴⁶ This is not to overlook the point that the Court could potentially delimit and stabilize authority relations and the scope of individual rights in a variety of ways. Yet to the extent that a Court is engaged in post-reform recalibration — as opposed to initiating or expanding reform — any stabilizing delimiting ruling will have a notable curtailing effect precisely because the Court will be giving weight to the legitimacy of resilient authorities in the face of reform principles.

⁴⁷ The morphing of reform opposition into new forms after a dismantling has occurred has been insightfully discussed by Reva Siegel in the context of race and gender hierarchies. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997). While related to my focus on “indirect curtailment,” I believe I part ways from Siegel in at least one crucial respect in not seeing post-reform delimiting efforts as merely the analogue of pre-reform opposition. Aspects of the latter certainly inform the former, but post-reform opposition is also driven by legitimate concern for, and commitment to, the resilient authorities that are being implicitly chal-

has justified its delimitation of reform not by frontally challenging the core achievements of the dismantling, but instead by emphasizing the continuing legitimacy of resilient authorities that might be threatened if the open-ended implications of reform principles are followed all the way through. Thus a slippery-slope rationale prominently underlies many of these judicial delimiting rulings. After identifying the slippery-slope threat, the judicial response in these delimiting opinions is to issue definitive rulings that demarcate external boundaries. This is what the Court did in delimiting rulings such as *The Civil Rights Cases*⁴⁸ and *Washington v. Davis*.⁴⁹ Furthermore, as will be elaborated in the case-studies, the relative weakness of appointments, political-structural, and social pressures on the Court during these moments ensures that the earliest and most important statements regarding how much recently-enacted reforms will displace and disrupt resilient governing authorities will consistently occur in these Supreme Court delimiting rulings (and not in legislative enactments).⁵⁰

lenged by reform. Also relevant to this discussion is Vesla Weaver's discussion of "frontlash" in the context of mid-twentieth century crime policy. Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007).

⁴⁸ *The Civil Rights Cases*, 109 U.S. 3 (1883).

⁴⁹ *Washington v. Davis*, 426 U.S. 229 (1976).

⁵⁰ But why has this been the case? After all, nothing about the task of delimiting reform would seem to either demand judicial resolution, or preclude legislative resolution. There are, however, institutional and structural reasons that provide the opportunity for the Court to consistently be at the forefront in resolving these post-reform controversies.

First, given the Court's reactive institutional orientation – it has to wait for controversies to come to it – this might seem to actually preclude opportunities for the judiciary to take the lead in delineating the scope of recent reforms. In the context of dismantled social hierarchies, this hurdle is reliably overcome by the fact that such reforms will consistently present pressing issues of public importance, sure to gain the attention of a number of potential litigants; they will always implicate established rights and prerogatives, which will make the Court a more than plausible venue for redress; and perhaps most importantly, seeking judicial redress will generally require significantly fewer resources, relative to legislative assistance, for those interested in seeking a limitation on reform.

Second, additional institutional and structural considerations furthermore ensure that when the Court acts, its rulings will be both the *initial statements* on delimitation, and will remain *free of subsequent legislative revision*. The crucial consideration in this regard is the durability of reform coalitions – even in the face of growing coalitional dissensus in the aftermath of reform. To elaborate, when political coalitions come together that are able to accomplish monumental legislative achievements like the Reconstruction Amendments and

2. Order-Creating Rulings

Even if external uncertainties may be resolved by delimiting rulings, an additional uncertainty also presents itself with respect to boundary-drawing questions that are “internal” to the domain of reform as well. That is, even if delimiting rulings may bring clarity with respect to both the scope of competing governing authorities and the scope of competing rights at the outer edges of reform, no such clarity may necessarily exist with respect to the precise contours of social relations *within* the domain of reform. For example,

the sixties civil rights legislation, they do not disintegrate overnight. Rather the coalitional cohesiveness created in previous decades, the political momentum of recent victories, the persistence of party loyalties among voters, and a staggered electoral calendar all function to ensure that even while the window for reform may close relatively quickly – due to changing circumstances or growing dissensus among reformers over highly contested implications of the initial reforms – the reform coalition will continue to hang on to at least some of the institutional levers of federal power for some time. A conservative legislative roll-back of reform would require control of each of the vetogates of the legislative process, and accomplishing such a task, even as the forces of reform are losing steam, remains a tall order.

When reform coalitions inevitably weaken, what follows before any anti-reform legislative majority can crystallize is a period of legislative stalemate, where reformers are unable to press forward any further, and opponents of reform have not yet achieved the upper hand. Because of the durability of reform coalitions, extended periods of legislative stalemate consistently arise after the period of reform, and this creates the opportunity for the Supreme Court to step into the void first, and to offer the earliest, definitive statements on the scope and limits of recent reforms. So long as these judicial rulings stay within the ideological space between the positions of reformers and their opponents, they are sustained by the persistence of the stalemate itself.

As will be expanded upon in the case-studies and in the final section of the paper then, these delimiting judicial rulings are reflective of a real form of judicial independence created by the condition of stalemate. While these delimiting rulings were of course conditioned by political circumstances in the sense that these Justices were appointed by governing coalitions, and these cases were prompted by issues of political contestation, the substance of these rulings cannot be wholly reduced to simply judicial appointments dynamics, or to the pull of broader political and social forces upon judges. In the context of stalemate, because of the relative weakness of the boundary constraints imposed by these forces, it is possible to isolate something close to an independent judicial effect. This is not to deny that the political branches play a role in recalibration as well. Subsequent pieces of “delimiting legislation” did emerge in each of my cases. The significance of these delimiting rulings stems from the fact that they were the earliest, definitive statements of recalibration; they established political boundaries that proved to be resistant to subsequent legislative revision; and they established legal precedents for subsequent anti-reform legislative efforts.

by the 1880s, it was undoubtedly clear that federalism was going to emerge substantially intact in the aftermath of Reconstruction, at least with respect to Southern race relations; by that time, there was no likelihood of a return of federal military intervention in the South. And yet, even with that external boundary issue resolved, the internal contours of the new post-Reconstruction system of Southern race relations – Would this be substantive racial equality? Racial segregation? – had hardly crystallized by that date.⁵¹

In response to this peculiar form of uncertainty, a Court inclined to promote stability would engage in what I call “order-creating rulings” that offer a definitive resolution of internal uncertainties over competing sets of rights and competing governing authorities. The effect of these rulings, when they build upon delimiting rulings, is – as their name implies – to usher in fully-formed, definitive, governing principles that will define the new post-dismantling social order. In function then, these order-promoting rulings bring to a close the larger process of clarifying the boundaries between competing authorities and rights that is needed to create a new social order. Textually, these opinions are distinctive in the definitive, principled nature of their conclusions that, in essence, articulate foundational legal standards that come to characterize the new social order.

None of this is to claim that new social orders are wholly the product of judicial will. When one considers a social order such as Jim Crow segregation, for example, a convergence of opinion among the federal judiciary, the federal elected branches, and, of course, the Southern state governments, was needed before it became entrenched. That being said, the efficacy of these order-creating rulings stems in part from the legitimacy benefits conferred by judicial constitutional interpretations. Indeed, it is not surprising that the start of the Jim Crow era is commonly dated to the Court’s order-creating rulings in *Plessy v. Ferguson*⁵² and *Williams v. Mississippi*

⁵¹ Indeed the assertion that a flux in Southern race relations persisted into the 1880s is the “Woodward Thesis.” C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 31-109 (3d rev. ed 1974).

⁵² *Plessy v. Ferguson*, 163 U.S. 537 (1896).

pi;⁵³ or that the dominance of industrial pluralism in post-War labor relations can be dated to the Court's order-creating rulings in the *Steelworker's Trilogy*⁵⁴ in 1960; or that the solidification of the current anti-classification regime in constitutional equal protection can be dated to the Court's order-creating rulings in *City of Richmond v. J.A. Croson Co.*⁵⁵ and *Adarand Constructors, Inc. v. Peña*⁵⁶ in 1995. Absent not just Court approval, but *emphatic* Court approval for any proposed resolution of internal boundary disputes over rights and governing authority, widespread uncertainty with respect to these items would likely continue.

Stated otherwise, if the Court is not on-board with a proposed resolution of internal boundary disputes, major conflicts over conflicting conceptions of rights and governing authority can be expected to continue in the form of adjudication – with the attainment of order thereby prolonged. However, the Court's definitive approval of a proposed resolution often brings to an end any lingering uncertainties. Thus, while boundary constraints, such as appointments, or political and social forces, may very well play a significant role in dictating judicial outcomes with respect to these order-creating rulings – even more so than they do with respect to delimiting rulings – it is the judicial commitment to stability that prompts the decisive and emphatic *mode of resolution* contained within order-creating rulings.

3. *Tension-Managing Judicial Rulings*

Even if external and internal boundary disputes may be resolved with delimiting and order-creating rulings, new uncertainties may nevertheless arise in subsequent years. Political conditions may change, legal values may change, and judicial commitments may change. Indeed sometimes conflicts and threats to the status quo

⁵³ *Williams v. Mississippi*, 170 U.S. 213 (1898).

⁵⁴ *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363 U.S. 593 (1960).

⁵⁵ *City of Richmond v. J.A. Croson Co.* 488 U.S. 469 (1989).

⁵⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

will emanate from the fact that the judiciary itself may be occasionally inclined to endorse certain values and legal outcomes that sit in tension with the entrenched legal doctrines that constitute the core of the reigning, post-dismantling social order. When this occurs, a Court may find itself pulled in opposite directions in seeking both to challenge the status quo, while also, incongruously, remaining committed to preserving the stability of the reigning order as well. A Court inclined to stabilize authority and rights relationships in the face of this peculiar type of uncertainty will engage in what I call tension-managing rulings to alleviate any such tensions and incongruities. In these rulings, we find the Court essentially bending the established foundational doctrines of the reigning social order in creative and even disingenuous ways, all in order to accommodate incongruous values within the status quo. The effect of these rulings is to preserve the social order and manage tensions, while also perhaps, sacrificing conceptual and ideological purity.

The textual hallmark of these tension-managing rulings is brought into stark relief when contrasted with the characteristics of delimiting and order-creating rulings. While the latter two modes of adjudication are distinctive for their definitive and even principled conclusions, tension-managing rulings are characterized by the vagueness and fuzziness of their reasoning – valuable attributes when the judicial goal is to reach a compromise rather than to establish definitive boundaries. More specifically, in its tension-managing rulings, the Court articulates vague – and sometimes conceptually incoherent – judicial rulings that both compromise and even cut against the core governing principles of the reigning political order, while also emphasizing continuity with that order. Tension-management is thus how I would interpret traditionally “odd” cases like *Buchanan v. Warley*⁵⁷ and *Grutter v. Bollinger*.⁵⁸ And while efficacious boundary constraints undoubtedly influenced the compromise-oriented outcomes reached in these cases, a focus on judicial-institutional interests is capable of explaining the peculiar form of compromise chosen by the Court in these cases. Indeed the political

⁵⁷ *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁵⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

significance of these tension-managing rulings stems precisely from the fact that so long as the Court stays within boundary constraints imposed by externalist forces, its choice of the terms of compromise will very likely persist.

The claim is *not* that tension-managing rulings are all that the Court will be doing during periods of political equilibrium. Indeed, once the new social order has been created, the bulk of what the judiciary is likely to be doing in these periods – at least within the policy domain that has undergone recent reform – is offering a full-throated affirmation of the reigning political order, and clarifying its implications for new social contexts and new problems. My claim is that to the extent that we see tension-managing rulings emanating from the Court, they will appear only during these periods of political equilibrium after a social order has been established. The recurrence of a mode of tension-management adjudication during periods of political equilibrium allows the ready inference to be made that a primary institutional interest of the Court – particularly during these periods – has been to occupy a middle way of giving voice to its concerns while also remaining committed to the stability and maintenance of the reigning order.

To restate and elaborate on the core claim of the Article then, my assertion is that the judicial-institutional interest in stability in these post-dismantling moments manifests itself in three distinctive forms of adjudication. Furthermore, to press a point only implied in the previous Sections, I would also claim that these modes of adjudication recur through constitutional history *in a particular sequence*. That is, when a dismantling of hierarchical social relations occurs, we should expect tension-managing rulings to always follow order-creating rulings, the latter of which should always follow delimiting rulings. The reason for this is implied in the preceding discussion: before any stable resolution of internal boundary issues can occur, there first has to be a stable “external” resolution that demarcates the boundaries between competing sets of authorities and rights at the margins of the reform. It is exactly such a resolution that is provided by delimiting rulings. Likewise, before any tension-managing rulings can be issued to alleviate stresses and incongruities between

newly-emergent values and the reigning social order, a reigning social order first has to be created – with the aid of order-creating rulings.

D. Scope of the Theory

Let me conclude this Part by offering one key clarification on the scope of the theory. As noted above, my judicial behavioral claim is confined to the peculiar context of post-reform periods where hierarchical social relations have been dismantled. And while the only two case-studies presented here involve transformations in race relations, I do not believe my theory is applicable only to that context. Indeed, although I am unable to explore it here, in other work I have demonstrated the applicability of the theory to a *non*-racial context where a system of hierarchical social relations was dismantled: namely, the labor context, where a master-servant system of common law relations was dismantled by the Wagner Act.⁵⁹ As such, I do believe the theory has broader applicability than the race context.

That said, beyond these three cases – the dismantling of slavery, the dismantling of pre-Wagner labor relations, and the dismantling of Jim Crow – it remains to be seen whether any other analogous cases of dismantling can be found in American history subsequent to the Revolution. An argument might also be made for the onset of gender equality in the seventies as perhaps a fourth case of dismantling, though given the fact that the ERA failed to pass, and given that the legal movement toward gender equality occurred piecemeal through judicial rulings, I remain hesitant to label it an instance of wholesale dismantling. Of course, had the ERA been successfully ratified, its parallels to Emancipation, the Wagner Act, and the Civil Rights Revolution would have been striking, and my theory would have predicted the recurrence of this sequence of adjudication-types.

If our attention is turned more toward the future, a conclusive, dramatic federal judicial-legislative victory for equal protection and sexual orientation could constitute another instance of wholesale

⁵⁹ Chinn, *supra* note 36.

dismantling. If such an event actually came to pass, I would fully expect these recalibration dynamics to recur there, though my suspicion is that sexual orientation will follow the same meandering path that the gender equal protection cases have.

It is striking that one can already find hints of delimiting rhetoric in Scalia's dissent in *Lawrence v. Texas* that parallel some of the delimiting language seen in the cases I discuss. Scalia critiques the logic of the Court majority by, essentially, offering a slippery slope argument. He says, for example, of the sodomy statute struck down in *Lawrence*, that if that statute could be struck down on rationality review, it would also seem that "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity" would also have to be struck down by the Court on the basis of rationality review.⁶⁰ Scalia's arguments suggest that even if the sexual orientation-equal protection cases have, up to this point, failed to align with the sequence of adjudication-types outlined in this Part, there is undoubtedly something to the form and structure of these modes of adjudication that carries beyond the confines of the small, but highly significant subset of legal development that is our focus here.

III. TWO CASE-STUDIES OF JUDICIAL DELIMITING RULINGS

A. *Judicial Delimitation in Post-Reconstruction*

The ending of slavery by the Thirteenth and Fourteenth Amendments was an institutional dismantling of the greatest magnitude. With this burst of federal lawmaking in the 1860s, a deeply entrenched and pivotal governing structure that lay at the core of the antebellum political order was effectively wiped away, never to return. Yet key questions remained regarding the scope of this dismantling of slavery, and its relation to still-resilient legal and political commitments to federalism. Would the abolition of slavery lead the Northern electorate to accept massive federal intrusion into the South to ensure the integrity of Republican reforms? Would the dismantling of slavery lead to a dismantling of federalism as well?

The political context of the 1870s and 1880s was shaped by two

⁶⁰ *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

governing crises in the early 1870s, which had the effect of permanently sapping the momentum for reform in the Republican Party, and of establishing a persistent stalemate. The first was the crisis posed by continuing Southern civil disorder. It was manifested in frequent incidents of racially and politically-motivated violence by Southern Democratic organizations, which were particularly egregious in Mississippi and Louisiana.⁶¹ The second was the governing crisis posed by the momentous Panic of 1873 that was a black mark for the governing Republican Party, diverted the Northern electorate's attention from the South, and undermined Republican party-building efforts in the South.⁶² The end result of the Panic, combined to some extent with Southern civil disorder, was the election outcome of 1874: in the greatest partisan reversal of the nineteenth century, the Republicans saw their 110 vote majority in the House change into a Democratic majority of 60 votes after the election. A few years later, Hayes would remove the federal troops that had been guarding the South Carolina and Louisiana statehouses after the 1876 election,⁶³ and Florida, Louisiana, and South Carolina became the last three states of the Confederacy to be "redeemed" into Democratic control.

Republicans subsequently succeeded in gaining a unified government twice before the 1896 election – in 1880 and 1888 – and lame-duck Republicans succeeded in passing the Civil Rights Act of 1875 before the Democrats took control, but the era when Republican electoral dominance could threaten further transformation in the South had truly ended with the 1874 result. The Democrats, in turn, were never able to mount a successful legislative offensive of their own during these years either. For example, Democrats, with their newly-acquired control of both houses of Congress in 1878,

⁶¹ ERIC FONER, *RECONSTRUCTION* 559-62 (Perennial Library ed. 1989)(1988); WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-1879*, 106-07, 110-15, 117-23 (1979); *see generally* NICHOLAS LEMANN, *REDEMPTION* (2006) (exploring the violence in Louisiana and Mississippi between 1873 and 1875).

⁶² FONER, *supra* note 59, at 523-25, 535, 539, 569; BROOKS D. SIMPSON, *THE RECONSTRUCTION PRESIDENTS* 165, 173-74 (1998); *see* MICHAEL PERMAN, *THE ROAD TO REDEMPTION: SOUTHERN POLITICS, 1869-1879*, 146-48 (1984).

⁶³ GILLETTE, *supra* note 59, at 344-46.

did attempt to repeal the Reconstruction enforcement acts by attaching riders to appropriation bills. Hayes, however, pushed back hard and vetoed seven of these appropriation bills from 1879-1880.⁶⁴ Democrats achieved a unified government only once in these decades, in 1892, and they were successful in repealing some forty provisions of the various enforcement acts in February 1894 thanks to their large majorities (and additional, significant repeals followed in 1909 and 1911).⁶⁵ But at least from the time of the 1874 election to 1892, the most accurate description of electoral politics for this period was that of an extended legislative stalemate between the Republicans and Democrats.

As such, the rulings of the Supreme Court had significant political effect. Specifically, Court rulings were consequential in that they constituted the first definitive statements on the scope of Reconstruction, and, in addition, they were consequential in that they remained free of any subsequent legislative revision due to the persistence of stalemate. By the time repeal of the enforcement acts began in 1894, the reassertion of federalism – and the curtailment of African-American rights – reflected in this legislative effort had already been pronounced, in definitive fashion, in Supreme Court rulings during the preceding two decades. And equally notable, the Court justified delimitation not by putting forth frontal assaults on Reconstruction; rather, the dominant, recurring underlying rationale used to support delimitation was an “indirect” appeal to the resilient authority of state governmental autonomy.⁶⁶

⁶⁴ STANLEY P. HIRSHSON, *FAREWELL TO THE BLOODY SHIRT* 56-57 (1964); MARK WAHLGREN SUMMERS, *RUM, ROMANISM & REBELLION: THE MAKING OF A PRESIDENT 1884*, 48-49 (2000); XI WANG, *THE TRIAL OF DEMOCRACY* 165-79 (1997) (describing the life of the appropriation bills).

⁶⁵ MICHAEL PERMAN, *STRUGGLE FOR MASTERY* 21-22, 43-47 (2001); WANG, *supra* note 62, at 254-59. Notably the repeals of 1909 and 1911 occurred with the 61st Congress, which was part of a unified Republican government.

⁶⁶ Kaczorowski's important work on the judicial rulings of this period notably emphasizes the crucial role that federalism concerns played in influencing these rulings. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876*, 182-83 (Fordham Univ. Press 2005) (1985). Orren and Skowronek also focus on the issue of the uncertain reach of the authority of the Reconstruction Amendments, especially as it related to institutional conflict between the Court and Congress. ORREN & SKOWRONEK, *supra* note 3, at 133-43.

1. *The Slaughter-House Cases*

Though more definitive judicial statements on post-Reconstruction delimitation would come later, the Court's first statement came with *The Slaughter-House Cases*⁶⁷ in 1873. There are a number of ways to historically situate this case. It might be interpreted as a peculiarity of Louisiana politics; since Republicans still controlled the Louisiana state legislature at this point, this put Louisiana conservatives in the very odd position of making nationalist legal arguments with respect to the Fourteenth Amendment in order to oppose the authority of their in-state rivals.⁶⁸ The case might also be viewed as an economic rights case: the plaintiffs were white butchers contesting a state-granted slaughter-house monopoly. Finally, given that this case marked the Court's first interpretation of the Privileges or Immunities Clause, one of *the* key components of Section One of the Fourteenth Amendment,⁶⁹ the temptation is strong to view this case as at least implicitly about African-American rights.⁷⁰

Regardless of whether one adopts a more economic or racial perspective on this case, *Slaughter-House* is deserving of mention because it clearly had a delimiting effect on the scope of African-American rights. Justice Miller, writing for the Court, famously rejected the argument that the Privileges or Immunities Clause protected individual rights that the Louisiana state legislature had violated with its state-granted monopoly; he asserted that the Clause protected only a relatively stingy set of rights that stemmed exclusively from national citizenship. The more fundamental rights of citizenship that included the butchers' free labor rights – that they were asserting here – stemmed from state citizenship, and as such, were subject to the authority of state legislatures. Hence no relief could be provided for the white butchers in this case.⁷¹

Miller's sweeping interpretation of the Privileges or Immunities

⁶⁷ *The Slaughter-House Cases*, 83 U.S. 36 (16 Wall.) (1873).

