Buchanan v. Warley and the Limits of Substantive Due Process as Antidiscrimination Law*

Introduction

If you were to ask Americans when the Supreme Court first recognized that segregation by law offended the Constitution, most, if not all, would point to *Brown v. Board of Education*.[1] However, nearly forty years before

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1. 347 U.S. 483 (1954). Or perhaps they would point to one of the earlier cases invalidating various forms of segregated higher education: *McLaurin v. Oklahoma State Regents*, 339 U.S. 637

Brown, in 1917, the Court struck down a Louisville, Kentucky ordinance mandating residential segregation in *Buchanan v. Warley*.[2] The Court did not rely on the Equal Protection Clause. In the heart of the *Lochner* Era, when libertarianism enjoyed its strongest position in American constitutional law, the Court employed substantive due process to hold that the law violated African-Americans' property rights.

Despite *Buchanan*, residential segregation persisted because of other causes: restrictive covenants,[3] facially neutral zoning laws,[4] violence,[5] and a simple refusal to sell or lease to blacks in white neighborhoods.[6] *Buchanan*'s defenders, who explicitly or implicitly defend substantive due process, view the resistance to *Buchanan* as having little bearing on the efficacy of substantive due process. They argue that substantive due process could have brought an end to more discrimination but for the NAACP's limited legal resources in the *Lochner* Era.

In this Note, I argue that substantive due process makes for problematic antidiscrimination law. To illustrate this point, I examine the role of substantive due process and its relationship to the struggle for civil rights in the years immediately following *Buchanan*. Although Louisville's discriminatory ordinance fell, relying on substantive due process for antidiscrimination principles had consequences.

Part I of this Note provides background; it briefly outlines the relevant libertarian and segregationist jurisprudence at conflict in *Buchanan* and covers the history of residential segregation ordinances from their inception in Baltimore through the Supreme Court's decision in *Buchanan*. Part II examines several scholars' perspectives on *Buchanan*. In Part III, I present my core criticisms of substantive due process as antidiscrimination law. I argue, in subpart III(A), that while the libertarian thrust of the doctrine proved helpful in combatting discrimination via statute, its emphasis on contractual freedom furthered the restrictive covenants that perpetuated residential segregation. In subpart III(B), I contend that theoretical weaknesses in substantive due process aided cities that enacted segregation ordinances after *Buchanan*. Finally, in Part IV, I continue my criticisms as I attempt to sketch the foundations of a social history of *Buchanan* that examines the role of and *Buchanan's* impact on socioeconomic class within the contemporary African-American community. I argue that *Buchanan* and its emphasis on property rights dovetailed with certain African-

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(1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (per curiam); or *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

2. 245 U.S. 60 (1917).

3. *See infra* notes 131–33 and accompanying text.

4. *See infra* notes 131–33 and accompanying text.

5. *See infra* notes 257–61 and accompanying text.

6. Douglas S. Massey, *Racial Discrimination in Housing: A Moving Target*, 52 SOC. PROBLEMS 148, 149 (2005).

American social institutions and forces, such that all but the direst legal needs of working-class blacks were left unattended. In contrast, the legal and economic needs of middle- and upper-class blacks received a relatively greater deal of attention during this era. Thus, I conclude that the events following *Buchanan* show that while substantive due process can, in some cases, provide relief from discriminatory legislation, the doctrine as a whole has significant weaknesses as antidiscrimination law.

I. Might *Lochner* Provide Relief from *Plessy*?: Libertarian Jurisprudence and Early Residential Segregation Ordinances

To understand *Buchanan* and the place residential segregation ordinances occupied in the American constitutional landscape, some background helps. This Part begins by discussing two major strands of early-twentieth-century constitutional thought, which are both now widely disparaged. First, I discuss *Plessy v. Ferguson*,[7] which represents an anemic interpretation of the Fourteenth Amendment through its approval of state-mandated segregation. Next, I examine *Lochner v. New York*,[8] an emblem of the Court's robust reading of the Due Process Clause as protecting many economic activities from state regulation. Finally, after discussing how residential segregation ordinances arose in the early 1910s and brought out the tensions between these two lines of cases, I consider how the competing legal doctrines came to bear on the ordinance in *Buchanan*.

A. Plessy

Plessy enjoys a firm place in America's constitutional anticanon.[9] After the Civil War, conditions for black Americans improved; they voted and were elected to office in the South, and they had opportunities to attend public schools.[10] These gains began to deteriorate in the 1880s. In 1883, the Supreme Court invalidated the Civil Rights Act of 1875, which had empowered the federal government to prosecute race discrimination in public accommodations and by common carriers.[11] Segregated railways increased by the 1890s, and the practice once prohibited by federal law was mandated by state legislatures.[12]

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7. 163 U.S. 537 (1896).

8. 198 U.S. 45 (1905).

9. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

10. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 10 (2004).

