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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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Ross E. Davies, editor. *Law & Commentary* operates on the same terms as the *Journal of Law*. Please write to us at editors@journaloflaw.us, and visit www.journaloflaw.us.

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.

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[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).

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

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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/plannedobsolescence/ (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 positive, 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

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[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.

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. *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.

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[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.

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[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. Pena*;[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. Pena, 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 behaviorial 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

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[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 case-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

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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]

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[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" approaches[41] 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

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[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]

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[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

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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 *de*stabilizing 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]

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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,

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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. Mississip-*

[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. Pena*[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. Pena, 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,

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[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]

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[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:

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[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]

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[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 States . . . .[82]

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-

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[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

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[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

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[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 AMERCA 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] Commentators[108] 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

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[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 ruling[122]:

> 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

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[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

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[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

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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-

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[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, *Yarbrough* 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 implicated[143]:

> 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

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[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-

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[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*'s[155] 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 issue[158] 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 scrutiny[161] – 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

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[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. Pena*,[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. Pena, 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

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[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 ruling[184] – 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 Court[185] 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

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[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

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[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]

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[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-

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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]

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[202] Adarand Constructors, Inc. v. Pena, 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 approval[216] – it seems more than likely that the Court's peculiar compromise at an "individualized consideration"

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[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 Distrinct 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 decision[226] 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,

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[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. *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 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 Schepsle 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 in 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. ▣