⁶⁸ See KACZOROWSKI, *supra* note 64, at 117-19.

⁶⁹ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 182 (1998).

⁷⁰ SMITH, *supra* note 39, at 333; See KACZOROWSKI, *supra* note 64, at 133, 138-39.

⁷¹ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 73-80.

Clause effectively gutted it of much substantive content. Though he offered some indication that the Clause might offer more protection for African-American rights claims,⁷² subsequent cases demonstrated otherwise; Miller's stingy assessment of the rights enjoyed by the white butchers under the Privileges or Immunities Clause turned out to be an assessment similarly applicable to African-American rights. In later years, the federal protection of individual rights against the states – whether in the economic or racial domain – had to enter through the Due Process and Equal Protection Clauses.

For our purposes, the relevance of *Slaughter-House* lies in how the Court definitively reconciled one of the major components of the Fourteenth Amendment with the broader, resilient authority of federalism – by delimiting the former. *Slaughter-House* did not, in itself, constitute a conclusive delimitation of Reconstruction reforms on race; that would only occur once the Court had dealt with the Equal Protection Clause in later cases. But for any kind of stability to emerge in the domain of Southern race relations, a judicial delimiting statement about the scope of the Privileges or Immunities Clause, of the kind offered here, was necessary.

Thus the delimitation theme is prominent in the majority opinion itself – and echoed in the arguments of the corporation's lawyers. The corporation's lawyers had warned against a more expansive interpretation of the Fourteenth Amendment, due to the fact that such a move would open the floodgates on litigation in the federal courts. All types of municipal legislation would then become matters appropriate for federal adjudication.⁷³ The corporation's lawyers raised the specter that this entire domain of state authority could be wiped out completely if the Court were to tread too far down the path of an expansive interpretation of the Fourteenth Amendment. To quote from the brief of Thomas J. Durant, one of the attorneys for the corporation:

⁷² *Id.* at 71-72.

⁷³ Brief of Charles Allen, Esq. at 13-14, *The Slaughter-House Cases*, 83 U.S. 36 (16 Wall.) (1873) (No. 479); Brief of Counsel of State of Louisiana, and of Crescent City Live Stock Landing and Slaughter House Company, Defendants in Error at 8, *Slaughter-House Cases*, 83 U.S. 36 (16 Wall.) (1873) (brief on re-argument).

To extend the interpretation of the amendment to the length which the plaintiffs in error demand would break down the whole system of confederated State government, centralize the beautiful and harmonious system we enjoy into a consolidated and unlimited government, and render the Constitution of the United States, now the object of our love and veneration, as odious and insupportable as its enemies would wish to make it.⁷⁴

Miller's opinion seized on these points and emphatically nodded to this concern that if the Court were to go in the direction of expansively construing the Privileges or Immunities Clause, it would start the nation down a slippery-slope toward federal centralization.⁷⁵ Furthermore, congressional oversight over the states would be unchecked by virtue of its authority under Section Five of the Fourteenth Amendment.⁷⁶ Surely, argued Miller, such a radical change could not have been the original intent of the Amendment's framers and ratifiers.⁷⁷ To quote a well-known passage from this ruling that epitomizes the dynamic of "indirect" reasoning toward delimitation:

The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.⁷⁸

⁷⁴ Brief of Counsel of State of Louisiana, *supra* note 71, at 15.

⁷⁵ *The Slaughter House Cases*, 83 U.S. at 78.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

In short, the Court justified delimitation in part not by frontally challenging the validity or goals of the Fourteenth Amendment, but instead by emphasizing the massive threat posed by allowing one component of that Amendment to further transform the polity. It recognized the threat posed to federalism should the Amendment be construed too robustly, and, as urged by the corporation's attorneys, it decided to pull back from such an interpretation and moved to delimit the Privileges or Immunities Clause instead.

2. *United States v. Cruikshank*

A similar result is apparent from the Court's ruling in *United States v. Cruikshank*⁷⁹ that came down three years later, which grew out of federal criminal prosecutions of the white perpetrators of the Colfax Massacre in Louisiana under the Enforcement Act of May 30, 1870. During this conflict, an estimated seventy-one African-American were killed; some were mutilated, and many were killed in cold blood by Democratic partisans.⁸⁰ The defendants were charged with various offenses based upon the expansively worded Section 6 of the Act.

Most significant for the present argument was the Court's ruling with respect to certain criminal counts that touched upon the Fourteenth Amendment. The third and eleventh counts charged the defendants with "the intent to . . . deprive the citizens named, they being in Louisiana, 'of their respective several lives and liberty of person without due process of law.'"⁸¹ Likewise, the fourth and twelfth counts focused on a different clause of the Fourteenth Amendment, the Equal Protection Clause, and charged an intent by the defendants

to prevent and hinder the citizens named, who were of African descent and persons of color, in 'the free exercise and

⁷⁹ *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁸⁰ FONER, *supra* note 59, at 437; GILLETTE, *supra* note 59, at 115; LEMANN, *supra* note 59, at 3-27; GEORGE C. RABLE, BUT THERE WAS NO PEACE 126-28 (1984); TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM AND RACE IN LOUISIANA, 1862-1877, 189-92 (1984) (detailing the massacre).

⁸¹ *Cruikshank*, 92 U.S. at 553.

enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States⁸²

Defense lawyers resorted to arguments that sought not to deny the legitimacy of the Amendment or the political changes it had wrought, but rather to draw sharp outer limits upon the reach of this Amendment, and to demonstrate how it failed to reach the present case. They did this by pushing hard on the idea that the guarantees of Section One of the Fourteenth Amendment (including the Due Process and Equal Protection Clauses) touched only state actions and not actions by private individuals – thus rendering the crimes in the present case outside the Amendment’s reach. There is reference to this point, though with varied attention, in all four of the defendants’ briefs.⁸³ And the arguments by the defense lawyers were hardly limited to textual points. More structural-institutional considerations were apparent as well: if the Court were to allow the federal oversight provided for in the Fourteenth Amendment to extend to private actions, “what crime or offense known to the law, committed with in [sic] the limits of a State, is there, of which the courts of the United States, may not take jurisdiction?”⁸⁴

These arguments found a receptive audience on the Court, since Waite’s opinion ultimately helped to formulate the state action principle as a matter of constitutional doctrine. On the third and eleventh counts that charged the defendants with “the intent to . . . deprive the citizens named, they being in Louisiana, ‘of their respec-

⁸² *Id.* at 554.

⁸³ Brief for Defendants at 24-26, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609) (David S. Bryon & P. Phillips); Brief for Defendants at 25-26, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609) (John A. Campbell); Brief for the Defendants at 4-5, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609) (David Dudley Field); Argument of Mr. David Dudley Field on behalf of the Defendants at 17, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609); Brief for Defendants at 17-19, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609) (H.R. Marr); *see also* Brief for Defendants at 19-20, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609) (David S. Bryon & P. Phillips).

⁸⁴ Brief for Defendants at 25, *United States v. Cruikshank*, 92 U.S. 542 (1876) (No. 609) (David S. Bryon & P. Phillips).

tive several lives and liberty of person without due process of law” Waite addressed the applicability of the Fourteenth Amendment to these counts, echoing arguments used by the defense:

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.⁸⁵

With respect to the applicability of the Equal Protection Clause, Waite articulated a state action limitation as well.⁸⁶ Subsequently, these initial steps toward a state action limitation, and toward delimiting the scope of federal authority under the Equal Protection Clause, found fuller expression in *The Civil Rights Cases* seven years later.⁸⁷

3. *The Civil Rights Cases*

The statute involved in *The Civil Rights Cases*⁸⁸ was the Civil Rights Act of 1875, which provided for equality of rights with respect to public accommodations, without regard to race. Justice Bradley, writing for the Court, struck down § 1 (the equality in public accommodations provision) and § 2 (the provision imposing penalties upon violators of § 1) of that Act as unconstitutional. It was in this case that post-Reconstruction delimitation reached its culmination in the form of the state action doctrine.

First, Bradley asserted that the Civil Rights Act could not be justified as a valid exercise of congressional power under Section One and Section Five of the Fourteenth Amendment because Section

⁸⁵ *Cruikshank*, 92 U.S. at 554.

⁸⁶ *Id.* at 554-55.

⁸⁷ Notably, Waite also seemed to entertain the possibility of federal involvement in alleged equal protection violations by private actors where there is a racial motivation (a circumstance not alleged in this case). It is not clear, however, whether Waite saw this as a loophole to the state action requirement of the Fourteenth Amendment Equal Protection Clause, or whether he saw a possible applicability for the Thirteenth Amendment in such cases of private racial discrimination. *Id.* at 555.

⁸⁸ *The Civil Rights Cases*, 109 U.S. 3 (1883).

One provided guarantees of individual rights—including a guarantee of equal protection – against actions of “the State” only.⁸⁹ This, of course, was largely the same argument offered in *Cruikshank*.⁹⁰ Second, Bradley also took up the question of whether the Act could be justified under the Thirteenth Amendment. Though he acknowledged that this latter Amendment had no state action limitation, he was unable to recognize refusal of service at an inn or theater as amounting to a badge of slavery.⁹¹ With no basis in either Amendment, he concluded that the Act was unconstitutional.⁹²

Bradley’s ruling is particularly interesting for the structural-institutional concerns justifying the state action limitation. Similar to Miller’s move in *Slaughter-House*, Bradley also broached the subject of perverse consequences that might be attendant upon any ruling that would uphold the broad exertion of federal authority embodied in the Civil Rights Act. As he stated, “If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property?”⁹³ And if Congress could do this, “[t]hat would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them.”⁹⁴

The significance of *The Civil Rights Cases* lies in its attempt to offer a clear, principled articulation of how far the scope of national authority – and the authority of Reconstruction – extended. Again, in delimiting this authority, there was no direct repudiation of Reconstruction in Bradley’s articulation of the state action doctrine. The

⁸⁹ *Id.* at 10-15.

⁹⁰ The state action requirement was also articulated in the case of *United States v. Harris*, 106 U.S. 629 (1883), decided almost nine months before *The Civil Rights Cases*. In discussing the Fourteenth Amendment, the Court stated, “[i]t is perfectly clear from the language of the first section that its purpose also was to place a restraint upon the action of the States.” *Id.* at 638.

⁹¹ *The Civil Rights Cases*, 109 U.S. at 24-25.

⁹² *Id.* at 25.

⁹³ *Id.* at 14.

⁹⁴ *Id.* at 13.

authority of the federal government to address defects in state action was explicitly recognized. That same authority, however, was “indirectly” delimited in significant part with reference to the continuing legitimacy of state autonomy.

Seen through the lens of recalibration, the significance of these rulings for the subsequent rise of Jim Crow is apparent. These rulings constituted the first principled, definitive reassertions of federalism by the federal government after Reconstruction because the Supreme Court was able to undertake certain actions that lay beyond the reach of conservative congressional actors at the time. Furthermore, by enshrining these principles in constitutional law, the Supreme Court imposed a heightened burden on those proponents of Reconstruction who were inclined to press their transformative goals further. By 1883, proponents of reform would have to contend with not only a strengthened foe in the elected branches, but also with the burden of overcoming the pronouncements of the Court – pronouncements that now constituted the status quo.⁹⁵

B. *Judicial Delimitation in the 1970s*

The delimitation of civil rights reform in the seventies should be a familiar story for many, since it tracks a fairly conventional narrative about developments in constitutional equal protection in the post-*Brown* era.⁹⁶ Beginning with *Brown v. Board of Education*⁹⁷ in

⁹⁵ Valelly makes this point as well. RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS* 19 (2004).

⁹⁶ Why focus just on the constitutional equal protection component of the civil rights revolution, as I do here? Indeed, one might reasonably argue that the dismantling of Jim Crow should more appropriately be a story about wiping away vestiges of racial discrimination in public accommodations, in private employment, or in voting rights, and, thus, the acts of dismantling that should be examined should be the Civil Rights Act of 1964 or the Voting Rights Act of 1965, rather than *Brown v. Board of Education*.

While I would concede that the dismantling of Jim Crow encompassed the rearrangement of institutional authorities in a number of different domains, including those noted above, not all of these institutional domains were equally significant in charting out the processes of recalibration. The site for locating recalibration processes at work tends to be at the outer boundaries of the reform effort, where the principles of dismantling become problematized as they confront other still-credible institutional authorities. In the context of the Civil Rights Era, that site was clearly in the legal domain of constitutional equal protection.

1954 and continuing with important congressional statutes in 1964 and 1965, Jim Crow – another entrenched system of hierarchical authority akin to antebellum slavery and master-servant labor relations – was dismantled by the federal government. As with our previous case, this dismantling immediately raised questions with respect to scope. As many have noted, in *Brown* – the paradigmatic case of the civil rights revolution – the repudiated laws employed racial classifications that functioned to subordinate African-Americans. As a result, it was not immediately clear just what the forthcoming jurisprudential revolution would amount to: would it stand for a principle of “anti-classification” or the repudiation of racial classifications in the law? Or would it stand for an even more expansive “anti-subordination” principle, or the repudiation of all laws that functioned in result or in impact to perpetuate the subordinate status of African-Americans as a group?⁹⁸

These were significant areas of uncertainty, since they implicated several important policy issues in the seventies. For example, affirmative action employs racial classifications, but employs them to aid the condition of African-Americans. Likewise, also in question at the time were laws that were facially-neutral with respect to any racial classification, but that also operated with a disparate negative impact on African-Americans as a group. Only when classification and impact were disaggregated – and choices were made between these two values – would the constitutional scope of this dismantling be delineated. Once that choice was made in favor of the anti-classification principle in the late sixties and early seventies, it subsequently became clear that *de facto*, or non-formalized racial exclusions would persist in the post-*Brown* era. In the realm of public education for example, even though vigorous requirements for school integration were imposed upon Southern school districts by the federal courts, a new commitment to neighborhood and local school assignments in public education – commitments that, notably, first emerged out of the South – arose in the sixties to ensure

⁹⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹⁸ These conceptual categories are discussed in Owen Fiss’s article. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

that consequential limits on racial integration would carry over into the post-Jim Crow racial status quo.⁹⁹

The rise of legislative stalemate in the post-Civil Rights Era delimitation shares many similarities to the analogous periods in Reconstruction: as with the elections of 1874, the election of 1968 constituted an important event in the post-reform politics of the 1960s. In the 1968 election, an aversion to incumbents stemming from the problem of the Vietnam War, a growing popular concern with rising crime, and increasing conservatism on the race issue led to Richard Nixon's ascendancy to the presidency.¹⁰⁰ This election did not signal anything like a popular repudiation of the civil rights advances of the past decade and a half; the Democrats retained firm control of both houses of Congress after the election,¹⁰¹ and Nixon's victory itself was far from resounding given that he barely edged Humphrey in the popular vote.¹⁰² Yet, Nixon and Wallace's share of the popular vote totaled nearly fifty-seven percent,¹⁰³ and this did signal that a new state of affairs had arrived. After several years of momentous reforms, a popular majority had crystallized that decisively turned against continuing on the path of further reform. If it was not a counter-revolutionary electoral result, it nevertheless signaled a growing legislative standstill on further dismantling efforts in the domain of constitutional equal protection — a standstill that has persisted at least up until the present time.¹⁰⁴

With the legislative stalemate created by the election of 1968, a space was cleared for the Court to step to the fore in establishing the precise limits on how far the transformation in equal protection would intrude upon American society. To be sure, the Court was

⁹⁹ MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 132, 244, 249, 304 (2006). *See id.* at 249, 304.

¹⁰⁰ ROBERT MASON, *RICHARD NIXON AND THE QUEST FOR A NEW MAJORITY* 35 (2004); *see* JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974*, 708 (2006).

¹⁰¹ MASON, *supra* note 99, at 35.

¹⁰² IRWIN UNGER & DEBI UNGER, *TURNING POINT* 527 (1988); *see also* JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 182 (1996).

¹⁰³ PATTERSON, *supra* note 99, at 705.

¹⁰⁴ *See* MASON, *supra* note 99, at 34-35; PATTERSON, *supra* note 99, at 707-08; UNGER AND UNGER, *supra* note 101, at 527-28.

not alone in its inclination to reestablish limits during this period. Congress, for its part, registered its antipathy to busing by prohibiting the use of federal funds for this purpose in the Education Amendments of 1972,¹⁰⁵ and purported to restrain judicial authority to order busing in the Equal Education Opportunities Act of 1974.¹⁰⁶ Neither of these legislative acts, however, should be taken as evidence of a consequential legislative delimitation effort, especially in light of the fact that the latter Act also explicitly sounded a note of deference to the judiciary in conceding that “the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.”¹⁰⁷ Commentators¹⁰⁸ have thus agreed that these statutes largely amounted to congressional posturing with little substantive effect on the Court, and the reason for this is apparent: congressional conservatives were unable to mount a more definitive attack on busing simply because they lacked the political strength to overcome pockets of Democratic control in the Senate at the time.¹⁰⁹

With the legislative process locked in stalemate, the earliest, definitive, principled statements of equal protection delimitation once again emerged from the Court. And as in the previous case-studies, the rationales underlying these delimiting opinions lacked any kind of frontal assault on the core achievements of the Civil Rights Era. Rather, delimitation was justified, in significant part, by indirectly appealing to a related and resilient authority – namely, preserving

¹⁰⁵ Prohibition Against Busing, Pub. L. No. 92-318, § 802(a), 86 Stat. 317 (1972) (codified as amended at 20 U.S.C. § 1652 (2006)).

¹⁰⁶ Equal Education Opportunities Act, Pub. L. No. 93-380, § 215(b), 88 Stat. 517 (1974) (codified at 20 U.S.C. § 1714(b) (2006)).

¹⁰⁷ Education Amendments Act of 1974, Pub. L. No. 93-380, § 203(b), 88 Stat. 515 (1974) (codified at 20 U.S.C. 1702 (2006)).

¹⁰⁸ GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 491 (Fifth Ed. 2005); Gary Orfield, *Congress, the President, and Anti-Busing Legislation, 1966-1974*, 4 J.L. & EDUC. 81, 108-09, 133 (1975). See also *Drummond v. Acree*, 409 U.S. 1228 (1972), where Powell, sitting as a Circuit Justice, quickly disposed of a statutory provision in the 1972 legislation that aimed to postpone judicial decisions involving busing until appeals on the initial decision had been exhausted.

¹⁰⁹ Orfield, *supra* note at 106, at 138.

the traditional rule-making prerogatives of other institutional bodies.

1. *Milliken v. Bradley*

After a string of school desegregation decisions in the late sixties and early seventies that demonstrated a strong willingness on the part of the Supreme Court to achieve hard results in integration, reformist impulses soon hit a wall with the Court's ruling in the case of *Milliken v. Bradley*.¹¹⁰ The general question posed in *Milliken* was the same question posed in much previous desegregation litigation: how expansive could judicial integration remedies be in response to a finding of de jure segregation? At issue, more specifically, was whether an inter-school district, city-suburban desegregation plan would be constitutionally permissible as a means to remedy a de jure segregation problem in the Detroit city school district. The need for such a plan lay in the demographics of the Detroit school district itself: there simply were not enough white students within it that could be shifted around to create racial compositions that reflected the larger metropolitan area.¹¹¹

Burger, writing for a majority that included three other Nixon appointees and Potter Stewart, opened his analysis of the case with a vigorous affirmation of the anti-classification view of equal protection. As he stated, "The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils."¹¹² In contrast, no constitutional requirement could be gleaned from past precedents for an appropriate "racial balance" of some sort in public schools that – Burger asserted – seemed to be the driving principle behind the city-suburban desegregation remedy.¹¹³

Particularly notable about Burger's opinion is that he did not ground the defense of anti-classification goals by frontally challeng-

¹¹⁰ *Milliken v. Bradley*, 418 U.S. 717 (1974).

¹¹¹ *Id.* at 732-34.

¹¹² *Id.* at 737.

¹¹³ *Id.* at 737-41, 745.

ing the racial egalitarian goals of the civil rights revolution. To the contrary, *Brown* and other school desegregation precedents were relied upon as authority for Burger's defense of anti-classification values. Further, Burger supplemented his doctrinal arguments with an appeal to a resilient system of governing authority that was tangential to the core issue of race: the power of local school boards to govern public education within their district lines. Allowing a federal court to shuffle students across school district lines would undeniably cut into this local governmental authority. As Burger stated:

Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.¹¹⁴

With Burger's default assumption of local authority over public education, the clear implication was that an inter-district remedy should not be something undertaken lightly. Equal protection violations calling for such a remedy had to be clear enough to override the pull of this significant, resilient authority. Burger thus demarcated the outer scope of federal and local authority by asserting that in order to justify a desegregation plan that crossed district lines, there had to be a violation of anti-classification values – either by actors within one or more school districts, or by actors with statewide authority – that had an inter-district effect. In this case, no such inter-district effect could be identified; evidence of *de jure* segregation was limited to the Detroit school district itself.¹¹⁵

Again, the Court effectively drew a sharp outer boundary on how far it was willing to pursue racial integration in public schooling without in any way impugning the value of integration as a goal.

¹¹⁴ *Id.* at 741-42.

¹¹⁵ *Id.* at 744-52.