11. The Civil Rights Cases, 109 U.S. 3, 9, 26 (1883).

12. KLARMAN, *supra* note 10, at 8.

In 1890, Louisiana enacted a law requiring segregated railroad cars.[13] A committee of upper-class blacks brought a test case against the statute.[14] The Supreme Court held the law did not violate the Fourteenth Amendment's Equal Protection Clause.[15] Justice Brown, writing for the Court, contended that the Amendment ensured "absolute equality . . . before the law" but was not "intended . . . to enforce social, as distinguished from political equality."[16] Segregation statutes were a "generally, if not universally, recognized" exercise of states' police powers.[17] The Court denied that the law itself "stamp[ed] the colored race with a badge of inferiority," instead asserting that such a badge only resulted from blacks "choos[ing] to put that construction upon it."[18] Justice Harlan dissented. He looked beyond the fact that the law imposed a prohibition on both blacks and whites and noted that its true "purpose . . . [was] to exclude colored people from coaches occupied by or assigned to white persons."[19] He thus argued that the Constitution did not permit the state to take race into account when a right such as this was at stake.[20]

Plessy ushered in an era where the law condoned "separate but equal" public accommodations.[21] Moreover, when race relations were at issue, "the state's interest in regulating health, safety, and morals (the so-called police power) could sometimes trump individual liberty interests."[22] Segregation could be justified under the police power as a means of quelling interracial violence and inhibiting miscegenation.[23]

B. Lochner

Besides cases sanctioning shamefully racist moments in American history, few Supreme Court decisions have met as wide of disapproval as *Lochner*.[24] New York had enacted a labor law prohibiting bakery owners from having employees work for more than sixty hours a week or ten hours

13. Plessy v. Ferguson, 163 U.S. 537, 540 (1896).

14. KLARMAN, *supra* note 10, at 8.

15. *Plessy*, 163 U.S. at 548.

16. *Id.* at 540, 543–44.

17. *Id.* at 544.

18. *Id.* at 551.

19. *Id.* at 557 (Harlan, J., dissenting).

20. *Id.* at 554.

21. *See* Comment, *Unconstitutionality of Segregation Ordinances*, 27 YALE L.J. 393, 394 (1918) (describing "fruitless attacks" on segregation in education and public accommodation).

22. KLARMAN, *supra* note 10, at 24.

23. *Id.*

24. For example, John Hart Ely, writing before recent attempts to rehabilitate *Lochner*, commented that *Lochner* and its progeny in the early twentieth century "are now universally acknowledged to [be] constitutionally improper." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980); *see also* Greene, *supra* note 9, at 380 (identifying *Lochner* as another member of the constitutional anticanon).

a day.[25] The Court in *Lochner* held that the statute violated the employer's and the employee's rights to contract, found in the Fourteenth Amendment Due Process Clause.[26] State exercises of the police power had to be "fair, reasonable and appropriate" as opposed to "unreasonable, unnecessary and arbitrary interferences with the right of the individual to his personal liberty."[27] Because there was no contention that bakers had diminished capacity to contract vis-à-vis other tradespeople and because public welfare, safety, and morals were not impacted by the regulation, New York did not validly exercise its police power.[28] Baking, the Court stated, was not so unhealthy as to warrant state interference.[29]

Justice Harlan, dissenting, also recognized a right to contract.[30] However, he argued that the act was a permissible interference with the liberty of contract to protect bakery workers' health.[31] To support this conclusion, he cited scientific studies about the health of bakery workers.[32] In contrast, Justice Holmes vigorously dissented, contending that the majority decided the case under a laissez-faire "economic theory which a large part of the country does not entertain."[33]

Lochner ushered in an era in which the Court significantly curtailed the states' regulatory capacities.[34] Cass Sunstein puts it simply: "[M]ost forms of redistribution and paternalism were ruled out."[35]

C. Libertarian Tensions

The philosophical underpinnings of *Lochner* and *Plessy* are arguably in tension. *Lochner* can, quite fairly, be described as libertarian; it endorses a "view of the proper role of government [as] limited to provision of the basic conditions of personal security, narrowly defined, and enforcement of contracts voluntarily entered, subject only to narrow exceptions for fraud

25. Lochner v. New York, 198 U.S. 45, 45–46, 46 n.1 (1905).

26. *Id.* at 53.

27. *Id.* at 56.

28. *Id.* at 57.

29. *Id.* at 59.

30. *See id.* at 65 (Harlan, J., dissenting) ("[T]he State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to every one . . . .").

31. *Id.* at 69–70.

32. *Id.* at 70–71.

33. *Id.* at 75 (Holmes, J., dissenting).

34. *See* Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 877 (1987) (commenting that the *Lochner* Court "sharp[ly] limit[ed] . . . permissible government ends").

35. *Id.* However, legal protections for women and children at times survived courts' scrutiny. *See* State v. Muller, 85 P. 855, 855, 857 (Or. 1906) (upholding a maximum hours law for women because women and children were wards of the state), *aff'd* 208 U.S. 412 (1908). *But see* Hammer v. Dagenhart, 247 U.S. 251, 268 n.1, 271–72, 277 (1918) (striking down federal child-labor legislation as a violation of the Commerce Clause).

and coercion, again narrowly defined."[36] In contrast, *Plessy*, decided less than a decade earlier, doesn't fall under the libertarian label.[37] There, the Court found libertarian freedom of contract principles unavailing[38] and permitted racist whites to avoid bargaining with the railroad for segregated accommodations.[39] Thus, *Plessy* endorsed a robust view of government power.