And, as in our prior cases, a more expansive interpretation of racial equality was “indirectly” undercut with reference to the importance of the continuing legitimacy of local governmental prerogatives. As Justice Burger stated:

But it is obvious from the scope of the interdistrict remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a *de facto* “legislative authority” to resolve these complex questions, and then the “school superintendent” for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.¹¹⁶

2. *Washington v. Davis*

Two years later, in the case of *Washington v. Davis*,¹¹⁷ anti-classification values were pitted even more directly against anti-subordination values. At issue in this case was the civil service exam Test 21, an entrance examination for prospective officers in the Washington, D.C., police force. Although there was no evidence of any intentional racial discrimination in the composition of the test or in the police force’s administration of the test, it nevertheless had the effect of excluding a disproportionate number of African-American recruits from the force.¹¹⁸ Indeed, four times as many African-Americans as whites failed Test 21.¹¹⁹ Two African-American plaintiffs brought suit challenging the test as a violation of equal protection guarantees under the Fifth Amendment because of this disproportionate exclusion. The case directly presented an equal protection claim on anti-subordination or results-oriented grounds, and sought to establish negative disparate impact as sufficient for showing a violation of constitutional equal protection.

Even though the *Milliken* ruling suggested that a disparate impact interpretation of the Fifth Amendment was a losing legal argument

¹¹⁶ *Id.* at 743-44.

¹¹⁷ *Washington v. Davis*, 426 U.S. 229 (1976).

¹¹⁸ *Id.* at 232-37.

¹¹⁹ *Id.* at 237.

here, there was nevertheless some very significant doctrinal support for the disparate impact view. Only five years earlier in the case of *Griggs v. Duke Power Co.*, the Court had itself established disparate impact standards for prevailing in employment discrimination claims under Title VII of the Civil Rights Act of 1964.¹²⁰ And before *Davis* reached the Court, the Court of Appeals had also previously found in favor of the African-American litigants in an earlier stage of this litigation, applying the standards for employment discrimination claims under Title VII to the constitutional claims presented.¹²¹ Finally, the briefs filed in this case by the parties and by the Department of Justice all also focused entirely on Title VII statutory standards that all expected the Court to address.

Thus the potential still existed in 1976 for the Court to press in an expansive direction with respect to constitutional equal protection guarantees. However, the Court declined to follow the lead of the Court of Appeals. As Justice White stated in writing for the Court in a 7-2 ruling¹²²:

As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.¹²³

Rather, the appropriate standard for finding a violation of constitutional equal protection was an anti-classification standard that

¹²⁰ That is, plaintiffs could prevail in challenging a given employment qualification with a showing of its disparate racial impact, so long as the qualifications at issue were not shown to be "significantly related to successful job performance." *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971).

¹²¹ *Davis*, 426 U.S. at 236-37.

¹²² Brennan and Marshall dissented. Brennan's dissent did not address the constitutional issues in the majority opinion, but focused instead on showing how Test 21 fell short of the relevant statutory standards, including those of Title VII of the 1964 Civil Rights Act. *Id.* at 256-70 (Brennan, J., dissenting).

¹²³ *Id.* at 238-39 (majority opinion) (footnote omitted).

looked to the existence of either explicit racial classifications in state actions, or discriminatory purposes behind state actions that constituted an implicit racial classification.¹²⁴ White did not think showings of racially disparate impact were entirely irrelevant to equal protection claims; a showing of disparate impact might itself be indicative of an underlying discriminatory purpose. But impact, by itself, would not be enough.¹²⁵

As with *Milliken*, there is no hint of repudiation or doubt about the core aims of the civil rights revolution in *Davis*. The first half of White's opinion was a defense of anti-classification values firmly grounded in his understanding of key precedents, many of which were handed down in the post-*Brown* era.¹²⁶ Supplementing this doctrinal justification, however, was a more pragmatic justification offered by White that explicitly nodded to the complexities of recalibration. As White stated in a notable sentence from that opinion:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.¹²⁷

This language is striking in its similarity to the slippery slope arguments employed by Justice Miller in *Slaughter-House*. White's statement nods to the potential for reform principles to swallow up an ever-expanding orbit of authority, if they are not delimited. Indeed

¹²⁴ *Id.* at 239 (citation omitted).

¹²⁵ *Id.* at 242.

¹²⁶ *Id.* at 239-45.

¹²⁷ *Id.* at 248. In a footnote to this paragraph, White goes on to list other state actions that might also be subject to an equal protection challenge as well such as "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities. . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." *Id.* at 248 n.14 (quoting Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300 (1972) (omissions and alterations in original)).

given that African-Americans as a group were disproportionately poor, the Court's adoption of an impact standard would have dramatically opened the door to allowing for the equal protection revolution in race to become an equal protection revolution in the law with regard to class as well – led by judicial rulings.¹²⁸ Furthermore, also contained in this sentence is a rejection of disparate impact, or anti-subordination, interpretations of racial equality in *Davis* because of concerns about how such interpretations – and their attendant implications for an expanding judicial authority – might severely threaten and undercut the rule-making prerogatives of other governmental entities.¹²⁹ In light of such concerns, the Court chose to delimit the scope of reform, and to stabilize the boundaries between competing governing authorities and rights at the outer edges of reform.

IV. TWO CASE-STUDIES OF JUDICIAL ORDER-CREATING RULINGS

A. *The Legal Entrenchment of Jim Crow*

Slaughter-House, *Cruikshank*, and *The Civil Rights Cases* clarified that the Southern state governments would essentially retain primary governing authority over the freedmen. Yet a second important question remained to be settled before order could emerge in post-Reconstruction race relations: how were the individual rights and responsibilities of African-Americans going to be structured *within* this allocation of governing authority? These questions escaped definitive resolution for more than a decade after *The Civil Rights Cases* were decided.

Uncertainties stemmed from continuing Northern Republican interest in the welfare of the freedmen up to the early 1890s, and, probably because of this interest, African-American voting was still significant in parts of the South for much of this time.¹³⁰ To be sure,

¹²⁸ Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1138-39 (1989).

¹²⁹ See *Davis*, 426 U.S. at 245-46.

¹³⁰ J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND*

at no point after Hayes's withdrawal did any indications surface of Northern Republican interest in fundamentally reshaping the federal-state balance and reopening the questions settled by the judiciary's delimiting rulings. But even if the preservation of Southern state autonomy on race was a settled matter, possibilities nevertheless remained for relatively more robust conceptions of African-American rights to take hold in the latter decades of the nineteenth century – *if* Northern Republicans could find some way to loosen the Democratic grip on electoral power in the South.

Thus Presidents Hayes, Arthur, and Harrison all attempted to form coalitions between the Republicans and anti-Democratic Southern white constituencies during their respective tenures in office.¹³¹ Furthermore, both Hayes and Arthur expressed support for black suffrage by encouraging federal prosecutions under the Enforcement Acts;¹³² more generally, federal prosecutions continued, albeit with limited vigor, into the mid-1880s.¹³³ The most important opportunity for establishing relatively more robust African-American rights during these years, however, was the Republican effort to pass another enforcement law in 1890.

This bill, the Lodge Bill, was a key measure that could have directly undermined the legislative stalemate that had prevailed since 1874 by protecting African-American voting in the South – thus giving the Republicans much-needed partisan votes. The bill provided for a) appointment of a federal chief election supervisor for each judicial district by the circuit court; b) the chief election supervisor to appoint three supervisors for each voting district to assist him in

THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, 28 & tbl.1.4 (1974); Kent Redding & David R. James, *Estimating Levels and Modeling Determinants of Black and White Voter Turnout in the South, 1880 to 1912*, 34 HIST. METHODS 141, 148 (2001).

¹³¹ All of these efforts failed, however. VINCENT P. DE SANTIS, *REPUBLICANS FACE THE SOUTHERN QUESTION; THE NEW DEPARTURE YEARS, 1877-1897*, 69, 73-85, 152-57, 172-75, 196-97 (1959); GILLETTE, *supra* note 59, at 336, 348-49; HIRSHSON, *supra* note 62, at 24-29, 50-51, 106-07, 115, 119-20, 179-89, 205-07; WANG, *supra* note 62, at 145-48, 161-62, 203, 231-32, 244.

¹³² ROBERT M. GOLDMAN, "A FREE BALLOT AND A FAIR COUNT": THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT OF VOTING RIGHTS IN THE SOUTH, 1877-1893, 96-98 (1990); HIRSHSON, *supra* note 62, at 50-51, 56-57, 99-101; WANG, *supra* note 62, at 161-62, 200.

¹³³ WANG, *supra* note 62, at 300 app. 7.

supervising elections; and c) perhaps most radically, it created a U.S. Board of Canvassers – three men – appointed by the circuit court who would examine the votes as transmitted by the supervisors. If the Board's decision on the winner of the election agreed with the judgment of state officials, the winner was free and clear. If they disagreed, however, the Board's decision was *prima facie* evidence of election, subject to appeal by the loser in a federal circuit court. If the court heard the case, the candidate certified by the court in case of a reversal would be the election winner.¹³⁴

Federal control over certifying congressional election winners was a significant policy innovation, and this reform option had the very important virtue of not requiring a burdensome enforcement machinery to punish Southern electoral fraud. The fact that the Lodge Bill was a serious legislative proposal more than a decade after Hayes's withdrawal of the federal troops is indicative of the fact that the substantive rights of the Southern freedmen remained in flux at this time and that Northern public opinion was hardly monolithically opposed to African-American rights.¹³⁵

Although the Lodge Bill did pass the House, any opportunity to maintain a federal presence in Southern elections ended with the Bill's defeat in the Senate in 1891. The Bill failed to pass due to both sustained filibustering efforts by Democrats and to a significant defection in the Republican ranks by the Silver-Republicans. The latter sacrificed a chance to pass the Lodge Bill in favor of pursuing a free-coinage bill.¹³⁶ With this failure, most scholars concur that the era of Reconstruction politics was drawing to a close: the Republican Par-

¹³⁴ I draw on and paraphrase De Santis's description of the bill. DE SANTIS, *supra* note 129, at 198-99. See also WANG, *supra* note 62, at 236-37 (detailing provisions of the bill); PERMAN, *supra* note 63, at 39-40 (overview of the bill and the voting).

¹³⁵ To be sure, by not including a provision for the assignment of federal troops or marshals to police the polls, PERMAN, *supra* note 63, at 40, the bill clearly did not purport to inject heavy-handed coercive forms of federal intervention into the states to challenge the earlier delimiting settlement.

¹³⁶ HIRSHSON, *supra* note 62, at 226-35; see PERMAN, *supra* note 63, at 40-41; WANG, *supra* note 62, at 241-49. In the aftermath of the failed Lodge Bill, *Yarborough* would prove to be more a historical oddity than a direct challenge to the judicial delimitation of the 1870s, nor even a toehold for a limited judicial protection of African-American voting rights. SMITH, *supra* note 39, at 384, 617 n.216.

ty soon began to move on to economic issues, and, after the 1896 election, it had found a way to break the legislative stalemate of the past two decades and win national elections without having to deal with the South.¹³⁷ The door was left wide open for the Southern state governments to erect the twin pillars of the new Jim Crow system: segregation statutes and disfranchisement measures.

In such a political context then, what might we expect from a Supreme Court particularly concerned with stabilizing political order? One answer to this is clear: such a Court would want to offer its support and bestow the benefit of constitutional legitimacy to the system of social relations that was seemingly ascendant within the polity. The fastest path to stability would be to throw the judiciary's weight behind the principles that enjoy widespread agreement – if any such principles exist. In addition, however, we might also expect a stability-minded Court to uphold these emerging allocations of individual rights and governing authorities in clear, definitive ways, and to articulate foundational legal standards for the emerging system of social relations. Clarifying and minimizing the legitimate boundaries of legal controversy would set the emerging political order on sturdier foundations relative to half-hearted or ambiguous judicial affirmations. In the case of the post-Reconstruction era the Court's rulings followed precisely this path. And once the Supreme Court eventually blessed the conception of African-American individual rights that was being pressed in new legislation by the Southern state governments, the constitutional entrenchment of the new order – in the form of Jim Crow – was complete.

The Court's first affirmation of that order was in *Plessy v. Ferguson*,¹³⁸ where Louisiana's railway segregation statute that provided for "equal but separate accommodations"¹³⁹ was at issue. The statute was challenged on both Thirteenth and Fourteenth Amendment grounds.¹⁴⁰ Justice Brown, writing for seven justices – with Harlan notably dissenting and Justice Brewer not participating – first quick-

¹³⁷ PERMAN, *supra* note 63, at 41; VALELLY, *supra* note 93, at 134-39.

¹³⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹³⁹ *Id.* at 540.

¹⁴⁰ *Id.* at 542.

ly dispatched the Thirteenth Amendment challenge with the assessment that the Louisiana statute did not function to reinstitute slavery or impinge on the “legal equality of the two races.”¹⁴¹

More interesting was Brown’s Fourteenth Amendment analysis; he stated early on that:

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.¹⁴²

Thus, the Court gave voice to a common legal categorization of rights from that era in categorically distinguishing between political and social rights. If, as Brown argued, the Fourteenth Amendment demanded “political equality” only, the crucial question for a Fourteenth Amendment challenge to this segregation law would then be: where did railroad seating fall within this spectrum of rights? Was it within the purview of that Amendment’s equality guarantees or not? The central holding of *Plessy* was the Court’s definitive conclusion that railroad seating was a matter of social rights. As such, legislation dealing with this issue could be regulated by the states with segregation laws, because only social rights were implicated¹⁴³:

Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.¹⁴⁴

In so ruling, the Court established a legal standard that went far in legitimating the separate-but-equal social arrangements that defined

¹⁴¹ *Id.* at 543.

¹⁴² *Id.* at 544.

¹⁴³ On the Court’s assertion of differential judicial treatment between political rights and social rights, see also *id.* at 545, 551.

¹⁴⁴ *Id.* at 544.

the Jim Crow order.¹⁴⁵

An equally important case, if not more so, in cementing the new Jim Crow order was the Court's validation of Southern disfranchisement efforts. When the Court confronted the Mississippi disfranchisement laws in *Williams v. Mississippi*¹⁴⁶ it unanimously upheld them because they did not discriminate against African-Americans on their face:

[T]he operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime.¹⁴⁷

The Court concluded that evidence of a racially discriminatory intent behind the Mississippi suffrage restrictions was unimportant to the constitutional inquiry.¹⁴⁸ The Mississippi disfranchisement scheme was a particularly prominent focal point in the emerging Southern movements to disfranchise African-American voters.¹⁴⁹ With the Court's validation of that scheme in *Williams*, a legal standard of federal judicial deference to the Southern states on this matter was thus seemingly established.

Williams set the tone for future Supreme Court cases dealing with voting rights. Five years later in *Giles v. Harris*¹⁵⁰ the Court was confronted with a Fourteenth and Fifteenth Amendment challenge by an African-American man to the disfranchisement scheme of Alabama embodied in its state constitution.¹⁵¹ Holmes, writing for six justices,¹⁵² pointed to two considerations that made this case inap-

¹⁴⁵ As a sidenote, in the subsequent case of *McCabe v. Atchison, Topeka, & Santa Fe Ry. Co.*, 235 U.S. 151 (1914), the equality component of the separate-but-equal standard enjoyed judicial validation as a constitutional requirement.

¹⁴⁶ *Williams v. Mississippi*, 170 U.S. 213 (1898).

¹⁴⁷ *Id.* at 222.

¹⁴⁸ *Id.* at 222-23.

¹⁴⁹ See PERMAN, *supra* note 63, at 70-90.

¹⁵⁰ *Giles v. Harris*, 189 U.S. 475 (1903).

¹⁵¹ *Id.* at 482.

¹⁵² Justices Brewer, Harlan, and Brown dissented. *Id.* at 488-504 (dissenting opinions).

propriate for an equitable remedy (and which thus undermined the appropriateness of federal jurisdiction in this case). First, in an extremely perverse kind of logic, Holmes noted that even if the Alabama scheme were unconstitutional, registering the African-American plaintiff would still not be appropriate:

The plaintiff alleges that the whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But of course he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?¹⁵³

Second, in a striking comment pleading judicial impotence, Holmes also emphasized the inappropriateness of an equitable remedy on pure pragmatic grounds: namely, that the Court itself, and by itself, could not right the legal wrongs of Jim Crow:

Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States.¹⁵⁴

After *Plessy* and *Williams v. Mississippi*, the twin supports of the Jim Crow system — segregation and disfranchisement — enjoyed conclusive judicial affirmation, and thus established definitive boundaries between competing authorities and rights “internal” to

¹⁵³ *Id.* at 486.

¹⁵⁴ *Id.* at 488. The analytical gymnastics of Holmes’s first point were replicated in Justice Day’s opinion for the Court in *Giles v. Teasley*, 193 U.S. 146 (1904). Here again, the Court once again stretched to deny judicial relief with respect to Alabama’s disfranchisement scheme.

the domain of Southern race relations. How much controversy would have persisted in the domain of race relations during these decades without a *Plessy*-like resolution is an open question, but it is undoubtedly the case that without definitive *judicial* resolution on these issues of Southern segregation and disfranchisement offered in *Plessy* and *Williams*, many more conflicts dealing with these matters would undoubtedly have continued to appear in the courts and in legislative bodies – with the attainment of a mature social order thus deferred.

B. *Race and the Entrenchment of the Anti-Classification Order*

In its delimiting rulings in *Milliken* and *Washington v. Davis*, the Court had resolved external uncertainties with respect to how reform principles were going to be integrated, at their outer margins, with established, resilient governing authorities and rights – such as the local governmental autonomy defended by Burger in *Milliken*, and the defense of traditional institutional prerogatives defended by White in *Davis*. These rulings established clear limits on how much minorities might demand of the state in confronting racial discrimination. Yet even with external uncertainties settled, these two cases established very little with regard to the limits upon governmental action when the government voluntarily chose to address the vestiges of racial discrimination. This latter question – which implicated contesting governing authorities and rights largely internal to the domain of reform – remained subject to ambiguity for almost twenty years after *Davis*. These internal disputes would have to be resolved before any new social order could emerge, and indeed, once the Court had reached its conclusion on the affirmative action issue in the nineties, the effect of its rulings was to conclusively entrench a new “anti-classification” order in constitutional equal protection.

The more technical legal question that occupied the Court during these two decades was whether governmental affirmative action programs challenged on constitutional grounds should be subject to strict scrutiny or not under the Court’s equal protection analysis. The early legal and political signs for government-sponsored affirm-

ative action programs were actually somewhat positive. While *Regents of the University of California v. Bakke*'s¹⁵⁵ 4-4-1 voting split did result in the invalidation of U.C. Davis's affirmative action program, Powell's swing vote combined with a liberal bloc of Brennan, White, Marshall, and Blackmun did amount to five votes holding that race could be considered in university decisions.¹⁵⁶ Furthermore, even though Powell did assert that strict scrutiny was the appropriate standard for this affirmative action program,¹⁵⁷ the failure of the Stevens-led conservative bloc (consisting of Burger, Stewart, and Rehnquist) to address the constitutional issue¹⁵⁸ ensured that no majority of the Court coalesced to conclude that strict scrutiny was the appropriate standard of review for affirmative action.

Affirmative action enjoyed an additional, less ambiguous victory two years later in *Fullilove v. Klutznick*.¹⁵⁹ *Fullilove* involved a challenge on largely Fifth Amendment equal protection grounds to the set-aside program in the Public Works Employment Act of 1977. In yet another odd voting alignment, Burger wrote the opinion of the Court, speaking for only two others: White and Powell. He rejected the Fifth Amendment equal protection challenge to the program and found it to be "narrowly tailored" toward achieving a valid congressional objective of remedying unequal economic opportunity across race.¹⁶⁰ These three votes, when added to a voting bloc composed of Marshall, Brennan, and Blackmun — who would have upheld the provision by applying intermediate scrutiny¹⁶¹ — totaled a majority of six for upholding the program.

Yet while Burger's ruling was a clear victory for affirmative action, it also did little to move the Court further toward a conclusive answer on the larger question of affirmative action's constitutional legitimacy. Of the Court's majority of six, there were the above three Justices who would have upheld the program applying inter-

¹⁵⁵ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹⁵⁶ *Id.* at 326.

¹⁵⁷ *Id.* at 289-305.

¹⁵⁸ *Id.* at 411-12 (Stevens, J., concurring in part and dissenting in part).

¹⁵⁹ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

¹⁶⁰ *Id.* at 490, 492.

¹⁶¹ *Id.* at 520-21 (Marshall, J., concurring).

mediate scrutiny, there was Powell's vote who would have upheld it by applying strict scrutiny,¹⁶² and there was the ambiguous standard of review announced by Burger in his opinion for the Court.¹⁶³

Definitive movement toward resolution of this issue, and the rise of political order, came nine years later in the significant case of *City of Richmond v. J.A. Croson Co.*, which concerned a Richmond, Virginia, set-aside affirmative action plan.¹⁶⁴ The case brought affirmative action before a Court that now included three Reagan appointments: O'Connor, Scalia, and Kennedy. These three had, in turn, replaced an affirmative action supporter in Powell, an opponent in Stewart, and a swing vote in Chief Justice Burger. The Court's composition alone did not favor a positive outcome for the set-aside, and the result was as expected. The Court held that strict scrutiny was the proper standard of review for all racial classifications – at least at the state level – regardless of whether the racial classification “burdened or benefited” racial minorities.¹⁶⁵ O'Connor's opinion on this point carried five votes: her own vote, Rehnquist, White, Kennedy,¹⁶⁶ and Scalia.¹⁶⁷ This was a bare majority, and while the ruling was perhaps limited to only local and state governmental actions given the *Fullilove* precedent, it also marked the first time that a clear majority of the Court had agreed on strict scrutiny as the standard of review for affirmative action – a point noted by Justice Marshall in his dissent.¹⁶⁸

Although *Croson* offered an important resolution, it still constituted only a partial settlement given the more deferential posture the Court had adopted toward federal affirmative action programs

¹⁶² *Id.* at 496 (Powell, J., concurring).

¹⁶³ *Id.* at 492 (majority opinion) (citation omitted).

¹⁶⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477-80. (1989).

¹⁶⁵ *Id.* at 494.

¹⁶⁶ *Id.* at 476 (noting votes for Part III-A).

¹⁶⁷ *Id.* at 520 (Scalia, J., concurring) (“I agree with much of the Court's opinion, and, in particular, with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is ‘remedial’ or ‘benign.’”).

¹⁶⁸ *Id.* at 551 (Marshall, J., dissenting). Marshall, joined by Brennan and Blackmun in dissent, asserted that intermediate scrutiny was the appropriate standard here, and this set-aside provision passed that test. *Id.* at 535-36.

in *Fillilove*.¹⁶⁹ Conclusive settlement of the affirmative action issue arrived six years later in the case of *Adarand Constructors, Inc. v. Peña*,¹⁷⁰ where the Court's focus was drawn to "subcontractor compensation clauses" that were included in most contracts awarded by federal governmental agencies, and that provided for extra compensation to prime contractors who hired racial minority subcontractors. These clauses were challenged as a violation of the equal protection component of the Fifth Amendment Due Process Clause.¹⁷¹

Major changes had occurred to the Court's composition since *Croson* five years earlier. It had lost its core liberal bloc of supporters for affirmative action in Brennan, Marshall, and Blackmun, and had lost the generally supportive White as well. In return it had gained three members who proved to be consistent affirmative action supporters in Souter, Ginsburg, and Breyer, and one who proved to be a consistent opponent in Thomas. Thomas's vote, combined with the conservative bloc of O'Connor, Scalia, Kennedy, and Rehnquist subsequently composed the five-person majority that O'Connor wrote for in *Adarand*.

O'Connor's opinion set forth the conceptual foundation of the ruling by first asserting three key propositions about affirmative action that could be gleaned, she argued, from the Court's past doctrine up through to *Croson*:

Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, *skepticism*: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination," Second, *consistency*: "The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification[.]" And third, *congruence*: "Equal protection analysis in

¹⁶⁹ The confusion was aided by the Court's ruling in *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), where a majority announced a standard of intermediate scrutiny for federal affirmative action programs.

¹⁷⁰ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹⁷¹ *Id.* at 204-10.

the Fifth Amendment area is the same as that under the Fourteenth Amendment.”¹⁷²

This ruling enjoyed five votes for the conclusive establishment of strict scrutiny as the proper standard for reviewing governmental affirmative action across-the-board, regardless of whether the program was federal or state in origin: “Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”¹⁷³

Once the contested constitutional status of affirmative action programs – the most pressing “internal” uncertainty within this policy domain – had been resolved with the Court’s adoption of a clear, definitive legal standard in *Adarand*, a new social order in post-civil rights race relations could be discerned. After *Adarand*, there was a recognizable jurisprudential order that cohered around a general, all-encompassing suspicion of governmental racial classifying whether invidious or benign in function, and whether employed by federal or state and local actors. In the same way that *Plessy* and *Williams v. Mississippi* enshrined certain core governing principles that defined social relations in race for that time, *Adarand* is the modern-day analogue of those cases.

Two possible complications arise with this narrative, however, that merit discussion. First, it may seem somewhat odd to argue that the rulings in *Croson* and *Adarand* exhibit a clear judicial-institutional interest in stability, given that both were closely divided five-four decisions. However, the vote totals may be somewhat misleading in this regard. Consider that in *Croson*, while five votes did come together for the establishment of strict scrutiny for non-federal affirmative action programs, Marshall’s dissenting opinion – which spoke for three votes – asserted that intermediate scrutiny was the appro-

¹⁷² *Id.* at 223-24 (emphasis added) (citations omitted).

¹⁷³ *Id.* at 224. O’Connor went on to note that to the extent that this ruling was in conflict with *Metro Broadcasting*, or with *Fullilove*, the latter two rulings were accordingly overruled. *Id.* at 227, 235.

priate standard to apply.¹⁷⁴ Certainly the Court was divided as to how it might promote legal stability in race relations, but the efficacy of the institutional-interest in stability may be gleaned in the fact at least eight justices sought to articulate a foundational legal standard for the adjudication of “internal” uncertainties.¹⁷⁵

Second, in addition to the closely-divided votes, there is another sense in which the Rehnquist Court may look somewhat different from the *Plessy* Court: unlike the Court’s largely reactive posture to the development of Jim Crow in the 1890s, it is true that the Rehnquist Court was vigorously engaged in dictating the terms of the anti-classification settlement. Thus contestation over affirmative action was played out in significant part through judicial rulings during this period. Why it was that the Supreme Court ultimately played such a prominent role in these political processes can be speculated upon: the temperament of the particular judges involved likely played a role, and various institutional obstacles probably prevented a fuller national contestation over the affirmative action issue in Congress. But the theory of judicial behavior pressed here does offer some insight into why judicial actions like *Adarand* and *Croson* – rather than legislative actions – inaugurated an anti-classification order to structure the rights of minorities in the post-*Brown* era. Contestation over authority relations and rights during these periods simply could not be minimized without judicial involvement. Transcending particular Court memberships or the temperament of par-

¹⁷⁴ Marshall was joined by Brennan and Blackmun in dissent. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 535 (1989). Marshall, Brennan, and Blackmun had similarly advocated for an intermediate scrutiny standard for affirmative action in *Bakke* (where they were joined by White), 438 U.S. 265, 359 (1978) (Brennan, J., concurring part and dissenting in part), and in *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

¹⁷⁵ In contrast, *Adarand* is arguably a harder case to explain. Notably, the three dissenting opinions in *Adarand* – offered by Stevens, Souter, and Ginsburg – studiously avoided articulating a clear legal standard for adjudicating affirmative action programs. One might interpret this omission as perhaps signaling agreement with the Court’s articulation of the strict scrutiny standard (if not the Court’s actual application of that standard). More realistically, this omission was likely a function of the dissenters recognizing the inevitability of the strict scrutiny standard – due in part, no doubt, to the *Croson* ruling itself – and wishing to carve out some wiggle room for future disputes. That is, because of the significant stability-promoting effect of *Croson*, the need for judicial convergence in *Adarand* was likely reduced.

ticular historical periods, it was the Court's institutional interest in facilitating the rise of political order that prompted the mode of adjudication in *Adarand*'s conclusive endorsement of anti-classification values.

V. TWO CASE-STUDIES OF TENSION-MANAGING RULINGS

A. Property Rights, Jim Crow, and Buchanan v. Warley

The substance of Southern African-Americans' rights in the post-Reconstruction era – conceded to by the North and by the Republican Party, constructed by the Southern state governments, and validated by the Court in *Williams* and *Plessy* – was to be structured according to two core principles: a) formal racial equality had to be respected by the Southern state governments in their legal relations with African-Americans due to the continuing authority of the initial reforms embodied in the Reconstruction Amendments; but b) the blatant racial subordination of African-Americans by Southern state actors and by Southern whites would not trigger a response from the North or the federal government, out of deference to the institutional settlements embodied in the Court's delimiting rulings.

Yet even with a coherent system of race relations entrenched, and with a political equilibrium in place within this policy domain, the era of Jim Crow was not without internal conflict. One of the most interesting institutional tensions that emerged within the Jim Crow system was the problem posed by residential segregation ordinances. The first residential segregation ordinance was passed in Baltimore in 1910. It was then followed by similar ordinances in a number of Southern cities very shortly afterward – particularly in the Border States.¹⁷⁶ The impetus for these laws was the migration of African-Americans from the rural South to the urban South and urban North, which resulted in a heightened demand for housing

¹⁷⁶ KLARMAN, *supra* note 28, at 79; David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 835 (1998); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 499 (1982).

among African-Americans, and which in turn resulted in their push into white neighborhoods.¹⁷⁷ A new societal circumstance had thus prompted a new type of policy, and a new extension of Jim Crow.

This was not an unproblematic extension, however. Indeed, for those opposed to such laws, an unlikely but powerful institutional ally could be found in the courts – given the existence of an assertive judicial commitment to property rights at the time that would seemingly cut against Jim Crow principles in this context. The *Lochner*¹⁷⁸ vision of judicial activism in defense of economic rights had suffered some defeats on the Court during this time,¹⁷⁹ and *Lochnerism* was also coming under an increasingly strong intellectual attack as well.¹⁸⁰ But the judicial commitment to economic rights and property rights was still quite alive after its growth at the very start of the twentieth century, and it would ratchet upward in the twenties.¹⁸¹

The intersection of race and property rights in the residential segregation ordinances posed a particularly interesting problem for judicial tension-management, once these ordinances were challenged. Jim Crow commitments to racial subordination, which enjoyed near-dominance at this time, would have pushed toward judicial deference toward these ordinances. But the pull of the judicial commitment to property rights in the *Lochner* era pushed in the opposite direction. For a Court committed to stabilizing the reigning Jim Crow order in race – which, in this era of political equilibrium, would have constituted maintaining the entrenched allocations of governing authority and individual rights established in prior years – the burden upon the Court was to be able to give weight to its own ideological predispositions *without* challenging or upsetting these

¹⁷⁷ KLARMAN, *supra* note 28, at 79; Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 902-03, 902 n.107 (1998); Schmidt, *supra* note 174, at 500.

¹⁷⁸ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁷⁹ *E.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a maximum-hours law for female workers); *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding a maximum-hours law for females and males).

¹⁸⁰ Bernstein, *supra* note 174, at 841-42; Schmidt, *supra* note 174, at 521.

¹⁸¹ KLARMAN, *supra* note 28, at 80-82; James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953, 954 (1998); Schmidt, *supra* note 173, at 456.

cornerstones of the reigning order. This was a task that called for a tension-managing ruling, and this is exactly what the Court offered when it confronted such a residential segregation ordinance in the significant case of *Buchanan v. Warley*.

Buchanan involved an ordinance from Louisville, Kentucky, approved in 1914, which made it illegal for African-Americans to move into majority-white-occupied city blocks, and made it illegal for whites to move into majority-black-occupied city blocks (although the ordinance did not purport to affect preexisting residential arrangements).¹⁸² The ordinance exhibited the formal symmetry and equality of Jim Crow laws. It was subsequently challenged on Fourteenth Amendment grounds “in that it abridges the privileges and immunities of citizens of the United States to acquire and enjoy property, takes property without due process of law, and denies equal protection of the laws.”¹⁸³

Ultimately, the Court held the statute to be unconstitutional. Notable about the ruling, however, was the Court’s implicit assumption of a distinction between civil and social rights in this ruling¹⁸⁴ – and the different protection each category of rights was accordingly entitled to – that allowed it to strike down this ordinance without directly challenging Jim Crow itself.

The Court’s reliance on this categorical differentiation can be gleaned in the extended discourse it offered on the fundamental status of property rights; if the *Plessy* Court had understood railroad seating to be a mere matter of social rights, it was clear that the *Buchanan* Court viewed property as implicating rights of a whole different sort. Justice Day’s opinion for another unanimous Court¹⁸⁵ began by conceding that the state possessed wide authority under its

¹⁸² *Buchanan v. Warley*, 245 U.S. 60, 70-72 (1917).

¹⁸³ *Id.* at 72.

¹⁸⁴ Categorizing rights as either civil, political, or social was an axiom of Civil War era thought. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, 395-97 (1982); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1016, 1024 (1995); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 886 (1987).

¹⁸⁵ Schmidt does note, however, that Justice Holmes did come close to dissenting. Schmidt, *supra* note 174, at 511-17.

police power to protect the public welfare.¹⁸⁶ But municipal legislation could not run afoul of constitutional guarantees, and a particularly prominent constitutional guarantee is the right of property.¹⁸⁷

From the start, the Court gave a strong indication that the property rights of African-Americans would prevail over the police power of the state. It did so by locating support for property rights in the paradigmatic sources of constitutional protection for the *civil* rights of African-Americans: the Fourteenth Amendment and the Civil Rights Act of 1866.¹⁸⁸ The analytical drift of the argument was thus hard to miss: even if Jim Crow laws could regulate matters in the realm of social rights, property was clearly more than a matter of social rights:

The statute of 1866, originally passed under sanction of the Thirteenth Amendment and practically reenacted after the adoption of the Fourteenth Amendment expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. . . . *These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color.* The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.¹⁸⁹

The Court again noted in conclusion that “[t]he case presented does not deal with an attempt to prohibit the amalgamation of the races.”¹⁹⁰ Rather, “[t]he right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person;”¹⁹¹ thus the Court struck the ordinance down

¹⁸⁶ *Buchanan*, 245 U.S. at 74.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 77-78.

¹⁸⁹ *Id.* at 78-79 (emphasis added) (citations omitted).

¹⁹⁰ *Id.* at 81.

¹⁹¹ *Id.*

and prevented the spread of segregation to this particular social context.

There are at least two ways to understand the Court's actions in *Buchanan*. One interpretation is that residential segregation ordinances represented a core violation of the Fourteenth Amendment, and *Buchanan* was an "easy" case that allowed the Court to give voice to the continuing validity of Reconstruction. Indeed, as suggested in Day's opinion itself, the ordinance quite clearly touched upon property rights, which were a core civil right, and the ordinance was thus unambiguously within the ambit of the Civil Rights Act of 1866 and the Fourteenth Amendment.¹⁹² Even if the right to own property for African-Americans was not wholly undermined by the Louisville ordinance, the fact does remain that, as Klarman argues, property rights were implicated in this statute – and property lay at the core of Fourteenth Amendment guarantees. That is certainly a reasonable distinction to draw between *Buchanan* on one hand – where segregation was struck down by the Court – and cases like *Plessy* and *Berea College*¹⁹³ on the other – which implicated rights in public transportation and education, respectively, and where segregation was upheld.

The difficulty with this interpretation, however, is that it overlooks the conceptual flexibility and fuzziness emanating from the Court's determination that the social practice involved here implicated civil, as opposed to social, rights. To return to the "easy" interpretation of *Buchanan* that would distinguish between residential segregation ordinances (a civil rights violation) versus segregation laws in transportation and education (mere social rights violations), a more than plausible critique of this distinction is that one can also easily imagine alternative categorizations of the latter social practices that could have, at least theoretically, led to different outcomes in

¹⁹² Klarman has articulated this view. Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 937 (1998). In his subsequent writing on this case, Klarman seems to have backed off somewhat from this view, however. KLARMAN, *supra* note 28, at 79-80.

¹⁹³ *Berea College v. Kentucky*, 211 U.S. 45 (1908) (upholding, in a narrow manner, a Kentucky segregation statute in education against a challenge by an integrated private college).

the transportation and education contexts as well. In an alternative universe, for example, both *Plessy* and *Berea College* could have been characterized as fundamentally about economic relationships and, thus, within the core ambit of the Fourteenth Amendment's protection of civil rights: it was the African-American passengers' economic relationship with the railroad company that was being infringed upon with a segregated seating statute in *Plessy*, and it was the students' economic relationship with their private college that was being infringed upon with a segregation statute in education in *Berea College*.¹⁹⁴ The 1866 Civil Rights Act did, after all, specifically encompass the right "to make and enforce contracts" and the right to "convey real and personal property."¹⁹⁵

Similarly, while state laws prohibiting interracial marriage were upheld because they were judged to implicate only social rights of association, both Siegel and Tushnet note that it would not have been conceptually difficult for judicial actors – if they were so inclined – to conclude that these laws implicated civil rights of contract instead and were thus subject to the Fourteenth Amendment's protections.¹⁹⁶ If judicial actors could so easily conclude that transportation, education, and marriage were all contexts comfortably within the realm of social rights – despite plausible arguments to the contrary – it is not difficult to imagine that a Supreme Court could have moved in the other direction in *Buchanan* and found laws regulating residence a matter of social rights rather than civil rights. Again, the fact that the Louisville ordinance neither wholly deprived African-Americans of property rights, combined with the apparent flexibility involved in the judicial categorization of rights, pushes toward the conclusion that *Buchanan's* result was not logically or legally compelled by the Fourteenth Amendment.

There is a second way to understand *Buchanan's* result, however: that it was likely due to the Court's commitment to the protection

¹⁹⁴ *Berea College* had argued in its defense that a private school "stands upon exactly the same footing as any other private business." Schmidt, *supra* note 174, at 447-48.

¹⁹⁵ Civil Rights Act of 1866, § 1, 14 Stat. 27 (1866).

¹⁹⁶ Siegel, *supra* note 44, at 1121-23; Mark V. Tushnet, *Progressive Era Race Relations Cases in Their "Traditional" Context*, 51 VAND. L. REV. 993, 998 (1998).

of economic rights in the *Lochner* era, combined with its concern for stability – as evidenced by its commitment to upholding the core legal standards of Jim Crow in the domain of race. Indeed there is seemingly near-uniform academic agreement that the influence of *Lochner* was, at the least, a major factor in dictating the liberal outcome of this case – which is not surprising given the heavy textual emphasis on the property theme in the opinion.¹⁹⁷

As such, *Buchanan* was less a matter of “easy” legal or conceptual reasoning and more the result of clashing institutional authorities producing a middle-ground solution. A judicial commitment to property rights, combined with the stability-related concern of preserving the vitality of Jim Crow social relations, produced a compromise, tension-managing ruling that accommodated property rights in its result, while also emphasizing its continuity with the legal standards of Jim Crow.¹⁹⁸ And the key pivot that allowed such an accommodation to occur was the conceptual fuzziness and flexibility of the categorical distinctions between civil and social rights that the Court employed to such effect here. Since the Court wished to merely “bend” the Jim Crow system to accommodate the judiciary’s skepticism toward residential segregation ordinances – without challenging Jim Crow directly – some means had to be devised by which segregation would be prohibited in this particular case without being similarly challenged in other social contexts. The categorical distinction of rights was a particularly convenient method for the Court to choose. It allowed the Jim Crow order to bend to accommodate integration in property rights as a “civil right,” while also preserving Jim Crow in all other domains judged to fall within the domain of “social rights.”¹⁹⁹

¹⁹⁷ KLARMAN, *supra* note 28, at 80-82; Bernstein, *supra* note 174, at 872-73; Schmidt, *supra* note 174, at 456, 518-19.

¹⁹⁸ On this point, I concur with Schmidt who asserts that: “It was the combination of racial discrimination touching on an important right that produced the decision.” Schmidt, *supra* note 174, at 521; see also Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 904 (1982).

¹⁹⁹ Reva Siegel has put forth a similar argument about the tripartite categorization of rights, Siegel, *supra* note 44, at 1121-28. Yet Siegel’s argument emphasized only the potential for legal actors to use the tripartite framework to achieve results antithetical to African-

In this manner then, the institutional tensions created by the threatened expansion of the Jim Crow order to new social contexts were managed in a way that preserved the integrity of that order. It is this seamless integration of the ruling within Jim Crow legal principles that is the strongest evidence of the Court's concern with stability. Notwithstanding its liberal outcome, the *Buchanan* ruling was really about preserving Jim Crow, not about attacking it. Again, this was reflected in the Court's use of the tripartite framework of individual rights, which established a clear continuity with its prior race relations jurisprudence. But this is reflected in terms of effects as well: Jim Crow retained an influence in the residential domain after *Buchanan* through individual racially restrictive covenants, which survived an NAACP challenge in 1926.²⁰⁰ Both *Brown v. Board of Education*²⁰¹ and the Civil Rights Movement were still very much in the future.

B. Affirmative Action, Anti-Classification, and Grutter

With *Adarand*'s conclusive determination that strict scrutiny would be applied to all affirmative action programs, a coherent system of race relations had also emerged in the post-*Brown* era that was premised on the single, basic principle that racial classifying by the state was a disfavored practice. Color-blindness, and not insidious *or* benign color-consciousness, was the guiding idea of this new system of social relations.

Yet if one were investigating tensions within this new political order after its consolidation in *Adarand*, probably the first place one might have looked to uncover traces of the continued vitality of benign color-consciousness would be in the domain of higher education affirmative action. Indeed, there were reasons for affirmative-

American interests. She failed to discuss how this framework might also aid the interests of African-Americans as well. Indeed, I would characterize *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), and *Sweatt v. Painter*, 339 U.S. 629 (1950), as tension-managing rulings. In both, the Court aided African-American rights by imposing heightened requirements on the "equality" component of the "separate but equal" legal standard.

²⁰⁰ KLARMAN, *supra* note 28, at 92; Bernstein, *supra* note 174, at 864; Schmidt, *supra* note 174, at 521, 522-24. The case was *Corrigan v. Buckley*, 271 U.S. 323 (1926).

²⁰¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

action supporters to think in the mid-nineties that if any type of affirmative action program could possibly survive after *Adarand*, it would be programs in higher education. For one thing, the possibility of the Court upholding an educational affirmative action program was not entirely far-fetched: even though there was a major historical obstacle to such an outcome, given the Court's arguably perfect track record in striking down programs subject to strict scrutiny standards, O'Connor's opinion in *Adarand* itself had also included this statement:

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.²⁰²

At the least, this indicated that O'Connor's vote plus the four votes of the liberal bloc of Stevens, Souter, Ginsburg, and Breyer could potentially be enough to uphold an affirmative action program.