Lochner's libertarianism threw into question state uses of the police power to enforce racial boundaries.[40] *Plessy* clearly controlled the question of segregated railway cars, via principles of stare decisis, but *Lochner* unsettled other questions about the government's power to make racially restrictive laws. The question remained as to how other issues of racial segregation, restricting blacks' ability to contract in the market, would fare in view of the conflicting precedents that were seemingly in tension. Residential segregation ordinances, which first arose in the early 1910s, would allow the Court to answer.

D. Residential Segregation Ordinances

1. Baltimore Beginnings.—Baltimore enacted the first residential segregation ordinance in December 1910.[41] African-Americans had largely resided in back alleys in dark and dirty conditions.[42] Black demand for housing was stoked when the Baltimore & Ohio Railroad acquired many black homes through condemnation, and the supply of housing in previously middle-class white neighborhoods increased as public transportation spurred whites to move to the suburbs.[43] Thus, many blacks saved up funds and moved into Baltimore's Druid Hill area.[44]

Their new white neighbors viewed these blacks as invaders and vandalized their homes.[45] Eventually, a tacit understanding developed: blacks would be left undisturbed, so long as they did not reside east of

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36. Mark Tushnet, Plessy v. Ferguson *in Libertarian Perspective*, 16 L. & PHIL. 245, 245 (1997).

37. *Id.*

38. *See* Plessy v. Ferguson, 163 U.S. 537, 545 (1896) (stating that antimiscegenation laws interfered with freedom of contract but were nonetheless a permissible exercise of the police power).

39. Tushnet, *supra* note 36, at 249.

40. *See id.* at 248–49 (suggesting that *Lochner*'s theory of liberty of contract could bar railroad segregation legislation as an impermissible interference with the right of the railroad and African-Americans to contract).

41. 1 CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, 1909-1920, at 183 (1967).

42. *Opinion—Baltimore*, 7 CRISIS 69, 70 (1913).

43. W. Ashbie Hawkins, *A Year of Segregation in Baltimore*, 3 CRISIS 27, 27 (1911). Hawkins, a black lawyer, brought suit against the ordinance. *See id.*

44. *Editorial*, CRISIS, Nov. 1910, at 10, 11.

45. Hawkins, *supra* note 43.

Druid Hill Avenue.[46] This agreement broke in June 1910, when a Yale-educated black lawyer, "in good standing at the bar," moved east of Druid Hill Avenue to McCulloh Street.[47] White citizens began to agitate, and an opportunistic Baltimore city councillor proposed an ordinance prohibiting a black person from moving into any residence on a block that was at least 51 percent white and vice versa.[48] It did not restrict the ownership or sale of property.[49] In addition to black opposition, white socialists,[50] real estate brokers,[51] and property owners[52] spoke out against the measure. A trial court struck down this first ordinance on a technicality for being "inaccurately drawn."[53]

Baltimore's City Council enacted a new ordinance in May 1911.[54] Unlike the first, this ordinance prohibited a white person from moving to a block *entirely* occupied by blacks and vice versa; again, it placed no absolute bar on ownership.[55] In November 1911, W. Ashbie Hawkins, a black attorney, commented that the new ordinance had "caused little hardship to any Negro"; white property owners who couldn't find buyers or tenants felt most of the burden.[56]

Lochnerian property rights were not a serious concern for Baltimore's white majority. Warren Hunting, a doctoral student at Johns Hopkins,[57] outlined the constitutional issues, noting that the ordinance presented a much harder question than segregation in schools or public transportation.[58] The critical question for Hunting was whether the law created a permissible race "distinction," as in *Plessy*, or caused unconstitutional "discrimination."[59] He found residential segregation indistinguishable from

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46. *Id.* at 28.

47. *Id.*

48. *Id.* at 28–29.

49. Warren B. Hunting, *The Constitutionality of Race Distinctions and the Baltimore Negro Segregation Ordinance*, 11 COLUM. L. REV. 24, 24 (1911).

50. *Opinion*, CRISIS, Nov. 1910, at 7, 7.

51. Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 302 (1983).

52. *Id.*

53. Hawkins, *supra* note 43, at 29; *see also* Power, *supra* note 51, at 303–04 (speculating that the ordinance fell because its title failed to describe its subject, a violation of a city charter provision requiring descriptive titles).

54. Hawkins, *supra* note 43, at 30.

55. *See* A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 812.