In addition, the longer that *Bakke* stayed on the books, the harder it would be to dislodge it. That ruling had already been entrenched for a generation by the mid-nineties, and, furthermore, it had greatly influenced admissions programs across the nation due to Powell's detailed discussion and endorsement of the Harvard admissions program. Even if public opinion had grown increasingly anti-affirmative action during this period, these programs enjoyed exceptionally strong support among elite universities and their administrators. These growing societal reliance interests in the *Bakke* ruling – coupled with the fact that the Court's two principal swing-voters, Kennedy and O'Connor, happened to be philosophically predisposed to maintaining entrenched precedents – all boded well for the next time affirmative action in higher education was brought before this particular Court.²⁰³

²⁰² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (citation omitted).

²⁰³ Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1769-70 (1996); Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1018-19 (1998).

Yet as was the case with *Buchanan*, if it were the case that the Supreme Court might be inclined to uphold racial preferences for universities, this would raise a difficult legal-conceptual dilemma for the Court. How would it be able to, given that strict scrutiny would be applicable, and given the stringent requirements of that doctrinal test as it had been historically applied? Such a scenario, where judicial inclinations might uncomfortably cut against the reigning orthodoxy, was the sort of context that gave rise to a judicial tension-management ruling in *Buchanan*. In the present case, the Court followed a similar path in *Grutter v. Bollinger*.²⁰⁴

The specific concern in *Grutter* was the University of Michigan Law School's admission policy. The policy had an explicit primary goal of securing a diverse student body. To that end, admissions were based upon a flexible, individualized assessment that looked to more traditional indicators of academic merit such as college GPA and LSAT scores, as well as at "softer" variables (such as application essays) – with the evaluation of the latter aimed at gauging a potential student's contribution to school diversity. Racial and ethnic status was considered one such type of diversity contribution, and was credited by admissions personnel accordingly in their efforts to enroll a "critical mass" of minority students.²⁰⁵ The policy was challenged as racially discriminatory on the grounds of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.²⁰⁶

O'Connor – writing for a majority of five including herself and the liberal bloc of Stevens, Souter, Ginsburg, and Breyer – first asserted that strict scrutiny was the appropriate standard to apply.²⁰⁷ O'Connor concluded that the Law School's goal in maintaining a diverse student body was a compelling purpose.²⁰⁸ The next question was whether this program narrowly tailored to serve the compelling purpose of student diversity? Surprisingly, O'Connor answered yes. She looked to Powell's opinion in *Bakke* for guidance,

²⁰⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁰⁵ *Id.* at 314-16.

²⁰⁶ *Id.* at 316-17.

²⁰⁷ *Id.* at 326 (citations omitted).

²⁰⁸ *Id.* at 328.

and the key analytical point for the Court's determination of whether an admissions policy would be narrowly tailored lay with the question of whether the admissions decision treated race as a non-quantifiable, non-formalized, individualized consideration, or whether it treated race in a more formalized, regularized manner. If the former was the case, it would be narrowly tailored; if the latter was the case, it would not be.²⁰⁹ The Law School program passed this requirement. First, it did not institute racial quotas, with the quota epitomizing the treatment of race in an overly-mechanistic manner for admissions purposes.²¹⁰ Second, the consideration of race by admissions personnel in the Law School was oriented toward an individualized, flexible treatment of race as only one aspect of the applicant's person.²¹¹

The sense in which *Grutter* might be interpreted as a tension-management ruling is not difficult to see. While strict scrutiny remained the unquestioned regulative principle for all governmental racial classifications even after *Grutter*, the Michigan Law School admissions policy was also left standing. The end result was a ruling that sought to accommodate affirmative action *within* the confines of the anti-classification order by applying a more relaxed, conceptually fuzzy version of strict scrutiny to higher education affirmative action. More specifically, the tension-management device the Court employed was a more relaxed "narrow tailoring" requirement.

More specifically, as noted before, the Law School admissions personnel considered the race of their applicants in the context of trying to assemble a "critical mass" of minority students for each class. They had testified that "critical mass" did not mean an implicit quota.²¹² However, Rehnquist, in a dissent joined by Scalia, Kennedy, and Thomas, succeeded in demonstrating a striking statistical relationship between the percentage of applicants who were members of a minority group and the percentage of admitted applicants who were members of that same minority group: the two seemed to

²⁰⁹ *Id.* at 334.

²¹⁰ *Id.* at 335-36.

²¹¹ *Id.* at 337.

²¹² *Id.* at 318 (citations omitted).

be closely correlated for the years between 1995 and 2000. In other words, in result at least, the Law School admissions policy looked a great deal more like a de facto racial quota rather than a form of substantive individualized consideration for applicants.²¹³ It would seem that if the Court were really honest with itself about how the Michigan program worked in practice, it should have struck the program down for violating the narrow-tailoring requirement.

The fact that this particular admissions program was validated by the *Grutter* Court under a standard of strict scrutiny is indicative of the fact that a new kind of narrow tailoring requirement, and a new kind of strict scrutiny test, was being applied in that case. But this move toward conceptual incoherence, and indeed conceptual disingenuousness, was the only way in which this program could be upheld without requiring a frontal assault on the anti-classification order. Not surprisingly, however, the dissenters all lined up to criticize the Court's undue amount of deference to the law school,²¹⁴ and correspondingly asserted that "real" strict scrutiny was not being applied in this case.²¹⁵

Whatever its legal-conceptual merits, the interpretation offered here is that a majority of the Court allowed its strict scrutiny standards – and the anti-classification order – to bend in order to make an exception for affirmative action in higher education. And given widespread societal ambivalence on affirmative action – which sits somewhere in the vast middle ground between general disapproval and wholesale approval²¹⁶ – it seems more than likely that the Court's peculiar compromise at an "individualized consideration"

²¹³ *Id.* at 383-86 (Rehnquist, C.J., dissenting).

²¹⁴ *Id.* at 387; *id.* at 388-89, 392-93 (Kennedy, J., dissenting); *id.* at 350 (Thomas, J., dissenting).

²¹⁵ *Id.* at 380, 387 (Rehnquist, C.J., dissenting); *id.* at 387, 393-95 (Kennedy, J., dissenting); *id.* at 350 (Thomas, J., dissenting). A second conceptual critique of the *Grutter* ruling is the fact that the law school program was upheld while the undergraduate affirmative action program in *Gratz v. Bollinger*, 539 U.S. 244 (2003), was struck down. The former passed the narrow tailoring requirement while the latter did not. One might reasonably conclude that a different, and harsher, version of strict scrutiny was applied in *Gratz*, but not in *Grutter*. Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 541-70 (2007).

²¹⁶ See, e.g., Devins, *supra* note 29 at 347-48.

standard is likely to hold sway and be politically efficacious for the foreseeable future. To be sure, the vote here was another five-four decision, so as with *Croson* and *Adarand*, this may seem like an odd case to demonstrate the existence of judicial-institutional interests. However, given that the stability interest ran in the same direction as political ideology for the dissenters – who would have endorsed the application of “conventional” strict scrutiny – the best illustration of the efficacy of the judicial-institutional interest in stability in this case comes from examining the actions of those five Justices who favored values that sat in tension with the core legal principles of the reigning social order. The fact that those five Justices remained committed to strict scrutiny as the primary regulative legal standard for affirmative action, notwithstanding their support for the Michigan Law School program, reflected their continuing commitment to the stability of this social order.

There is, admittedly, a very different interpretation of this case that might be valid – at least at this point in time. One might also look at *Grutter* as a decision that spelled the beginning of the end of the anti-classification order instead. After all, the central governing principle of the anti-classification system is color-blindness; its very own consolidation was marked by the rise of strict scrutiny for all racial classifications in *Adarand*. How resilient could this system possibly be after *Grutter* with the rise of a new “strict scrutiny-lite” standard in the *Grutter* ruling?

Although no definitive answer to this question will be possible without the benefit of more time, the addition of Justices Roberts and Alito suggests otherwise. Indeed, the negative impact of these two recent additions to the Court for affirmative action proponents is suggested by the Court’s recent ruling in *Parents Involved in Community Schools v. Seattle School District No. 1*,²¹⁷ where the Court struck down voluntarily-adopted student-assignment plans in two school districts that took account of the race of students in making allocation decisions among their respective schools – with the purpose of bringing their various school populations closer to the racial

²¹⁷ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

demographics of the larger, surrounding community. Both of the student-assignment plans were challenged as violations of the Fourteenth Amendment's Equal Protection Clause for making student assignments based upon race.²¹⁸

Grutter certainly did not help to lead the Court to a more sympathetic stance on these plans. In fact, the Court distinguished *Grutter* from these plans by noting the uniqueness of the latter's social context. To quote Roberts, who spoke for five votes on this point:

In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." . . . The present cases are not governed by *Grutter*.²¹⁹

In the aftermath of *Parents Involved*, it seems fairly clear that the anti-classification regime is alive and kicking, and that *Grutter* was the "odd" case rather than a harbinger of the new orthodoxy. That is, strict scrutiny was very likely only "bent," and not broken in *Grutter* — out of deference to the particularized judicial sympathy for affirmative action in higher education. As such, current legal developments suggest the greater plausibility of viewing *Grutter* as a system-maintenance ruling rather than a decision that signals the decay of the anti-classification order. Furthermore, looking to the future, such conflicts and tensions are likely to persist as the Court's commitment to the anti-classification social order in constitutional equal protection will inevitably be pitted against entrenched political, social, and legal commitments to anti-subordination values. The measured and qualified reassertion of anti-classification values in Title VII doctrine by the Court in *Ricci v. DeStefano*,²²⁰ and the not-so-subtle avoidance of definitive, principled, expansive legal resolu-

²¹⁸ *Id.* at 709-718. Seattle had never engaged in formal segregation in the past; Jefferson County schools had been subject to a desegregation decree until reaching unitary status in 2000. *Id.* at 712, 715-16.

²¹⁹ *Id.* at 724-25 (citations omitted).

²²⁰ *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009).

tion seen in *Northwest Austin Municipal Utility District No. One v. Holder*²²¹ reflect the kind of tension-managing adjudication that will likely continue in the Court's treatment of race.

VI. EVALUATING ALTERNATIVE EXPLANATIONS OF JUDICIAL BEHAVIOR

In drawing attention to the distinctive language employed in delimiting, order-creating, and tension-managing rulings, and in explicating the stabilizing effects of these decisions, my aspiration is to have at least made a plausible claim that the Court is institutionally predisposed to stabilize boundaries between competing sets of governing authority and competing sets of rights in the aftermath of a dismantling. To further support my core claim, however, consider first how two of the more prominent theories of judicial behavior and political change might alternatively fare in explaining these delimiting rulings. Again, an appointments theory of judicial behavior would posit that changes to the Court membership is the primary means by which shifts in political winds are registered in changed legal doctrine.²²² A composite political-cultural theory of judicial behavior would instead posit that shifting assumptions, views, preferences, and beliefs in the broader world of politics, society, and culture can prompt changes in judicial behavior and legal doctrine, even independent of the appointments mechanism.²²³ While I would concede that neither of these theories is falsified by my case-studies, their value in explaining these rulings is inconsistent. These external influences on judicial behavior are undoubtedly quite significant in setting boundary conditions on the scope of plausible judicial actions, and they do have some value in explaining judicial outcomes. However, at a minimum, neither the appointments thesis nor the political-cultural thesis is capable of consistently accounting for the judicial use of particular modes of adjudication. Furthermore, in those contexts where appointments and political-cultural forces im-

²²¹ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504 (2009).

²²² See, e.g., Balkin & Levinson, *supra* note 16; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

²²³ See, e.g., KLARMAN, *supra* note 28, at 4-6, 446-54; Siegel, *supra* note 29.

pose only an indeterminate boundary on judicial action (i.e., such as during judicial delimiting periods) these theories are of limited usefulness even in accounting for judicial *outcomes* as well.

A. *The Post-Reconstruction Cases*

Let us start with the case of post-Reconstruction cases then. With respect to the delimiting decisions, this is an historical context where the appointments thesis performs poorly. With the exception of Justice Clifford (who was a holdover from the Buchanan presidency), all of the justices who voted in *Slaughter-House*, *Cruikshank*, and *The Civil Rights Cases* were appointed by Republican presidents. With the exception of Stephen Field, a pro-Union Democrat appointed by Lincoln,²²⁴ all of the justices themselves were Republicans. If the appointments thesis were our guide, the case of post-Reconstruction presents the striking oddity of seeing delimitation being carried out by the appointees of the reform coalition itself. A defender of the appointments thesis might explain post-Reconstruction delimitation by proposing that changes in Republican Party goals prompted the appointment of justices known to be hostile to African-American rights. Yet, Henry Abraham's discussion of the appointments of post-Reconstruction Court members suggests the implausibility of this hypothesis. With the possible exception of Hayes's consideration of sectional reconciliation in his selection of William B. Woods, a potential nominee's stance on African-American rights beyond the matter of abolition did not seem to be a positive or a negative for Republican presidents making their judicial selections in these years.²²⁵

Given this historical background, an appointments mechanism could perhaps explain why it was that Reconstruction reformist goals failed to find a strong advocate in the Supreme Court. Without sustained attention given to a judicial nominee's interpretations of the Reconstruction Amendments, the door would be opened to

²²⁴ HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 90 (new & rev. ed. 1999).

²²⁵ *Id.* at 86-105.

both delimiters and reformers to make it on the Court. But the appointments thesis also fails to explain why it was that liberal interpretations of the Reconstruction Amendments enjoyed such consistent hostility on the Court either. *Slaughter-House* was a close five-four decision, but more telling is that in subsequent cases where the race issue was more central, *Cruikshank* was essentially a unanimous decision²²⁶ and *The Civil Rights Cases* was an 8-1 decision with only Harlan dissenting. The appointments thesis would seemingly predict more of a mixed bag among Republican Justices in terms of their approach to African-American rights – given that the latter was a non-factor for making appointments, and given that consequential pockets of support for Reconstruction very much continued to exist in the Republican Party at least up until the failed Lodge Bill in 1891. In short, a focus on appointments tells us nothing of interest about what the Court is doing in the 1870s and early 1880s.

Similar problems follow a political-cultural explanation of these delimiting rulings. On the one hand, one could defend the position that the post-Reconstruction Court was acting in accordance with at least a substantial portion of public opinion in reaching conservative legal conclusions in the 1870s and 1880s; one cannot say that the Court was acting in a counter-majoritarian fashion. At the same time, it would be difficult to maintain that political-cultural forces were so uniform and so prevalent in favor of curtailing African-American rights that they dictated these delimiting rulings. Indeed, a detailed historical literature also documents that there was a continuation of strong Republican Party interest in African-American rights in the post-Reconstruction decades;²²⁷ this literature undercuts any assertion that there was a widespread consensus of conservative public opinion that the Court was merely following with these delimiting rulings. To the contrary, had the Court acted in a more liberal manner and upheld African-American rights in these post-Reconstruction rulings, some political-cultural theorists of judicial behavior would actually be capable of defending such results

²²⁶ Clifford issued a dissent, but concurred in the result.

²²⁷ DE SANTIS, *supra* note 129; see generally HIRSHSON, *supra* note 62 (exploring the role of Northern Republicans in pursuing African-American rights); WANG, *supra* note 62.

as *consistent* with their views, given the emphasis some of them have placed on the disproportionate weight that elite political preferences carry on the Court. That a political-cultural theory of judicial behavior might be capable of explaining both delimiting and non-delimiting rulings here seems, like an appointments thesis, unsatisfying for lacking explanatory value.

In contrast to the uneven record of the appointments and political-cultural theories in explaining these post-reform rulings, consider the alternative explanation that an institutional-interest theory might provide: first, in the case of post-Reconstruction, the latter would direct our attention to the fact that *Slaughter-House*, *Cruikshank*, and *The Civil Rights Cases* all presented urgent issues regarding how reform had problematized authority relations. Each confronted the problem of *how much* state governmental authority had been displaced by the Reconstruction Amendments, and implicated in these uncertainties were additional uncertainties regarding the scope and substance of the African-American rights that had been created by reform. Given this, the Court's orientation toward more conservative outcomes in these cases might be traced to an institutional interest in promoting legality values by stabilizing the boundaries between federal and state authority, and by beginning to create a new social order in the domain of race relations. This would be an institutional interest that we might expect to emerge from any Court in the aftermath of a dismantling reform, and this is precisely why a Court full of Republican appointees might press in more conservative directions notwithstanding their affiliation with the party of reform, or the fact that some segments of the Republican Party favored more expansive interpretations of reform at the time.

With respect to the Court's order-creating rulings one would be hard-pressed to make an appointments-related claim to explain the rulings in *Plessy* and *Williams v. Mississippi*; it is highly doubtful that the issues involved in these cases were crucial and recurrent considerations in the appointments of the relevant Justices. Probably the more powerful externalist argument would emphasize the constitutive influence of social and political forces more broadly upon legal outcomes. And on this latter point, it is true that a number of schol-

ars have noted that *Plessy* and *Williams* were wholly in line with prevailing public sentiment.²²⁸

One might start with these facts and make the bolder assertion that social and political forces not only supported these judicial outcomes, but also determined these outcomes and their modes of resolution. This latter assertion, however, runs into difficulties. While it is hard to imagine an alternative outcome and mode of settlement for *Plessy*, given the nature of that ruling and given where political and social forces lay on the segregation issue, other options were certainly open with respect to disfranchisement schemes. To propose one possible counter-factual, suppose that in *Williams v. Mississippi* the Court upheld Mississippi's registration, residency, and poll tax requirements, but decided to strike down Mississippi's "understanding" test as too obvious a tool of black disfranchisement, in violation of either the Equal Protection Clause or the Fifteenth Amendment.²²⁹ Is there any doubt that someone could successfully interpret this hypothetical, more liberal judicial ruling as fully consistent with externalist theories of judicial behavior? An externalist might argue as follows: such a ruling would have hardly stemmed the tide of black disfranchisement in the South, given the ruling's approval for all other aspects of the Mississippi disfranchisement scheme including the poll tax, the latter of which apparently proved to be the most effective disfranchising tool in many Southern states.²³⁰ Precedent would have offered support for striking down the understanding test,²³¹ and although this hypothetical, more liberal ruling would have sparked more Southern complaints about federal intervention, it is doubtful that the Southern states would have been that outraged: most Southern states did not even have understanding clause provisions in their toolkit of disfranchising

²²⁸ EDWARD L. AYERS, *THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION* 327 (1992); KLARMAN, *supra* note 28, at 21-23, 38-39; Schmidt, *supra* note 174, at 469.

²²⁹ Potential voters were required to either read a provision of Mississippi's state constitution, or "understand" some provision of it when read to them. AYERS, *supra* note 226, at 149. Mississippi's disfranchisement scheme is discussed in *id.* at 146-49.

²³⁰ PERMAN, *supra* note 63, at 313-14.

²³¹ Arguably the case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), might have offered some support for striking down the Mississippi Plan. KLARMAN, *supra* note 28, at 35-36.

laws.²³² In short, it would be difficult to claim that broader social and political pressures wholly *dictated* all of the key elements of the actual ruling in *Williams*.

Yet an institutional-interest theory might offer some additional insight into this ruling, and a potential answer as to why this hypothetical, and more liberal, ruling may *not* have arisen: the Court wanted to give wholesale approval to disfranchisement in the crucial decade of the 1890s to put to rest any possible lingering doubts about the legality of Jim Crow voting laws. That is, the Court chose sweeping, affirmative resolutions in these cases in order to minimize legal uncertainty in the domain of individual and group rights, and to facilitate the rise of a new coherent political order. The more general point to be drawn is that although public opinion and social forces undoubtedly imposed boundaries in the realm of feasible judicial action here, the judiciary still retained options in choosing how it would accommodate social and political pressures. The significance of these affirming rulings thus stems not only from the policy choices they made, but also from the broad, sweeping manner in which those choices were made.

Finally, with respect to the Court's tension-management ruling in *Buchanan*, although an appointments thesis would probably offer limited value in explaining this case, an externalist approach to judicial behavior that focused on broader social forces might be of somewhat greater assistance. To be sure, an externalist might have a somewhat difficult time in one respect in explaining *Buchanan*: the impetus for protecting African-American property rights was apparently more of a judicial commitment rather than a commitment rooted in broader society. Indeed, to the extent that any broader public sentiment might be discerned, it cut in the opposite direction, given that the residential segregation ordinances were still recently-enacted laws by the time of *Buchanan*'s ruling.²³³ Yet even if an externalist account does not offer us much help in understanding the egalitarian pull of *Buchanan*, it does offer an explanation as to

²³² Only four Southern states employed an "understanding" test. KOUSSER, *supra* note 128, at 239 tbl.9.1.

²³³ KLARMAN, *supra* note 28, at 79.

why this result did not initiate any broader assault on Jim Crow: broader public sentiment in 1917 clearly was not supportive of such a change.²³⁴

Thus externalist accounts may be helpful in explaining why a “compromise” ruling resulted from this legal controversy. Yet jurisprudential compromises can be achieved in any number of ways, and again, it is in explaining modes of legal resolution that an institutional-interest approach to judicial behavior might be particularly helpful. In *Buchanan*, since this was a situation where the Court was pressing *against* societal preferences, the only stability-related concern posed here was to ensure that judicial innovation did not undermine the integrity of the still-dominant Jim Crow order. Hence the Court’s approach to tension-management was not to articulate a vague, open-ended standard of compromise – which might arouse popular suspicion and antipathy toward the Court – nor was it to carve out anything looking like a one-time, partial repudiation of Jim Crow – which might do the same. Rather, the key argumentative pivot of the opinion was Day’s categorization of the rights at stake in a particular way. African-American rights were not defended as a result of a candid discussion on the limits and demands of equality; instead they were defended on the basis of a seemingly technical legal matter that was firmly and wholly rooted in the prevailing doctrinal categories. The *Buchanan* compromise then was a ruling that aimed to support the resiliency of the Jim Crow order. A focus on judicial-institutional interests thus gives us analytical leverage to appreciate these subtleties of Day’s argument that may not be as apparent with a political-cultural focus on judicial behavior.