56. Hawkins, *supra* note 43, at 30.

57. WARREN B. HUNTING, THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION iii (1919).

58. Hunting, *supra* note 49.

59. *Id.* at 28. Hunting cites the law prohibiting blacks from serving on juries struck down by the Supreme Court in *Strauder v. West Virginia*, 100 U.S. 303, 310–12 (1880), as an example of "discrimination." Hunting, *supra* note 49, at 28. Hunting's analysis, for the most part, seems

other, permissible forms of segregation and thus subject to rational basis review as an exercise of the police power.[60] He framed the right curtailed by the police power quite narrowly as "the right to live where one wants to."[61] Although the Baltimore ordinance did not directly prohibit black ownership on white streets (and vice versa), Hunting's narrow framing gives short shrift to another critical property right more directly curtailed by the ordinance: the right to lease one's property. This right, according to Hunting, was only "incidentally impaired" when an owner on a black block could only lease to blacks.[62]

A challenge to the ordinance reached Maryland's highest court in 1913.[63] Like Hunting's article, the court's constitutional analysis proceeded through the rational basis test triggered by exercises of the police power.[64] The court took judicial notice of the racial tension in Baltimore to hold that the ordinance was not unreasonable.[65] Other than oblique acknowledgements that the police power could interfere with property rights,[66] the court's analysis under the *federal* Constitution ignored property-rights concerns.[67] However, the ordinance violated *Maryland's* constitution because it interfered with a *vested* property right, as it applied retroactively.[68] For example, a black person who owned a home on a white block before the ordinance passed could not move into that home under the terms of the ordinance.[69]

In sum, the first segregation ordinances enacted in Baltimore failed to trigger significant property-rights concerns. Although the country was well into the *Lochner* Era by the early 1910s, the substantive due process jurisprudence did not bear upon informed local citizens, like Hunting, or upon Maryland's highest court, when considering residential segregation

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evenhanded by modern standards. He contends that *Plessy* was a "depart[ure] from the spirit of *Strauder*." *Id.* at 26–28.

60. *See* Hunting, *supra* note 49, at 28–29.

61. *Id.* at 31.

62. *Id.* at 33.

63. State v. Gurry, 88 A. 546, 547 (Md. 1913).

64. *See id.* at 551 ("If, then, [the police] power is inherent in every state for the preservation of its general welfare, is the ordinance in question an unreasonable exercise of it, and are its provisions so arbitrary and oppressive that they amount to the invasion of a person's constitutional rights?").

65. *See id.* (remarking that the counsel for the black defendant "acknowledged . . . friction resulting" from racially mixed blocks).

66. *See, e.g.*, *id.* at 550 (noting that "[p]roperty . . . is held subject to those general regulations which are necessary for the common good and general welfare").

67. *See id.* at 549–50.

68. *Id.* at 552–53. The NAACP argued that in reaching this holding, the Court of Appeals "took pains to point out how an ordinance could be drawn" without violating the state constitution. NAACP, *Segregation*, 6 CRISIS 241, 241 (1913).

69. *Gurry*, 88 A. at 552.

ordinances. Instead, *Plessy*'s police power analysis provided their doctrinal framework.

2. Expansion to Louisville.—After Baltimore, other cities followed suit with their own residential segregation ordinances.[70] Louisville enacted an ordinance on May 11, 1914.[71] The ordinance, according to the NAACP, was "carefully drawn."[72] It provided that a black person could not move in to a home on a majority white block and vice versa.[73] Further, it was not retroactive.[74]

The post-*Plessy* police powers jurisprudence permeated the language of the ordinance. For example, the title of the ordinance not only referenced preserving the "public peace" and promoting the "general welfare,"[75] but also acknowledged the rational basis standard of review by labeling the segregation mandate as composed of "reasonable provisions."[76] Louisville quickly became the "strategic point" in the NAACP's battle against segregation ordinances.[77]

A local NAACP chapter soon organized and brought a test case against the ordinance.[78] Charles Buchanan, a white man, brought suit against William Warley, a black man, for specific performance of an agreement to sell Warley a home on a white street.[79] To test the ordinance, the parties inserted a clause into the agreement that allowed Warley to refuse to accept

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70. These cities included Ashland and Richmond, Virginia, *see* Hopkins v. City of Richmond, 86 S.E. 139, 141 (Va. 1915) (per curiam) (holding the ordinances constitutional), Atlanta, Georgia, *see* Carey v. City of Atlanta, 84 S.E. 456, 456, 460 (Ga. 1915) (finding that the ordinance violated property rights found in the Due Process Clause), and Winston, North Carolina, *see* State v. Darnell, 81 S.E. 338, 340 (N.C. 1914) (holding that the ordinance exceeded the state legislature's grant of authority to the municipality). The segregation ordinances arising between Baltimore's and Louisville's are not crucial to this Note, but for a detailed account of these cities' ordinances see Higginbotham et al., *supra* note 55, at 809–20.

71. C.B. Blakey, *History By Attorney Blakey*, *in* C.H. PARRISH ET AL., THE HISTORY OF LOUISVILLE SEGREGATION CASE AND THE DECISION OF THE SUPREME COURT 10, 10, *microformed on* Black Studies Research Sources, Papers of the NAACP, Part 5: Campaign Against Residential Segregation, 1914–1955, Reel 4, Slide 000794 (Univ. Publ'ns of Am.) [hereinafter Papers of the NAACP, Part 5].

72. NAACP, *Segregation*, 8 CRISIS 236, 236 (1914) (making this assertion in September 1914).

73. Buchanan v. Warley, 245 U.S. 60, 70–71 (1917).

74. *See id.* at 71–72 (providing that a white person who leased or occupied a home on a majority black block before the ordinance passed could continue to occupy the home, but if a black person subsequently leased or occupied the house, it could not be later leased or occupied by a white person, and vice versa).