B. *The Post-Civil Rights Era Cases*

Finally, consider the case of the Court’s rulings in the seventies. Among all of the cases examined here, *Milliken* provides the best support for an appointments thesis: this ruling, which marked a con-

²³⁴ It is for these reasons that Klarman’s interpretation of *Buchanan* largely sees this case as being driven by judicial values. To the extent that externalist forces factor into his analysis, they are seen as boundary constraints that were tolerant of *Buchanan* only because the latter did not seriously challenge residential segregation in practice. KLARMAN, *supra* note 28, at 83, 90-93, 142-43.

servative shift in the Court's desegregation cases, closely followed four Nixon appointments: Burger (1969), Blackmun (1970), Powell (1972), and Rehnquist (1972). These four, along with Potter Stewart, made up the five-vote majority in *Milliken* in 1974. Yet while an appointments thesis does tell us something of interest here, it also leaves a few items under-explained. First, the correspondence between the addition of Nixon appointees and a shift in the Court's orientation is not perfect; even with all four Nixon appointees on the Court, a 7-1 majority (with Rehnquist dissenting) still pressed forward with an aggressive desegregation remedy in the 1973 case of *Keyes*, one year prior to *Milliken*. Second, the other delimiting case from the seventies, *Washington v. Davis*, enjoyed a 7-2 majority with Stevens, White, and Stewart joining the four Nixon appointees. In order to explain this latter ruling, and at least the latter two votes, one's analysis would have to extend beyond merely discussing appointments. Indeed, White's and Stewart's votes in *Washington v. Davis* are particularly interesting because both were notably supportive of more liberal outcomes in earlier desegregation cases; both joined Court majorities in reaching liberal outcomes in *Green* and *Swann*, and Stewart also joined a liberal majority in *Keyes*. Why these two Justices moved toward more conservative outcomes in the mid-seventies raises questions that lie outside an analysis of appointments.

A political-cultural explanation might fill in the gap: perhaps these delimiting rulings were the result of appointments dynamics aided by broader social and cultural influences on the Justices. Indeed the Court's delimiting rulings in the seventies seem to be well within majoritarian public sentiment. Yet, as with the case of the late thirties, a political-cultural thesis of judicial behavior is less convincing once a broader set of judicial actions is considered: public sentiment against busing was on the rise years before *Milliken* in 1974, yet the Court nevertheless continued to *press forward* with aggressive desegregation remedies in the face of growing conservatism. The Court may have been responding to public pressure in *Milliken* and *Davis*, though in order for a political-cultural thesis of judicial behavior to explain delimitation, it would have to explain why those so-

cial and cultural forces made a greater impression on the Court in the mid-seventies than they did in the late sixties and early seventies, when the Court pressed against public opinion.

In contrast, consider the applicability of an institutional-interest theory to the seventies race cases. The question confronted by the Court in both *Milliken* and *Davis* was the question of how much the prerogatives of federal, state, and local institutions were going to be displaced by the authority of the federal judiciary in the name of guaranteeing constitutional equal protection to racial minorities. And once again, the delimiting result can be explained with reference to a judicial inclination to stabilize the boundaries of authority between these various institutional entities. Furthermore, focusing on problematized authority relations also offers us clues as to why the inclusion of four Nixon appointees did *not* preclude an aggressive desegregation remedy in *Keyes* a year prior to *Milliken*, why the Court may have pressed forward with aggressive desegregation remedies *against* social and political pressures in several cases, and why White and Stewart voted in favor of the delimiting result in *Davis*, notwithstanding their earlier collective support for more liberal outcomes in *Green*, *Swann*, and *Keyes*. The issues presented in *Milliken* and *Davis* problematized authority relations in a way that the earlier school desegregation cases did not. Indeed, in *Green*, *Swann*, and *Keyes*, the Court understood itself to be remedying local governmental actions that had been in flagrant violation of core reform principles by engaging in intentional discrimination. If the *Brown* principle stood for anything, it certainly stood for the idea of redressing such violations. However, in *Milliken* and *Davis*, no such core violations of reform were present. These latter cases instead addressed the outer reaches of the transformation in constitutional equal protection. I would assert that even if the Court had *not* had four Nixon appointees by 1974, it is not difficult to imagine that the Court's institutional interest in stabilizing authority relations would nevertheless have led it to issue some type of a delimiting ruling in these cases.

With respect to the Court's order-creating rulings in the nineties, an appointments thesis could certainly illuminate the outcomes

of the affirmative action cases, as hinted at above. Furthermore, not only were new Republican judicial appointments a major factor; the opinions they helped to produce were also probably in line with emerging public sentiment through the eighties and nineties.²³⁵

One might start with these facts and make the bolder assertion that social and political forces not only supported these judicial outcomes, but also determined these outcomes and their modes of resolution as well. This latter assertion, however, runs into difficulties. Consider the point that while an externalist would hardly be surprised that the Court adopted a hostile attitude toward racial preferences in *Adarand* in 1995, a number of other options were also available to the Court at these moments that would have been congruent with prevailing public sentiment. In *Adarand*, public sentiment against affirmative action was probably not so monolithic in 1995 as to demand a judicial conclusion that all racial classifications should be subject to strict scrutiny. The Court could have simply declared a rule of strict scrutiny for racial preferences in federal governmental contracting – which was the source of the dispute in *Adarand* – or the Court might have stated a general rule of strict scrutiny for federal governmental racial preferences while also explicitly carving out an exception for more deferential judicial review of racial preferences enacted under Congress's § 5 authority.²³⁶

Had such alternative judicial outcomes been reached in *Adarand*, surely an externalist theorist of judicial behavior would have had little difficulty in making the case that these alternative outcomes would have been aligned with prevailing political and social sentiment as well. The assertion here is that the Court chose sweeping,

²³⁵ Terry H. Anderson, *The Strange Career of Affirmative Action*, 22 S. CENT. REV. 110, 122-25 (2005).

²³⁶ O'Connor's dissent in *Metro Broadcasting* had suggested her willingness to possibly grant a broader judicial deference to congressional affirmative action programs that were enacted pursuant to Congress's Section Five authority under the Fourteenth Amendment. 497 U.S. 547, 605-07 (1990) (O'Connor, J., dissenting). The *Adarand* ruling did not specifically signal her rejection of that view. Thus a possible implication that one might glean from the ruling is that perhaps congressional affirmative action programs enacted pursuant to § 5 could have fewer constitutional infirmities. O'Connor's opinion in *Adarand*, however, offered only ambiguous statements on this matter. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230-31 (1995).

affirmative resolutions in these cases in order to minimize legal uncertainty in the domain of individual and group rights, and to facilitate the rise of a new coherent political order. As with *Williams v. Mississippi*, the significance of *Adarand* stems not only from the policy choices it embodied, but also from the mode of resolution.

Finally, with respect to *Grutter*, although an appointments thesis could be of some use in explaining this outcome, an externalist approach to judicial behavior that focused on broader social forces would probably be even more relevant. Works within this latter scholarly genre have noted, for example, that the Court's qualified endorsement of racial preferences in *Grutter* — especially when combined with the Court's simultaneous disapproval of the Michigan undergraduate affirmative action program in *Gratz v. Bollinger*²³⁷ — accurately reflected the broader public ambivalence about both affirmative action and color-blindness.²³⁸

Thus externalist accounts may be helpful in explaining why “compromise” rulings resulted from the legal controversies discussed in this Part. Yet as noted with *Buchanan*, jurisprudential compromises can be achieved in any number of ways, and again, it is in explaining modes of legal resolution that an institutional-interest approach to judicial behavior might be particularly helpful.

Consider that the stability-related concerns posed by the *Grutter* controversy raised the specter of not just threats to the anti-classification order in this particular case, but also the threat of potentially destabilizing situations in the future. After all, who can predict what forms and types of affirmative action may or may not gain greater political and social support in future years, as different approaches emerge in any number of different social contexts? Unlike the tight link between jurisprudential commitments to property and African-American rights in *Buchanan*, the continuing evolution of broader public opinion on affirmative action suggests a greater future volatility on this issue. In this context then, where the potential for incongruities between judicial values and public opinion may be less than they were in *Buchanan*, and where the potential for fu-

²³⁷ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

²³⁸ See, e.g., Devins, *supra* note 29 at 347-48.

ture tensions may be greater, the ideal tension-managing ruling in *Grutter* would call for a different approach than that seen in *Buchanan*.

Hence in *Grutter*, the Court's key analytical move was to definitively establish *Bakke*'s "individualized consideration"²³⁹ requirement for determining whether a given affirmative action plan was narrowly tailored enough for strict scrutiny purposes. This individualized consideration requirement was the substance of the jurisprudential compromise in *Grutter* since it would largely either validate or invalidate a challenged program. The distinctive aspect of this compromise is its vagueness: all that is definite in the post-*Grutter* era is that racial quotas are constitutionally prohibited, and that point-systems like that in *Gratz* are probably prohibited as well. But in terms of what the *Grutter* ruling will mean in an affirmative sense – that is, what the narrow tailoring requirement actually means affirmatively – the signpost of "individualized consideration" is obviously not exceedingly clear.²⁴⁰

One can, of course, imagine alternative ways that broader societal ambivalence about racial preferences might have been achieved. One can easily imagine a counterfactual ruling where the Court set out more exhaustive statements on what "individualized consideration" entailed, for example. One could imagine the articulation of perhaps a new standard of scrutiny for this particular context. That the Court chose to articulate a vague standard of jurisprudential compromise *within* the language of strict scrutiny, however, is indicative of additional considerations at play. Specifically the Court's inclination to resolve tensions by articulating flexible legal rules in these cases is indicative of its institutional concern with preserving the vitality and continuity of the reigning social order, both in the present *and* in moving forward. Unlike jurisprudential compromises built upon specific terms and conditions that might prevent a Court

²³⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 & n.52, 319 & n.53 (1978).

²⁴⁰ Justice Scalia touched on this point in his dissent. *Grutter v. Bolinger*, 539 U.S. 306, 348 (2003) (citations omitted) (Scalia, J., dissenting); see David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 497, 520-22 (2004).

from integrating future exceptions and future tensions within the reigning order, vague standards are valuable for their opposite effect: they aid the resiliency of political order by giving the Court the greatest future flexibility possible in dealing with new tensions. Why the Court preferred a vague standard of compromise cannot be explained by just externalist approaches to judicial behavior. An institutional-interest theory of judicial behavior that posited a judicial institutional interest in preserving stability, however, offers an explanation.

VII. CONCLUSION

The primary thesis of this paper is that a judicial-institutional interest in political order has played an important role in influencing judicial behavior in certain, specific contexts. While the dominant theories of judicial behavior in the current literature emphasize the centrality of forces “external” to the law in influencing shifts in judicial behavior, I understand my thesis to be at least a crucial supplement, and sometimes a qualified challenge, to those theories. As noted before, claims of a countermajoritarian Court acting wholly counter to prevailing political and social pressures do not arise in this paper, nor are such claims demonstrated in the case of the Supreme Court’s post-Reconstruction and post-Civil Rights Era rulings on race. Rather, the focus on judicial-institutional interests is intended to offer insight into the nature of judicial behavior either when externalist influences are ambiguous, or when externalist influences allow for the possibility of more than one mode of judicial resolution – which should usually be the case. ▣

BEYOND PRESENTISM

A COMMENT ON STUART CHINN'S

*RACE, THE SUPREME COURT, AND THE JUDICIAL-
INSTITUTIONAL INTEREST IN STABILITY*

Bruce Ackerman[†]

The spirit of presentism haunts constitutional scholarship. The key debate tries to identify those aspects of present-day realities which drive constitutional change – a shift in social mores, the rise of social movements, a change in party balance, or simply the death and replacement of justices.

Chinn moves beyond presentism, without disputing its undoubted importance. For him, the Court's work also represents an ongoing and self-conscious effort to synthesize past principles into a constitutional order that makes sense to Americans of the present and future.

This judicial enterprise becomes particularly challenging in the wake of a sweeping transformation – like those occurring during Reconstruction, the New Deal, and the Civil Rights Revolution. Given the system of checks and balances, it takes a lot of time and effort to pass the constitutional amendments and landmark statutes required to revolutionize fundamental principles. Even if a political movement is sufficiently powerful to leap through this obstacle course, it will inevitably lose momentum long before it can tell lawyers everything they want to know about the nature of the new constitutional regime.

[†] Sterling Professor of Law and Political Science, Yale University. Copyright © 2011 Bruce Ackerman. *Editor's note:* For the work on which Professor Ackerman is commenting, see Stuart Chinn, *Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 J.L. (1 L. & COMMENT.) 95 (2011).

A key problem is constitutional synthesis: while the new amendments and statutes announce large principles, they don't entirely repudiate the legacy left by previous generations of constitutional politics. How then to put Humpty-Dumpty together again, melding new and old principles into a coherent constitutional order?

As the political movement for constitutional reform begins to lose control of the House, Senate, and Presidency, the Supreme Court is left to answer this question more-or-less on its own. Here is where Chinn offers a helpful trichotomy: the Court's first task will be *to delimit* the scope of the new principles, and thereby define what is living and what is dead in the constitutional legacy left by the past. Later on, it will elaborate *order-creating* opinions that give more affirmative meaning to the new constitutional principles; these principles will, of course, sometimes conflict with others derived from earlier constitutional moments, requiring the Court to confront a third, and more standard, task: writing opinions that seek to *resolve the tensions* between constitutional principles inherited from different eras of our constitutional development. This functionalist trichotomy makes a lot of sense, but it shouldn't be treated as a rigid law of judicial evolution: delimitation, order-creation, and tension-resolution are on-going processes, though one function may well be more salient at an early stage while others gain in importance later. With this caveat, Chinn's trichotomy helps moves the debate beyond presentism: while current social and political realities, as well as the particular character of the justices, certainly do matter, so too do the Justices self-conscious understanding of their role in sustaining the constitutional regime through serial acts of intergenerational synthesis.

Chinn's trichotomy also offers an antidote for another presentist tendency – the habit of modern day lawyers to judge judicial decisions of the distant past by contemporary standards. It is increasingly common, for example, to say that *Slaughterhouse's* evisceration of the "privileges" or "immunities" clause was "wrongly decided" – without a serious consideration of the distinctive way the justices framed their interpretive problem in 1873. Chinn's analysis offers a different perspective. Instead of asking whether *Slaughterhouse* was

“rightly” or “wrongly” decided, he invites us to consider how the Court confronted its problem of delimitation: On the one hand, Republican Reconstruction *did* represent a quantum leap forward toward a more nation-centered understanding of We the People; but on the other hand, it did *not* represent a total repudiation of the Founding legacy of constitutional federalism. How, then, should the Court mark off the central concerns of the Reconstruction Amendments while leaving some space for the very different understandings of federalism inherited from the Founding?

By reframing the question, Chinn opens up a new path to interpretive insight. For all we know, the coming decades will once again generate a constitutional revolution – perhaps on a scale rivaling Reconstruction. And the Court, once again, will be placed in the position of delimiting the scope of the new constitutional achievements. From this vantage, there is something more important to learn from *Slaughterhouse* than whether it was “correctly” decided. Instead of fixating on the bottom-line, it will pay to study the different techniques deployed by Justice Miller and his colleagues approaching their problem of delimitation. If the legal community engages with the *Slaughterhouse* opinions on this methodological level, twenty-first century judiciary might actually *learn* something useful when confronting similar problems of delimitation in the future.

As Chinn rightly suggests, the great transformations of the twentieth century – the New Deal and the Civil Rights Revolution – also left the Justices confronting the basic questions of delimitation, and will also serve as a rich resource of methodological insight. The same can be said, of course, when we turn to consider the order-creating and tension-resolving opinions that Chinn has identified. Three cheers, then, for Chinn’s trichotomy, and its promise of insight into two centuries of judicial effort to make sense of a constitutional tradition that has been made and remade through the efforts of many generations of constitutional politics.

It is at this point, alas, that I must part company. When he views the Court through his tri-opticon, Chinn manages to see a curiously monotonic image. Whether the Court is engaged in delimitation, order-creation, or tension-resolution, Chinn thinks that it always

has the same objective: trying to stabilize the regime by creating clear and bright lines. I don't agree, but it will take a book to provide my affirmative account.¹ For now, let me suggest two basic problems with Chinn's monotonic proposal.

The problem of dissent. When the Court speaks by a narrow majority, whatever it says is unstable. Everybody knows that the Court may change its mind in a few years, depending on future appointments. Rather than stabilizing the regime in a decisive fashion, most important decisions simply resolve a particular controversy. Their larger significance is the way they shape and reshape an on-going constitutional conversation – introducing new themes, eliminating others from the realm of serious legal argument.

Return to *Slaughterhouse* one more time: While Miller's five-judge majority opinion was influential, so was Field's dissent. It's a fair question whether Miller or Field was more influential over the next fifty years. The fact that Field only got four votes certainly didn't banish his views from the on-going constitutional dialogue.

The Justices are perfectly aware of the disruptive power of dissent – and they may sometimes try to win greater authoritativeness by handing down a unanimous opinion. But even unanimity may not suffice to generate stability. Think *Brown v. Board* or *Cooper v. Aaron*. It was the civil rights movement, not the Court, that finally stabilized the new regime by creating a political environment that allowed the President and Congress to enact the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Ought implies can – since the Justices know that they *can't* stabilize the regime simply by handing down a decisive-looking opinion, it seems implausible to suppose, with Chinn, that this is what they think they *ought* to be doing. Since Justices can't accomplish Chinn's goal, it is far more likely that each sets a more modest objective for him/herself: to write opinions *that make constitutional sense, and persuade their various audiences that their constitutional interpretations are*

¹ This will be the mission of my fourth volume in the *We the People* series. For a sketch, see *We the People: Foundations* chaps. 4-6. I'm presently finishing up the third volume, dealing with the civil rights revolution, see my *Holmes Lectures: The Living Constitution*, 120 *Harvard Law Review* 1727 (2007). So my book on interpretation won't be out for a while.

more meaningful than those offered up by their rivals on the Court.

If anything serves to stabilize the regime, it is this on-going judicial dialogue (better, multi-logue). The multilogue draws in many sectors of the population that might otherwise be alienated by a series of judicial ipse-dixits that aim to establish order once and for all. While different social groups will lose particular court decisions, the fact that dissenters are expressing their concerns in legal language may sustain their engagement in the constitutional enterprise.

Or it may not. Court-centered multilogue has broken down in the past, and may well break down in the future. But when it does, the Justices have little choice but to rely on political leadership to hammer out revised constitutional understandings.

Clarity and stability? Even when the Justices do aim to stabilize the regime, this effort rarely generates the clarity that Chinn hypothesizes – rather the reverse. As we all know, the typical unanimous opinion is generally full of obscurities and incongruities – as the Justices struggle to paper over their underlying disagreements. The judicial quest for stability generates legal obscurity, not clarity.

There are exceptions to this rule. *Darby* and *Wickard* – the Court's famous opinions codifying the New Deal — are unanimous *and* clear. But this is because Roosevelt and his Democratic Congresses had already stabilized the new regime by the late 1930s through a series of landmark statutes and transformative Supreme Court appointments. This permitted the Court to announce to the legal world what everybody-already-knew: that the American people had decisively repudiated the principles of limited federal government that had guided the Republic between 1868 and 1932.

If you want to find real clarity, the place to look is the solo dissent: Harlan or Holmes or Brandeis or Scalia can be clear because they have given up on their colleagues and are appealing to some future age for redemption. If an opinion-writer is trying to win the support of a decisive majority, compromise will often lead to doctrinal confusion.

Moving beyond small group dynamics, clarity can also be counterproductive in stabilizing the larger regime. Sometimes it is better for the court to hide the ball as it creeps toward the elaboration of a

clear principle — this is, at least, the lesson of Alex Bickel's *Least Dangerous Branch*; and Cass Sunstein is even more timid, worrying that the clear statement of any strong principle is apt to generate destabilizing backlash.

So muddling through might sometimes be the best way to stabilize — assuming (which I don't) that this is what the Justices are invariably aiming for.

To sum up; Chinn's article is a real breakthrough — inviting all of us to ask important new questions. But I don't think he has answered his questions in the right way.

But I'm sure that Chinn will have lots to say in his defense — leading both of us to glimpse better answers than those which we can presently envision. Perhaps others will join in as well. Whatever the future holds, Professor Chinn has certainly earned a place at the table! ☐

CONTINGENCY V. STRUCTURES IN EXPLAINING JUDICIAL BEHAVIOR

A COMMENT ON STUART CHINN'S
*RACE, THE SUPREME COURT, AND THE JUDICIAL-
INSTITUTIONAL INTEREST IN STABILITY*

Sanford Levinson[†]

Stuart Chinn has written an interesting – and truly informative – article on the role that the United States Supreme Court has played in stabilizing the American socio-political order following periods of transformation. Almost inevitably, he suggests, the transformations are less extensive and go less deeply than their proponents might have wished, not least because the Court, for a variety of reasons, attempts to integrate these transformational changes into an existing status quo in order to produce minimal disruption. Chinn, who is a political scientist as well as lawyer, is interested in explaining, as set out in the very first sentence, “[w]hat factors influence judicial behavior.” That is, it is not enough simply to describe what the Court has done. Chinn, and the rest of us, are curious as to *why* they behaved as they did (which implies, among other things, that there might have been alternatives).