75. Blakey, *supra* note 71.

76. *Id.*

77. NAACP, *supra* note 72.

78. *Id.*

79. *Buchanan*, 245 U.S. at 69–70; *see also* Blakey, *supra* note 71, at 11 (identifying the parties by race).

property he could not legally occupy, and Warley asserted the clause and the ordinance as a defense.[80]

Warley was a notable black citizen of Louisville. A product of the city's segregated schools, he graduated from State University in Louisville.[81] After college, he worked for the post office, then a high-status position in the black community, and founded a newspaper, which he used to battle racism.[82] He served as the Louisville NAACP's second president and remained on its executive committee once his term expired.[83] According to Russell Wigginton, "finding the right buyer [for the test case] was . . . critical. . . . [T]he purchaser needed to have the respect of the black community and the resiliency to handle potential defeat."[84] Warley fit the bill.

The trial court held that the ordinance was valid and dismissed Buchanan's suit.[85] The Kentucky Court of Appeals affirmed in a case combining the appeals of *Buchanan* and a criminal prosecution under the law.[86] In a unanimous opinion, Kentucky's high court provided a full-throated defense of the state's ability to enforce racial boundaries through its police power. The principle of *jus disponendi*, the "right of disposing,"[87] had "little place in modern jurisprudence."[88] In contrast to the libertarian principles found in *Lochner*, the court announced that "private property is held subject to the *unchallenged* right and power of the state to impose . . . reasonable regulations . . . for the public welfare."[89] Not only did the court find the ordinance reasonable based on evidence of "racial discord" in the record; it also argued that the segregation ordinance would promote so-called "mutual helpfulness and racial friendship."[90]

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80. *Buchanan*, 245 U.S. at 69–70.

81. Russell Wigginton, *"But He Did What He Could": William Warley Leads Louisville's Fight for Justice, 1902-1946*, 76 FILSON HIST. Q. 427, 432–33 (2002).

82. *Id.* at 433.

83. *See* PARRISH ET AL., *supra* note 71, at 3–5.

84. Wigginton, *supra* note 81, at 437. Unfortunately, the files of the NAACP's national office regarding *Buchanan* were not archived, and the Louisville branch's files contain scant information on Warley, so it is difficult to gain a comprehensive understanding of how the NAACP selected Warley as a party. *See* August Meier, *Introduction* to UNIV. PUBL'NS OF AM., A GUIDE TO THE MICROFILM EDITION OF PAPERS OF THE NAACP PART 5: THE CAMPAIGN AGAINST RESIDENTIAL SEGREGATION, 1914–1955 xi, xi (Randolph Boehm & Martin Schipper eds., 1986) (explaining the papers' scope of coverage of *Buchanan*).

85. Blakey, *supra* note 71, at 11.

86. Harris v. City of Louisville, 177 S.W. 472, 473, 477 (Ky. 1915), *rev'd sub nom.* Buchanan v. Warley, 245 U.S. 60 (1917).

87. BLACK'S LAW DICTIONARY 938 (9th ed. 2009).

88. *Harris*, 177 S.W. at 476.

89. *Id.* (emphasis added).

90. *Id.* at 477.

Buchanan appealed to the Supreme Court, and the national NAACP lent its support.[91] The NAACP's first president, Moorfield Storey, an eminent white lawyer from Boston, who some identify as a libertarian,[92] signed on as counsel and argued the case before the Court.[93]

Storey and Clayton Blakey, the local counsel from Louisville, separately briefed the case. Blakey's brief trod familiar ground, arguing for a robust right to property[94] and contending that the ordinance was an illegitimate exercise of the police power because it failed to benefit the general welfare.[95] In contrast, Storey took an approach that was in some ways more subtle and in others more radical. The first case cited in his brief was *Lochner*, albeit on an ancillary point of law, thus framing the case in libertarian trappings.[96] In addition to the requisite property rights argument[97] and portion distinguishing unfavorable prosegregation precedent,[98] Storey spent a sizeable portion of his brief arguing that the ordinance violated the Fourteenth Amendment's Privileges or Immunities and Equal Protection Clauses—not that it violated due process.[99] His claim, which seemingly flew in the face of the notorious separate-but-equal principle, was that rather than avoiding discrimination by acting equally upon both blacks and whites, the ordinance was doubly discriminatory—in one instance against blacks and in another against whites.[100]

The Supreme Court labeled Louisville's ordinance a "drastic measure."[101] The police power, according to Justice Day writing for a unanimous court, could not be exercised when legislation violated the Constitution, a principle so basic that the Court explicitly declined to cite cases.[102] The property right found in the Due Process Clause was a broad

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91. Blakey, *supra* note 71, at 11–12.

92. *See* Damon W. Root, *The Party of Jefferson: What the Democrats Can Learn from a Dead Libertarian Lawyer*, REASON, Dec. 2007, at 35, 36–39 (arguing Storey was a libertarian Democrat).

93. Blakey, *supra* note 71, at 11–12.

94. *See* Brief for the Plaintiff in Error at 33, Buchanan v. Warley, 245 U.S. 60 (1917) (No. 614) (arguing that the ordinance will deprive Louisville blacks of "their inalienable right to . . . property").