After canvassing a variety of explanations, including one proffered by Jack Balkin and myself that focuses on the “partisan en-

[†] W. St. John Garwood and W. St. John Garwood Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. *Editor's note:* For the work on which Professor Levinson is commenting, see Stuart Chinn, *Race, the Supreme Court, and the Judicial-Institutional Interest in Stability*, 1 J.L. (1 L. & COMMENT.) 95 (2011).

trenchment” of judges committed to one or another of the great “high political” views of what the Constitution means and what role courts should play in protecting that meaning, Chinn offers his own candidate, which is the “institutional interest” possessed by the Court in “stability.” “[I]n the particular context of post-reform periods, the Court has been inclined at these moments to stabilize, delineate, and clarify the boundaries between competing governing authorities and competing sets of rights within the recently-transformed policy domain.” Even more striking (and potentially important) is his “additional claim . . . that this judicial-institutional interest in stability has manifested itself in three specific types or ‘modes’ of adjudication that recur in American constitutional history.” This allows us to see deep patterns in decisions over time, in what may first appear to be quite disparate eras and doctrinal areas, that can be explained, in significant measure, by placing them within the structure that he has identified, i.e., a prior time of significant transformation (initiated by other branches or social movements) that is then “tamed” (my word, not his) to fit into what remains a largely (even if not completely) untransformed legal polity.

Chinn has clearly mastered a great deal of the relevant literatures, in history, political science, and law, and it is an impressive achievement by any measure. My role as a commentator, however, is not simply to offer applause, however merited, but also to indicate any concerns I might have. My major concern is *not* his unwillingness to accept in toto the Balkin-Levinson “partisan entrenchment” thesis; he is certainly fair in describing it and in offering some of his own reservations. Rather, my concern is that Chinn’s own thesis tends to dampen our recognition of the importance of contingency and sheer historical happenstance because of the emphasis on deep structural forces which are seemingly destined to triumph.

Kenneth Scheppsle many years ago emphasized that Congress is a “they,” not an “it.” It’s not only that there are two quite different Houses of Congress, but, equally important, each House is subdivided into lots of smaller institutions and groups, each with its own interests and incentives. And, of course, finally there are the individual members of the House and the Senate, whose interests, con-

tra to Madison's suggestion in Federalist 51, may be quite different from the ostensible interests of "the place," whether because they are hyper-party-loyalists or because they rather desperately wish to be re-elected (or, these days, be hired by K St. lobbying firms). Similarly, even the Supreme Court, with its (usual) nine justices, is also very much a "they"; members of the Court will often disagree both on what "the law" means and, one must assume, also on what counts as the specific institutional interests of the Court at a given moment in time.

One might be most confident about "institutionalist" explanations – and, for that matter, what might be termed standard-form "legalist" explanations – when decisions are unanimous. And institutionalist explanations are often dispositive when, for example, the Court refuses to grant certiorari in cases that are clearly hot potatoes. Or, even if cert. has been granted, one might offer an institutionalist explanation for the majority's actual behavior in a case like *Newdow*, where it almost shamelessly (and, for some, shamefully) invented a wildly implausible theory of standing to avoid having to admit that the Ninth Circuit Court of Appeals was correct in pronouncing "under God" in the Pledge of Allegiance to be unconstitutional. That would undoubtedly have provoked calls for a constitutional amendment, as well as, perhaps more importantly, made the Court itself a central focus of the 2004 presidential campaign. One can easily understand why most justices believed that almost certainly would not have served the Court's institutional interests (any more than would the Court's declaring not only that William Marbury deserved his commission as justice of the peace, but also that the Court stood ready to order James Madison to deliver it).

But Chinn, by and large, is not dealing with unanimous opinions, or with the crafty denial of certiorari or the use of what Alexander Bickel famously called the "passive virtues" to avoid institution-threatening hot potatoes. Instead, with some frequency, cases featuring bitter divisions between a five-justice majority and four angry dissenters are also explained by reference to the structural imperatives, and so the obvious question is why the dissenters were so blind to the institutional interests in a way that was not true of the

majority. Perhaps they had a different calculus of "interest"; less plausible for many analysts today is the possibility that they were blithely indifferent to such pragmatic concerns and, instead, devoted themselves, *a la* a version of Dworkin's "Hercules," to articulating what they deemed the single best answer to the question of who actually enjoyed a legal right to a favorable outcome, quite independent of any implications it might have for the institutional position of the Court.

In any event, Chinn writes, altogether accurately, that his findings are not designed to bring pleasure to those who view the Court as a likely partner in "liberal expansion of open-ended dismantling reforms." This is yet another articulation, using a quite different methodology, of the view that it is basically a "hollow hope" to look to the judiciary if one really wishes transformation. I have no trouble agreeing with much of his "bleak suggestion" about the limits of the judiciary as an agent of change. But I must say that I want to look at other explanations for this reality instead of (or, at the very least, as a complement to) the particular kind of argument that Chinn offers.

Let me suggest, for example, that it is a fundamental error to underestimate the importance of life tenure on the United States Supreme Court, which means, among other things, that the "partisan entrenchment" emphasized by Balkin and myself is a function not only of who wins specific elections, *e.g.*, Ronald Reagan instead of Jimmy Carter, but also of whether the president in question has the opportunity to make appointments that will presumably further his agenda. It is a notorious truth that Jimmy Carter is the only elected (one-term) President in our history to go through a four-year term without having a single opportunity to name someone to the Supreme Court. (One reason for this, a recent biography of William J. Brennan suggests, was Brennan's basically egoistic desire to remain on the Court. He did suggest around 1978 to his clerks that he was thinking of retiring, but one suspects this was basically designed to elicit the anguished cries of "no, you can't," which he certainly received.) Richard Nixon, on the other hand, got to name four members to the Court during his six-year term. Most interest-

ing, in many ways, was FDR, who had no appointments at all during his first term and then a full 8 appointments (including boosting Harlan Fiske Stone to the Chief Justiceship after Hughes retired) in the next seven years. Some of us still believe that Al Gore “really” won the 2000 election, but it was, obviously, George W. Bush who was ultimately able to name two extraordinarily conservative members to the Court. Had Lyndon B. Johnson not been so eager to name his good friend Abe Fortas as Chief Justice (or, for that matter, to put him on the Court in the first place), then there would have been no vacancy for Harry Blackmun to fill. Or think of what might have been had Arthur Goldberg not proved so subject to LBJ’s cajoling him to leave the Court. Similarly, Prof. Yalof has suggested that if Howard Baker had not asked for a night to think it over, he would have joined the Supreme Court instead of William Rehnquist (so memorably identified by the appointing President, Richard Nixon, as “Renchburg” and “that clown” with long sideburns who dressed, according to Nixon, somewhat like a hippie).

I don’t want to argue that whirl is all and contingency is king (or queen). It is surely not the case that presidents could have named just any lawyer to the Court, as manifested in the successful filibuster against Fortas and the defeat of two of Nixon’s nominees to the Court. The structural limitations facing even very strong presidents is a necessary caution against overestimating the power of a given individual. That being said, though, I’m not sure about the strength of a theory that is built on so many 5-4 decisions. (See only the list of cases set out near the beginning of the text [p. 4 of the manuscript]. Chinn is obviously aware of the frequency of “closely-divided Supreme Court votes” on many of these issues, but I’m not sure he pays adequate attention to his own insight. Instead, he is determined to make the case for “larger, structural explanations of judicial behavior.”

What is probably most truly distinctive about Chinn’s thesis, and its greatest contribution, is his emphasis not only on the result of given cases, but also on the doctrinal forms within which they were argued. Most political scientists look only at results – in the confidence, often debatable, that it is easy to discern the meaning of a

particular result for the wider political order – and rarely at the internal logics of argument. Here is where Chinn is most lawyerly, for he believes that what an opinion contains by way of argument is at least as important as the particular result. Theories of partisan entrenchment, for example, help to explain results along a liberal/conservative axis. They do not, in any uncomplicated way, help to explain why the Court would or would not decide to adopt an “originalist” posture or accept or reject legislative history when attempting to discern the meaning of statutes. But Chinn does offer a mode of analysis that purports to explain “how the judicial-institutional interest in stability manifests itself in specific modes of adjudication that recur – in precise order – in the context of post-dismantling periods” (p. 14).

In particular, Chinn locates as “core judicial values” the provision of “settlement, notice, and predictability.” But all of these words are extremely mixed in their specific messages. Consider the notion of “settlement.” Arguably, there are many equilibria that could provide a “settlement” of sorts; more to the point, there are inevitably many such ostensible “settlements” that break down, whether in short order or in the long run. Similarly, “predictability” could be satisfied by practically any stark declaration. Consider, for example, an announcement by a court, perhaps in an opinion written by Justice Lewis Powell, that “hereafter in suits brought by labor unions against management, we will always find for management.” There may be few instances of such crass predictability – and no instances, presumably, of such clearly articulated predictions – but, presumably, repeated instances union defeats and management victories will lead most unions to refrain, at the very least, from filing petitions for certiorari regarding losses below.

That American constitutional development might in fact be more subject to purely contingent forces may require a tempering of what might be termed “structuralist exuberancy.” That, however, does not diminish the contribution of the close readings of many classic cases and their placement within very real political contexts within which judges were almost undoubtedly concerned with the kinds of institutional concerns identified by Chinn. That there might have

been alternative histories does not allow us to ignore the actual events that occurred, and the extent to which they indeed helped to shape the contours of the overall American political system. □

L&C

Congressional Record

FantasyLaw Edition



United States
of America

SELECTED PROCEEDINGS, DEBATES, AND OTHER ACTIVITIES
OF THE 112th CONGRESS, FIRST SESSION



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PARTICIPANTS IN FANTASYLAW AND THE ENJOYMENT OF
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Brian Rock

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PARTICIPATION: FantasyLaw is exactly what it sounds like: a fantasy sports game featuring congressional lawmakers in the United States instead of players on professional major league teams. Our goals are to draw attention to the substantive details of the lawmaking process through a lens based on facts rather than media perception, and far more importantly, to allow users to compete with their friends over congress. Visit www.fantasylaw.org to learn more about FantasyLaw and download either (a) the rules (which you must follow) and forms (which you must complete and deliver) necessary to establish a FantasyLaw League or (b) the form necessary to request a drop/add or trade. Registration of a Team in a *Green Bag* FantasyLaw League entitles the Owner of that Team to some impossible-to-predict-or-promise combination of the joys and sorrows of participation in the League of which that Team is a part, and nothing more. Anything else the *Green Bag* may produce will take the form of gifts that we may or may not bestow on some Leagues or Owners (*e.g.*, a Blackmun Trophy) or products you may acquire separately (*e.g.*, a subscription to the *Green Bag*, which may from time to time contain a FantasyLaw supplement, or *Judge Dave and the Rainbow People*).

EDITORIAL POLICY: This journal is subject to the same rules as the rest of the *Journal of Law* (see the masthead of this issue of the *Journal of Law* for details), as well as the rules spelled out here and on the FantasyLaw website at www.fantasylaw.org.

CORRESPONDENCE: Please write to us at the addresses on our website, www.fantasylaw.org.

2011 DRAFT KIT

A FANTASYLAW GUIDE

Alex B. Mitchell & Brian Rock[†]

FantasyLaw is a web-based game that allows users (called “Team Owners”) to create a fantasy team of U.S. Senators and Representatives. They then compete against other Team Owners to determine who has drafted the *best* set of lawmakers. A League is comprised of anywhere between 5-9 Team Owners. The League gets together, holds a draft to select teams, and then competes against one another for an entire session of Congress.

WHAT MAKES A TEAM?

Each Team has 10 Players and must fill these roster positions:

SAMPLE TEAM

Leader¹ – The Speaker or any Majority/Minority Leader/Whip
Senator – Any Senator
Senator – Any Senator
Senator – Any Senator
Representative – Any Representative
Representative – Any Representative
Representative – Any Representative
Representative – Any Representative
“Rookie” Senator – Any first-term Senator
“Rookie” Representative – Any first-term Representative²

[†] *Alex B. Mitchell expects to graduate from the George Mason University School of Law in 2011. Brian Rock expects to do the same at the University of Virginia School of Law.*

¹ There are a total of nine congressional leaders. Therefore, no League can contain more than nine Team Owners. A Team may contain multiple leaders, but no Team Owner can draft a second leader until all teams have drafted at least one. For a full list of Leaders, see Drafting Resources below.

² “First-term” here means that the congressperson has only been elected once to his/her current office. Therefore, for example, a Senator in year five of his/her first six-year term

DURATION OF THE FANTASYLAW SEASON

When the FantasyLaw Board begins a season, that season lasts until the end of the current session of Congress. Each Congress is broken down into two sessions, and each session spans roughly one year.³ The 2011 FantasyLaw season will begin Monday, March 14, and will last until the first session of the 112th Congress ends – sometime during the last two weeks of December, 2011.

2011 FANTASYLAW SEASON

Begins: Monday, March 14, 2011

Ends: December 20-30, 2011

HOW DO I WIN?

The goal of FantasyLaw is to amass the most points and outscore other Teams in your League. Players can earn points in any of the 13 FantasyLaw scoring categories. These scoring categories are:

- Sponsorship of bills introduced (SBI)
- Sponsorship of bills reported (SBR)
- Sponsorship or co-sponsorship of bills passing the House (SBH)
- Sponsorship or co-sponsorship of bills passing the Senate (SBS)
- Sponsorship of bills enacted (SBE)
- Appearances in five major daily newspapers (ADN)
- Appearances in four major Hill periodicals (AHP)
- Appearances on five major Sunday morning talk shows (ATS)
- Appearances on Comedy Central's *The Daily Show* or *The Colbert Report* (ACC)
- Press releases issued (PRI)
- Voting Attendance (VTA)
- Maverick Voting (MVV)
- Lone Wolf Voting (LWV)

is still considered a "Rookie" for our purposes. For a guide on Rookies, see Drafting Resources below.

³ The 111th Congress spanned almost all of 2009. The first session began January 6, 2009 and ended on December 24, 2009. The second session began January 5, 2010 and ended on December 22, 2010.

THE SCORING

So what exactly are these categories?⁴

Sponsorship of bills introduced (SBI) – Players earn points for sponsoring a bill introduced in the House or Senate.

Sponsorship of bills reported (SBR) – Players earn points for sponsoring a bill that makes it out of committee and is reported on the floor.

Sponsorship or co-sponsorship of bills passing the House (SBH) – Players earn points for sponsoring or co-sponsoring a bill that passes the House.

Sponsorship or co-sponsorship of bills passing the Senate (SBS) – Players earn points for sponsoring or co-sponsoring a bill that passes the Senate.

Sponsorship of bills enacted (SBE) – Players earn points for sponsoring a bill that becomes Public Law.

Appearances in five major daily newspapers (AND) – Players earn points for each name mention in any one of the five major daily national newspapers that we track (*Boston Globe*, *New York Times*, *Washington Post*, *Los Angeles Times*, and *U.S.A. Today*).

Appearances in four major Hill periodicals (AHP) – Players earn points for each name mention in any of the four major Hill periodicals that we track (*Roll Call*, *The Hill*, *Politico*, and *National Journal's CongressDaily*).

Appearances on five major Sunday morning talk shows (ATS) – Players earn points if they are interviewed on any of the five major Sunday morning talk shows (*Face the Nation*, *State of the Union*, *Meet the Press*, *Fox News Sunday*, or *This Week*).

Appearances on Comedy Central's The Daily Show or The Colbert Report (ACC) – Players earn points for appearing, as a guest or otherwise, on *The Daily Show* or *The Colbert Report*.

⁴ For more details on how each category is tabulated, see *Opening Day*, 12 GREEN BAG 2D 347 (2009), available at [www.fantasylaw.org/CongRecFL/1%20Cong%20Rec%20FL%20Ed.%20no.2,%2012%20Green%20Bag%202d%20347%20\(2009\).pdf](http://www.fantasylaw.org/CongRecFL/1%20Cong%20Rec%20FL%20Ed.%20no.2,%2012%20Green%20Bag%202d%20347%20(2009).pdf).

Press releases issued (PRI) – Players earn points for each press release their office issues to constituents and the general public.

Voting Attendance (VTA) – Players earn points for each vote cast in an all Roll Call vote.

Maverick Voting (MVV) – Players earn points for casting a vote that is different from 95% of his/her party (thus, he/she casts a vote with the majority of the other party).

Lone Wolf Voting (LWV) – Players earn points for voting against 95% of Congress as a whole.

HOW IS SCORING TABULATED?⁵

A FantasyLaw season is broken down weekly, beginning on a Monday and ending on the following Sunday. Week 1 will begin on Monday, March 14, 2011 and end on Sunday, March 20, 2011. Week 2 will span Monday, March 21, 2011 and end on Sunday, March 27, 2011.

Each Sunday, all of the statistics every Member of Congress has accumulated during the previous week will be tabulated and points will be assigned to each team in the league. Total points awarded are contingent upon the number of teams in a league. Let's use two leagues as examples.

Example League A has 5 teams. Example League B has 9 teams.

Because League A has 5 teams, the team amassing the most Press Releases Issued (PRI), for example, during one week, receives 5 points. The team amassing the second most PRI in that week will be awarded 4 points, and so on. Thus, the team amassing the lowest PRI in a week is given 1 point.

However, because League B has 9 teams, the team amassing the most Press Releases Issued (PRI), for example, during one week, receives 9 points. The team amassing the second most PRI in that week will be awarded 8 points, and so on. Thus, the team amassing the lowest PRI in a week is given 1 point.

⁵ For more details on how scoring is tabulated, see *Scoring Summary*, 12 GREEN BAG 2D 487 (2009), available at greenbag.org/v12n4/v12n4_FL_klionsky.pdf

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Scoring is awarded in this fashion across all 13 categories, each week. Thus, in League A, during one week, if one team were to finish first place in all 13 categories, that team would score a total of 65 points (13 X 5 points) for that week. However, in League B, during one week, if one team were to finish first place in all 14 categories, that team would score a total of 117 points (13 X 9) for that week.

Every Monday morning, after statistics are tabulated and points awarded to each team day before (Sunday), updated standings for each team in a league will be posted to that team's page on FantasyLaw's website at www.fantasylaw.org/. Each league will have its own unique link that is accessible from the FantasyLaw homepage.

So, for reference, League A is below.

LEAGUE A

Roster	Leader	Senator	Senator	Senator	Rep.	Rep.	Rep.	Rep.	1 Sen	1 Rep
Team 1	Boehner	McCain	Cardin	Burr	Pastor	Ross	Polis	Pence	Rubio	West
Team 2	Pelosi	Hatch	Akaka	Carper	Paul	Capps	Price	Olver	Paul	Yoder
Team 3	Cantor	Leahy	Baucus	Ensign	Griffin	Herger	Scott	Levin	Webb	Long
Team 4	Hoyer	Durbin	Begich	Franken	Bonner	Issa	Lewis	Upton	Tester	Bass
Team 5	Reid	Sessions	Boxer	Hagan	Baca	Bono	Walsh	Walz	Corker	Berg

So, Team 1's ten players will all amass Press Releases Issued (PRI) during week 1 (Monday, March 14, 2011 – Sunday, March 20, 2011). The total number of PRI from all ten of Team 1's players will be measured against the other team's total PRI for week 1, and so on, for all 13 categories.

Let's now assume the total numbers for each category come out for week 1, as follows:

Teams	SBI	SBR	SBH	SBS	SBE	ADN	AHP	ATS	ACC	PRI	VTA	MVV	LWV
1	6	2	7	4	2	65	45	7	2	12	90	8	7
2	5	2	4	3	1	34	45	4	2	15	90	6	5
3	4	2	2	3	1	38	56	6	2	45	89	5	4
4	3	2	1	3	0	21	23	3	1	67	88	4	3
5	3	2	0	2	0	14	25	2	1	87	85	3	2

As noted above, different teams placed first in different categories for this mock week 1. Also noted above, some teams tied in particular categories for the week. The points awarded to each team, based on the above statistics for week 1, are as follows:

Teams	SBI	SBR	SBH	SBS	SBE	ADN	AHP	ATS	ACC	PRI	VTA	MVV	LWV
1	5	3	5	5	5	5	3.5	5	4	1	4.5	5	5
2	4	3	4	3	3.5	3	3.5	3	4	2	4.5	4	4
3	3	3	3	3	3.5	4	5	4	4	3	3	3	3
4	1.5	3	2	3	1.5	2	1	2	1.5	4	2	2	2
5	1.5	3	1	1	1.5	1	2	1	1.5	5	1	1	1

If two or more Teams earn the same number of points in the same category, they split the number of points that would have been allocated to each of their rankings evenly. For instance, in League A, both Team 1 and Team 2 scored 90 in the VTA category, the highest in their league for that week. Because they occupy first and second place for that category that week, they split the $5+4=9$ points typically allocated to those spots. Thus, they both earn 4.5 points in the VTA category for week 1.

Finally, we sum each Team's points earned in each category for the week. So, after week 1, the standings in League A would be the following:

First place – Team 1 – 56 points
 Second place – Team 2 – 45.5 points
 Third place – Team 3 – 44.5 points
 Fourth place – Team – 27.5 points
 Fifth place – Team – 21.5 points

Note that the total weekly points awarded in this five-team league are 195. This is because $13 \text{ categories} \times 15 \text{ points per category} = 195$. Each Monday, new points are awarded, and the standings will be updated based on the previous week's performances.

RULES

1. Each team in a *FantasyLaw* league shall be owned, drafted, and run by a different person.
2. No person shall have more than one team within the same league.
3. No person shall participate in more than one *FantasyLaw* league.
4. All persons shall adhere to the draft rules explained in the "Draft" section.

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5. Each league shall appoint a Commissioner to run the draft and to communicate with the FantasyLaw Board. The Commissioner shall serve as the liaison between the FantasyLaw Board and the other team owners in his/her league. Any materials emailed to the Commissioner might contain directions to disperse to the rest of the team owners in that league.
6. No person within a FantasyLaw league other than the Commissioner shall attempt to contact the FantasyLaw Board unless he/she decides to submit a player add/drop request in lieu of having the League Commissioner submitting that request on his/her behalf.⁶
7. Any FantasyLaw owner may submit an “add/drop” request. This means that the FantasyLaw owner decides to drop any player on his/her team, (a FantasyLaw team must have a Leader on its roster at all times) and replace that player with one not currently on any other team in their FantasyLaw league. Add/drop requests are processed by using the PDF form that will be posted on the FantasyLaw homepage.
8. There is no maximum number of add/drop requests allowed per player, however, the roster requirements must always be followed (for example, a FantasyLaw owner may not drop a Senator and replace that Senator with a Representative because this would compromise that FantasyLaw owner’s team requirements).
9. In the event of a tie in points at the end of any FantasyLaw season, the team between the tie that compiled the most points in any single FantasyLaw week will be declared the league champion.
10. The FantasyLaw season begins on Monday, March 14, 2011 and

⁶ FantasyLaw prides itself on a certain level of anonymity. The only communication allowed between the FantasyLaw Board and its leagues is by way of email communication with the appointed Commissioner in a particular league. The one exception to this rule is if a FantasyLaw player chooses to submit an add/drop request directly, rather than forwarding that request to his/her league Commissioner to send on his/her behalf.

will end on the Sunday following the adjournment of the first session of the 112th Congress in December, 2011.

DRAFT

1. The League Commissioner runs the draft. The draft can be conducted over the phone or via email, but an in-person draft is fastest.
2. The League Commissioner should select the draft order at random. We recommend picking names-out-of-the-hat, or any other reasonable alternative.
3. The first round follows the draft order as determined in Step 2. The order in subsequent rounds follows a “snake draft” format, with odd-numbered rounds following the original draft order, and even-numbered rounds proceeding in reverse-draft order. For example, if there were five teams in a league, and the draft order was determined to be Team 2, Team 4, Team 5, Team 1, then Team 3, the draft would proceed as follows:

	1 st Pick of Round	2 nd Pick of Round	3 rd Pick of Round	4 th Pick of Round	5 th Pick of Round
Round 1	Team 2	Team 4	Team 5	Team 1	Team 3
Round 2	Team 3	Team 1	Team 5	Team 4	Team 2
Round 3	Team 2	Team 4	Team 5	Team 1	Team 3
... Round 10	Team 3	Team 1	Team 5	Team 4	Team 2

Notice that while Team 2 gets the first overall pick, Team 2’s second selection is the tenth overall pick (the last pick of Round 2).

4. Drafting continues in this format until every Team Owner has drafted a full team. (For team requirements, see *What Makes a Team?* – page 3.)
5. The League Commissioner must send the draft results for his/her respective league by Friday, March 11, 2011 at 10:00 p.m. to FantasyLawEditor@gmail.com in order for the league to be officially registered for the 2011 FantasyLaw season. Please have the players in your league fill out the draft cards below and submit and attach these as email attachments.

DRAFTING RESOURCES

LEADERS

Speaker of the House:	John Boehner
House Majority Leader:	Eric Cantor
House Minority Leader:	Nancy Pelosi
House Majority Whip:	Kevin McCarthy
House Minority Whip:	Steny Hoyer
Senate Majority Leader:	Harry Reid
Senate Minority Leader:	Mitch McConnell
Senate Majority Whip:	Richard Durbin
Senate Minority Whip:	Jon Kyl

ROOKIES

Senate Rookies are any Senators who have yet to serve a full six year term as of January 2011. This includes all Senators who assumed office in the Senate for the first time as a result of being elected in 2006, 2008, and 2010 elections. If a Senator has previously served as a Representative in the House, he/she is still considered a Rookie as long as he/she is still serving his/her first six year term in the Senate. House Rookies are any Representatives who assumed office in the House for the first time as a result of being elected in the 2010 elections.⁷

COMMITTEE CHAIRS

House Committees

1. Committee on Agriculture: Chair – Frank Lucas, Ranking – Collin Peterson
2. Committee on Appropriations: Chair – Jerry Lewis, Ranking – Norman Dicks
3. Committee on Armed Services: Chair – Howard “Buck” McKeon, Ranking – Adam Smith
4. Committee on the Budget: Chair – Paul Ryan, Ranking – Chris Van Hollen
5. Committee on Education and Labor: Chair – John Kline, Ranking – George Miller

⁷ For example, Rep. Mario Diaz-Balart (R-FL) is not considered a House Rookie because, while he was elected to represent Florida’s 21st district for the first time in 2010, he had already served in the House as Florida’s 25th district representative from 2003-2011.

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6. Committee on Energy and Commerce: Chair – Fred Upton, Ranking – Henry Waxman
7. Committee on Ethics: Chair – Jo Bonner, Ranking – Linda T. Sanchez
8. Committee on Financial Services: Chair – Spencer Bachus, Ranking – Barney Frank
9. Committee on Foreign Affairs: Chair – Ileana Ros-Lehtinen, Ranking – Howard Berman
10. Committee on Homeland Security: Chair – Peter King, Ranking – Bennie Thompson
11. Committee on House Administration: Chair – Dan Lungren, Ranking – Robert Brady
12. Committee on the Judiciary: Chair – Lamar Smith, Ranking – John Conyers, Jr.
13. Committee on Natural Resources: Chair – Doc Hastings, Ranking – Edward Markey
14. Committee on Oversight and Government Reform: Chair – Darrell Issa, Ranking – Elijah Cummings
15. Committee on Rules: Chair – David Dreier, Ranking – Louise Slaughter
16. Committee on Science and Technology: Chair – Ralph Hall, Ranking – Eddie Bernice Johnson
17. Committee on Small Business: Chair – Sam Graves, Ranking – Nydia Velazquez
18. Committee on Transportation and Infrastructure: Chair – John Mica, Ranking – Nick Rahall, II
19. Committee on Veterans' Affairs: Chair – Jeff Miller, Ranking – Bob Filner
20. Committee on Ways and Means: Chair – Dave Camp, Ranking – Sander Levin

Senate Committees

1. Agriculture, Nutrition, and Forestry: Chair – Debbie Stabenow, Ranking – Pat Roberts
2. Appropriations: Chair – Daniel Inouye, Ranking – Thad Cochran
3. Armed Services: Chair – Carl Levin, Ranking – John McCain
4. Banking, Housing, and Urban Affairs: Chair – Tim Johnson, Ranking – Richard Shelby
5. Budget: Chair – Kent Conrad, Ranking – Jeff Sessions

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6. Commerce, Science, and Transportation: Chair – John Rockefeller, Ranking – Kay Bailey Hutchison
7. Energy and Natural Resources: Chair – Jeff Bingaman, Ranking – Lisa Murkowski
8. Environment and Public Works: Chair – Barbara Boxer, Ranking – James Inhofe
9. Finance: Chair – Max Baucus, Ranking – Orrin Hatch
10. Foreign Relations: Chair – John Kerry, Ranking – Richard Lugar
11. Health, Education, Labor, and Pensions: Chair – Tom Harkin, Ranking – Michael Enzi
12. Homeland Security and Governmental Affairs: Chair – Joseph Lieberman, Ranking – Susan Collins
13. Judiciary: Chair – Patrick Leahy, Ranking – Charles Grassley
14. Rules and Administration: Chair – Charles Schumer, Ranking – Lamar Alexander
15. Small Business and Entrepreneurship: Chair – Mary Landrieu, Ranking – Olympia Snowe
16. Veterans' Affairs: Chair – Patty Murray, Ranking – Richard Burr

LIST OF PLAYERS

Senators

Name in **Bold** denotes a Leader; * denotes a Committee Chair

Daniel K. Akaka	Al Franken	Barbara A. Mikulski
Lamar Alexander	Kirsten E. Gillibrand	Jerry Moran
Kelly Ayotte	Lindsey Graham	Lisa Murkowski
John Barrasso	Chuck Grassley	*Patty Murray
*Max Baucus	Kay Hagan	Benjamin E. Nelson
Mark Begich	*Tom Harkin	Bill Nelson
Michael F. Bennet	Orrin G. Hatch	Rand Paul
*Jeff Bingaman	John Hoeven	Rob Portman
Richard Blumenthal	Kay Bailey Hutchison	Mark L. Pryor
Roy Blunt	James M. Inhofe	Jack Reed
John Boozman	*Daniel K. Inouye	Harry Reid
*Barbara Boxer	Johnny Isakson	James E. Risch
Scott P. Brown	Mike Johanns	Pat Roberts
Sherrod Brown	Ron Johnson	*John D. Rockefeller IV
Richard Burr	*Tim Johnson	Marco Rubio
Maria Cantwell	*John F. Kerry	Bernard Sanders
Benjamin L. Cardin	Mark Steven Kirk	*Charles E. Schumer
Thomas R. Carper	Amy Klobuchar	Jeff Sessions
Robert P. Casey Jr.	Herb Kohl	Jeanne Shaheen
Saxby Chambliss	Jon Kyl	Richard C. Shelby
Daniel Coats	*Mary L. Landrieu	Olympia J. Snowe
Tom Coburn	Frank R. Lautenberg	*Debbie Stabenow
Thad Cochran	*Patrick J. Leahy	Jon Tester

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Susan M. Collins
 *Kent Conrad
 Christopher Coons
 Bob Corker
 John Cornyn
 Mike Crapo
 Jim DeMint
Richard Durbin
 John ENSIGN
 Michael B. ENZI
 Dianne Feinstein

Mike Lee
 *Carl Levin
 *Joseph I. Lieberman
 Richard G. Lugar
 Joe Manchin III
 John McCain
 Claire McCaskill
Mitch McConnell
 Robert Menendez
 Jeff Merkley

John Thune
 Pat Toomey
 Mark Udall
 Tom Udall
 David Vitter
 Mark R. Warner
 Jim Webb
 Sheldon Whitehouse
 Roger Wicker
 Ron Wyden

Representatives

Name in **Bold** denotes a Leader; * denotes a Committee Chair

Gary L. Ackerman
 Sandy Adams
 Robert B. Aderholt
 W. Todd Akin
 Rodney Alexander
 Jason Altmire
 Justin Amash
 Robert E. Andrews
 Steve Austria
 Joe Baca
 Michele Bachmann
 *Spencer Bachus
 Tammy Baldwin
 Lou Barletta
 John Barrow
 Roscoe G. Bartlett
 Joe Barton
 Charlie Bass
 Karen Bass
 Xavier Becerra
 Dan Benishek
 Rick Berg
 Shelley Berkley
 Howard L. Berman
 Judy Biggert
 Brian P. Bilbray
 Gus M. Bilirakis
 Rob Bishop
 Sanford D. Bishop Jr.
 Timothy H. Bishop
 Diane Black
 Marsha Blackburn
 Earl Blumenauer
John A. Boehner
 *Jo Bonner
 Mary Bono Mack
 Dan Boren
 Leonard L. Boswell
 Charles W. Boustany Jr.

Chris Gibson
 Gabrielle Giffords
 Phil Gingrey
 Louie Gohmert
 Charles A. Gonzalez
 Bob Goodlatte
 Paul Gosar
 Trey Gowdy
 Kay Granger
 *Sam Graves
 Tom Graves
 Al Green
 Gene Green
 Tim Griffin
 Morgan Griffith
 Raúl M. Grijalva
 Mike Grimm
 Frank Guinta
 Brett Guthrie
 Luis V. Gutierrez
 *Ralph M. Hall
 Colleen Hanabusa
 Richard Hanna
 Gregg Harper
 Andy Harris
 Vicky Hartzler
 Alcee L. Hastings
 *Doc Hastings
 Nan Hayworth
 Joe Heck
 Martin Heinrich
 Dean Heller
 Jeb Hensarling
 Wally Herger
 Jaime Herrera
 Brian Higgins
 James A. Himes
 Maurice D. Hinchey

Richard Nugent
 Devin Nunes
 Alan Nunnelee
 Pete Olson
 John W. Olver
 William L. Owens
 Steven Palazzo
 Frank Pallone Jr.
 Bill Pascrell Jr.
 Ed Pastor
 Ron Paul
 Erik Paulsen
 Donald M. Payne
 Steve Pearce
Nancy Pelosi
 Mike Pence
 Ed Perlmutter
 Gary C. Peters
 Collin C. Peterson
 Thomas E. Petri
 Chellie Pingree
 Joseph R. Pitts
 Todd Russell Platts
 Ted Poe
 Jared Polis
 Mike Pompeo
 Bill Posey
 David E. Price
 Tom Price
 Ben Quayle
 Mike Quigley
 Nick J. II Rahall
 Charles B. Rangel
 Tom Reed
 Denny Rehberg
 David G. Reichert
 Jim Renacci
 Reid Ribble
 Laura Richardson

2011 Draft Kit

Kevin Brady
 Robert A. Brady
 Bruce L. Braley
 Mo Brooks
 Paul C. Broun
 Corrine Brown
 Vern Buchanan
 Larry Bucshon
 Ann Marie Buerkle
 Michael C. Burgess
 Dan Burton
 G. K. Butterfield
 Ken Calvert
 *Dave Camp
 John Campbell
 Francisco Canseco
Eric Cantor
 Shelley Moore Capito
 Lois Capps
 Michael E. Capuano
 Dennis A. Cardoza
 Russ Carnahan
 John Carney
 André Carson
 John R. Carter
 Bill Cassidy
 Kathy Castor
 Steve Chabot
 Jason Chaffetz
 Ben Chandler
 Judy Chu
 David Cicilline
 Hansen Clarke
 Yvette D. Clarke
 Wm. Lacy Clay
 Emanuel Cleaver
 James E. Clyburn
 Howard Coble
 Mike Coffman
 Steve Cohen
 Tom Cole
 K. Michael Conaway
 Gerald E. Connolly
 John Conyers Jr.
 Jim Cooper
 Jim Costa
 Jerry F. Costello
 Joe Courtney
 Chip Cravaack
 Rick Crawford
 Ander Crenshaw
 Mark S. Critz
 Joseph Crowley
 Henry Cuellar

Rubén Hinojosa
 Mazie K. Hirono
 Tim Holden
 Rush D. Holt
 Michael M. Honda
Steny H. Hoyer
 Tim Huelskamp
 Bill Huizenga
 Randy Hultgren
 Duncan Hunter
 Rob Hurt
 Jay Inslee
 Steve Israel
 *Darrell E. Issa
 Jesse L. Jackson Jr
 Lee, Sheila Jackso
 Lynn Jenkins
 Bill Johnson
 Eddie Bernice Johnson
 Henry C. "Hank" Johnson Jr.
 Sam Johnson
 Timothy V. Johnson
 Walter B. Jones
 Jim Jordan
 Marcy Kaptur
 Bill Keating
 Mike Kelly
 Dale E. Kildee
 Ron Kind
 *Peter T. King
 Steve King
 Jack Kingston
 Adam Kinzinger
 Larry Kissell
 *John Kline
 Dennis J. Kucinich
 Raul Labrador
 Doug Lamborn
 Leonard Lance
 Jeff Landry
 James R. Langevin
 James Lankford
 Rick Larsen
 John B. Larson
 Tom Latham
 Steven C. LaTourette
 Robert E. Latta
 Barbara Lee
 Sander M. Levin
 *Jerry Lewis
 John Lewis
 Daniel Lipinski
 Frank A. LoBiondo

Cedric Richmond
 David Rivera
 Silvestre Reyes
 Scott Rigell
 Martha Roby
 David P. Roe
 Harold Rogers
 Mike Rogers (AL)
 Mike Rogers (MI)
 Dana Rohrabacher
 Todd Rokita
 Thomas J. Rooney
 Peter J. Roskam
 *Ileana Ros-Lehtinen
 Dennis Ross
 Mike Ross
 Steven R. Rothman
 Lucille Roybal-Allard
 Edward R. Royce
 C. A. Dutch Ruppersberger
 Jon Runyan
 Bobby L. Rush
 *Paul Ryan
 Tim Ryan
 Linda T. Sánchez
 Loretta Sanchez
 John P. Sarbanes
 Steve Scalise
 Janice D. Schakowsky
 Adam B. Schiff
 Bobby Schilling
 Jean Schmidt
 Aaron Schock
 Kurt Schrader
 Allyson Y. Schwartz
 David Schweikert
 Austin Scott
 David Scott
 Robert C. "Bobby" Scott
 Tim Scott
 F. James Sensenbrenner Jr.
 José E. Serrano
 Pete Sessions
 Terri Sewell
 Brad Sherman
 John Shimkus
 Heath Shuler
 Bill Shuster
 Michael K. Simpson
 Albio Sires
 Louise McIntosh Slaughter
 Adam Smith
 Adrian Smith
 Christopher H. Smith

Alex B. Mitchell & Brian Rock

John Abney Culberson	David Loeb sack	*Lamar Smith
Elijah E. Cummings	Zoe Lofgren	Steve Southerland
Danny K. Davis	Billy Long	Jackie Speier
Geoff Davis	Nita M. Lowey	Fortney Pete Stark
Susan A. Davis	*Frank D. Lucas	Cliff Stearns
Peter A. DeFazio	Blaine Luetkemeyer	Steve Stivers
Diana DeGette	Ben Ray Lujan	Marlin Stutzman
Rosa L. DeLauro	Cynthia M. Lummis	John Sullivan
Jeffrey Denham	*Daniel E. Lungren	Betty Sutton
Charles W. Dent	Stephen F. Lynch	Lee Terry
Scott DesJarlais	Carolyn McCarthy	Bennie G. Thompson
Theodore E. Deutch	Kevin McCarthy	Glenn Thompson
Mario Diaz-Balart	Michael T. McCaul	Mike Thompson
Norman D. Dicks	Tom McClintock	Mac Thornberry
John D. Dingell	Betty McCollum	Patrick J. Tiberi
Lloyd Doggett	Thaddeus G. McCotter	John F. Tierney
Robert Dold	Jim McDermott	Scott Tipton
Joe Donnelly	James P. McGovern	Paul Tonko
Michael F. Doyle	Patrick T. McHenry	Edolphus Towns
*David Dreier	Mike McIntyre	Niki Tsongas
Sean Duffy	*Howard P. "Buck" McKeon	Michael R. Turner
Jeffrey Duncan	David McKinley	*Fred Upton
John J. Duncan Jr.	Rodgers, Cathy McMorris	Chris Van Hollen
Donna F. Edwards	Jerry McNERney	Nydia M. Velázquez
Keith Ellison	Connie Mack	Peter J. Visclosky
Renee Ellmers	Carolyn B. Maloney	Tim Walberg
Jo Ann Emerson	Donald A. Manzullo	Greg Walden
Eliot L. Engel	Kenny Marchant	Joe Walsh
Anna G. Eshoo	Tom Marino	Timothy J. Walz
Blake Farenthold	Edward J. Markey	Debbie Wasserman-Schultz
Sam Farr	Jim Matheson	Maxine Waters
Chaka Fattah	Doris O. Matsui	Melvin L. Watt
Bob Filner	Pat Meehan	Henry A. Waxman
Stephen Fincher	Gregory W. Meeks	Daniel Webster
Mike Fitzpatrick	*John L. Mica	Anthony D. Weiner
Jeff Flake	Michael H. Michaud	Peter Welch
Chuck Fleischmann	Brad Miller	Allen West
John Fleming	Candice S. Miller	Lynn A. Westmoreland
Bill Flores	Gary G. Miller	Ed Whitfield
J. Randy Forbes	George Miller	Frederica Wilson
Jeff Fortenberry	*Jeff Miller	Joe Wilson
Virginia Foxx	Gwen Moore	Robert J. Wittman
Barney Frank	James P. Moran	Frank R. Wolf
Trent Franks	Michael Mulvaney	Steve Womack
Rodney P. Frelinghuysen	Christopher S. Murphy	Rob Woodall
Marcia L. Fudge	Tim Murphy	Lynn C. Woolsey
Elton Gallegly	Sue Wilkins Myrick	David Wu
John Garamendi	Jerrold Nadler	John A. Yarmuth
Cory Gardner	Grace F. Napolitano	Kevin Yoder
Scott Garrett	Richard E. Neal	C.W. Bill Young
Jim Gerlach	Randy Neugebauer	Don Young
Bob Gibbs	Kristi Noem	Todd Young

2011 Draft Kit

REGISTRATION

Send the information below (in .doc or PDF) to
FantasyLawEditor@gmail.com by March 11, 2011 at 10:00 p.m.

League Name:

Number of Teams in League:

Commissioner Email:

Team 1

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

Team 2

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

Team 3

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

Team 4

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

Team 5

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

Team 6

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

Team 7

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

Team 8

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

Team 9

Team Name:

Leader –

Senator –

Senator –

Senator –

Representative –

Representative –

Representative –

Representative –

“Rookie” Senator –

“Rookie” Representative –

FANTASYLAW RECAP

1. Find friends and form a league not smaller than five teams and not larger than nine teams by following the draft rules laid out in the “Draft” section.
2. To aid in drafting, team Owners may consult the list of Members of Congress, the Roster requirements, and the Rules.
3. Team owners in a league appoint a Commissioner to gather the draft results and register their league using the Registration form.
4. Once the Commissioner receives confirmation that the league is registered, all Team owners can view their team on a daily-basis, and see weekly scoring updates every Monday by accessing their league page on the FantasyLaw website, fantasylaw.org
5. Team owners may add and drop players on their team by utilizing the add/drop request form on the FantasyLaw website, fantasylaw.org

The FantasyLaw season begins Monday, March 14 and ends toward the end of December, 2011 (the end of the first session of the 112th Congress).

JL