95. *See id.* at 12 (arguing that the purpose of the ordinance was to benefit white voters in the majority).

96. *See* Brief for the Plaintiff in Error at 12, *Buchanan*, 245 U.S. 60 (No. 614) (citing *Lochner v. New York*, 198 U.S. 45, 64 (1905) for principles of statutory interpretation).

97. *Id.* at 14–17.

98. *Id.* at 29–31.

99. *Id.* at 17–29.

100. *See id.* at 25–26 ("[T]he Constitution cannot be satisfied by any such offsetting of inequalities and that a discrimination against one race is not one whit less a discrimination, because in some other matter a discrimination is made against the other race.").

101. *Buchanan*, 245 U.S. at 73.

102. *Id.* at 74.

one; it included "the right to acquire, use, and dispose."[103] The Fourteenth Amendment and statutes effectuating the Amendment[104] made property a "fundamental" right instead of merely a "social" right.[105] The Court distinguished *Plessy*. *Plessy* made "no attempt to deprive persons of color of transportation" on the railroad and acted equally on both races.[106] To conclude, the Court gestured to the police power. It pointed out that despite the law's stated purpose of maintaining racial purity, it made an exception for black servants of white families and allowed the races to live in close proximity, so long as they didn't live on the same "block[]."[107] The Court suggested that antimiscegenation laws were valid under the police power but indicated that violations of property rights could not be the means to that end.[108] Thus, Louisville's segregation ordinance fell.[109]

II. Perspectives on *Buchanan*

What should we make of *Buchanan*? On one hand, a facially discriminatory statute, not all too far removed from the time *Plessy* was decided, earned the disapprobation of a unanimous Supreme Court—an unquestionable victory.[110] On the other hand, *Buchanan* didn't clearly signal future, more radical antidiscrimination constitutionalism. The decision sounded in property rights, buried within the imprecise and controversial boundaries of substantive due process. Moorfield Storey's appeal for a holding under the Equal Protection Clause, later the primary font of antidiscrimination constitutionalism, fell upon the deaf ears of the nine Justices. *Plessy* remained good law.

Given that *Buchanan*'s antidiscrimination principle came in the trappings of *Lochner* Era substantive due process, what did the case portend? This Part will examine several perspectives on *Buchanan*: first,

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103. *Id.*

104. *See* 42 U.S.C. § 1982 (2006) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."); *id.* § 1981(a). Section 1981(a) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. § 1981(a).

105. *Buchanan*, 245 U.S. at 78–79.

106. *Id.* at 79.

107. *Id.* at 81.

108. *Id.*

109. *Id.*

110. *See, e.g.*, Press Release, NAACP, N.A.A.C.P. Will Defend Dr. Leroy Bundy, Accused of Murder in the East St. Louis Riot Cases (Nov. 21, 1917), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 4, Slide 000787 (celebrating *Buchanan* as a "tremendous victory").

Buchanan's place in the most workaday accounts of American constitutional history—casebooks and treatises; second, David Bernstein's high praise of *Buchanan* in his efforts to rehabilitate *Lochner*; third, Michael Klarman's more skeptical attempt to contextualize *Buchanan*; and fourth, Leon Higginbotham's speculation on *Buchanan*'s impact.

A. Standard Accounts

Sweeping works of constitutional history tend to be dismissive of *Buchanan*. Many texts omit the case altogether.[111] Others quickly write it off without much serious commentary[112] or paint the case as a pure aberration.[113] Finally, a few authors have taken a sharply critical stance. For example, Lucas A. Powe does not consider *Buchanan* a "true civil rights case" because Justice James McReynolds, a noted racist, joined in the unanimous decision.[114]

B. David Bernstein's Revisionist Support

In the face of traditional skepticism, David Bernstein has emerged as *Buchanan*'s greatest champion. Bernstein has taken on a career-spanning project of writing revisionist historical accounts "rehabilitating" *Lochner* and its libertarian progeny.[115] *Buchanan* plays a key role in his effort, allowing him to cast laissez-faire constitutionalism and substantive due process as potent antidiscrimination law.[116]

Bernstein's main move in *Rehabilitating* Lochner is to widen the frame through which his audience views *Lochner*; he attempts to show that

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111. Most surprisingly, Randy Barnett, a prominent libertarian professor, omits *Buchanan* from his casebook. *See* RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 1337 (2008) (omitting *Buchanan* from the Table of Cases).

112. *See, e.g.*, LOUIS MICHAEL SEIDMAN, CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS 131 (2003) (commenting that *Buchanan* had "some impact on the margins" but failed to "change the underlying fact of systemic suppression of African Americans").

113. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 370–71 (5th ed. 2006) (describing *Buchanan* as a "major exception" best explained by "the supposed uniqueness of real property and the then-prevailing doctrine of economic due process"). For a powerful rejoinder arguing that the case has strong foundations in civil rights, see 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, 518–23 (1982). Schmidt's outstanding article contains a substantial discussion of *Buchanan*. Its major contributions are in unearthing Justice Holmes's unpublished dissent and analyzing the standing issue raised by Holmes, which I briefly discuss in subpart III(A), below, and in its discussion of *Buchanan*'s place in the civil rights vs. property rights taxonomy. As both of these topics fall largely outside the scope of this Note, I have not included Schmidt's scholarship in this Part.

114. LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 189 (2009).

115. *See generally, e.g.*, DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

116. *See id.* at 78–86.

laissez-faire jurisprudence was not the era's true evil.[117] Critics assail *Lochner*, so Bernstein essentially asks, "If *Lochner* is evil, what is it evil relative to?" In the abstract, striking down a maximum hours law that seems to protect bakers' health feels harsh and unwarranted to many critics when compared to the modern regulatory state.[118] Bernstein wants us to evaluate *Lochner* in light of "the available contemporary alternative to liberty of contract[:] the extreme pro-government ideology of liberty of contract's opponents among the Progressive legal elite."[119]

Bernstein brands this ideology "progressive sociological jurisprudence."[120] Its proponents denied that constitutional rights could be found in natural law or first principles.[121] Rather, judges should consider the "public interest and 'social facts'" when divining principles of constitutional law.[122] Bernstein doesn't make it absolutely clear how big his maligned "sociological jurisprudence" tent really is. He describes Harlan's *Lochner* dissent, which recognized the liberty of contract but cited to scientific evidence, as a "model sociological opinion."[123] But he argues the scholars for whom he has the most scorn, self-identified progressives, cared little for Harlan's opinion and instead hailed Holmes's *Lochner* dissent as ideal sociological jurisprudence, which in fact made no reference to social or scientific facts.[124] These progressives' true preference was pure majoritarianism—whatever the legislature, subject to the influence of innumerable special interests, might decide.[125]

Plessy met with the general approval of progressives; the case relied on a strong conception of government powers over private actors and pseudoscientific facts about race.[126] Many progressives carried *Plessy*'s attitudes forward and argued for residential segregation, voicing fears of racial friction that the police power could allegedly quell.[127] Bernstein argues that *Buchanan* "repudiated *Plessy*'s presumption that segregation laws, including those that infringed on civil rights, are reasonable."[128]

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117. *See id.* at 3 (seeking to dispel the "*Lochner*-related mythology" that liberty of contract was a judicial tool of "laissez-faire Social Darwinism").

118. For example, modern OSHA regulations of bakery equipment alone are seven pages long. 29 C.F.R. § 1910.263 (2013).

119. BERNSTEIN, *supra* note 115, at 3.

120. *Id.* at 40–41.

121. *Id.* at 42.

122. *Id.*

123. *Id.* at 44–45.

124. *See id.*

125. *See id.* at 46.

126. *Id.* at 73.

127. *Id.* at 78.

128. *Id.* at 82. To cast further shame on the sociological school, Bernstein points out that Justice Holmes drafted, but did not publish, a dissent in which he argued that the ordinance was permissible under the police power. *Id.*

Further, he asserts that the case's articulation of "antidiscrimination principles" far exceeded those stated in *Brown v. Board of Education*.[129]

Bernstein's assessment of *Buchanan*'s impact is relatively sanguine. He speculates that "but for *Buchanan*" blacks might have lost their right to own and alienate property and that these property rights enabled blacks to participate in the civil rights movement.[130] Bernstein acknowledges that *Buchanan* did not cause residential desegregation, as racially restrictive covenants and facially neutral zoning laws soon sprung up.[131] He questions the efficacy of contemporary racially restrictive covenants[132] and argues that zoning laws, typically abhorred by libertarians, deserve more scholarly attention for their role in causing residential segregation.[133] Thus, in spite of other impediments, *Buchanan* helped open the door for black migration to urban areas in the North and South, where blacks had better economic opportunities.[134]

Further, Bernstein argues the limited effect of *Buchanan* did not arise from the case itself; he believes *Buchanan* could have been used to combat laws mandating segregation in private businesses.[135] He laments that the NAACP's limited resources hobbled its efforts.[136] While not claiming *Buchanan*'s superiority to Civil Rights Era triumphs,[137] Bernstein suggests that the case shows that the road to racial egalitarianism could have followed a libertarian path.[138] Thus, *Buchanan* had both contemporary and future promise in Bernstein's eyes.

C. Michael Klarman's Effort to Contextualize

In contrast to Bernstein, Michael Klarman's effort to contextualize *Buchanan*—to situate the case within its "social, political, economic, and

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129. *See id.* (describing *Brown*'s language as "tepid"). While Bernstein doesn't directly point to any "tepid" language in *Brown*, I believe he's referring to the portion of the opinion that rejects school segregation based not on a longstanding antidiscrimination principle found in the Equal Protection Clause, but instead on "psychological knowledge" about the harms of segregation unavailable to the *Plessy* Court. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

130. BERNSTEIN, *supra* note 115, at 82–83.

131. David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 861 (1998). For an account denying that *Buchanan* actually led to the rise of racially restrictive covenants, see Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 548–51 (2000).

132. BERNSTEIN, *supra* note 115, at 83.

133. *See* Bernstein, *supra* note 131, at 864–65.

134. BERNSTEIN, *supra* note 115, at 83.

135. *Id.* at 85.

136. *Id.*

137. *Id.*

138. *Id.* at 86. Bernstein goes on to argue that *Bolling v. Sharpe*, 347 U.S. 497 (1954), which ended segregation in Washington D.C. public schools, was in fact based on substantive due process, especially before Justice Black prevailed on Chief Justice Warren to omit citations to all *Lochner*-era cases besides *Buchanan*. BERNSTEIN, *supra* note 115, at 87–88.

ideological context"—takes a more skeptical view.[139] *Buchanan* was an unambiguous violation of the Fourteenth Amendment; the basic right to own property hewed far closer to the Framers' conception of the Amendment than rights regarding education and travel.[140] Further, Klarman urges not to conflate libertarian constitutionalism with civil rights; though libertarian jurisprudence may produce "incidental benefits," the relationship between the two causes is "contingent and contextual."[141] The power of laissez-faire constitutionalism ebbs and flows according to the existing law; harmful laws (e.g., the ordinance at issue in *Buchanan*) fall alongside beneficial laws (e.g., antidiscrimination provisions for employment and public accommodation, which interfere with contractual freedom).[142]

Klarman also doubts *Buchanan*'s impact on residential segregation, attributing continued segregation to private choice, restrictive covenants, zoning, and violent resistance.[143] However, he offers a measured belief that *Buchanan* had some "symbolic or educative" impact.[144] The NAACP's membership grew significantly after *Buchanan*.[145] Further, *Buchanan* established litigation as an outlet for civil rights activism, free from the violence that plagued protests.[146]

D. Judge Leon Higginbotham's Relative Optimism

Not all academic treatments from the left share Klarman's skepticism. The late Leon Higginbotham, then-Chief Judge of the U.S. Court of Appeals for the Third Circuit and a noted civil rights leader, contends that *Buchanan* indeed had a significant impact on housing segregation. Higginbotham's outlook is comparative, illustrating how the American Constitution empowered its judiciary to combat housing segregation as compared to the South African Constitution, which neutered judicial ability to protect civil rights under Apartheid.[147] In other words, *Buchanan* stanched the bleeding. But Higginbotham also astoundingly speculates that without the use of due process to invalidate racial segregation ordinances,

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139. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 882, 937 (1998) (refusing to characterize *Buchanan* as a "pathbreaking decision").

140. *See id.* at 937–38 (citing provisions of the 1866 Civil Rights Act protecting property rights, among other things). Klarman's account doesn't consider how the 1875 Civil Rights Act, which provided for equal treatment in transportation and public accommodations, might bear on the core, if not the original, meaning of the Fourteenth Amendment. *See supra* note 11 and accompanying text.

141. Klarman, *supra* note 139, at 939.

142. *Id.* at 939 n.323.

143. *Id.* at 942–43.

144. *See id.* at 947 (discussing *Buchanan*'s symbolic impact while acknowledging the difficulty of measuring it).

145. *Id.*

146. *Id.* at 948–51.

147. Higginbotham et al., *supra* note 55, at 767.

southern states "could be nearly as destructive of the rights of black Americans in 1990 regarding equality of opportunity in housing" as they were before *Buchanan*.[148] To support his conclusion, he surveys residential segregation ordinances enacted in direct resistance to *Buchanan* and finds that each was held unconstitutional.[149]

III. The Aftermath of *Buchanan*: The Overlooked Troubles with Laissez-Faire Constitutionalism and Substantive Due Process

Each of the three scholars discussed above who has given *Buchanan* serious consideration has some meaningful insights. Bernstein, *Buchanan*'s strongest proponent, deserves credit for drawing attention to the willingness of contemporary opponents of substantive due process to condone, or even actively support, racist legislation.[150] Klarman's skepticism about the reach of substantive due process as antidiscrimination law—as it is blind to whether legislation's aim is beneficial or harmful[151]—is well-founded. Finally, Higginbotham's piece, in its comparison to South African discrimination, importantly points out that *Buchanan* ultimately won out over significant, direct efforts at resistance;[152] *Buchanan* wasn't toothless, and its teeth came in handy.

My concerns rest with each author's treatment of laissez-faire constitutionalism and substantive due process. Higginbotham, in his comparison of South Africa's utterly repugnant history to the United States' slightly less disturbing history of racism, fails to consider what consequences come from relying on substantive due process to combat discrimination. While Klarman identifies some consequences, he leaves his observations in the abstract; he fails to address how substantive due process as antidiscrimination law played out in the real world. Bernstein has grappled with some of the consequences of substantive due process as antidiscrimination law in his more recent work.[153] His response to the consequences helps to better sketch the contours of a world where substantive due process, particularly of the economic variety, functions as antidiscrimination law. It's a world that looks different from our own and highlights both the practical and normative concerns of employing substantive due process to combat discrimination.

My first concern is that the authors leave an elephant in the room. Each notes that *Buchanan* had little effect on segregated housing and hurls

148. *Id.* at 770.
149. *Id.* at 856–61.
150. *See supra* notes 126–27 and accompanying text.
151. *See supra* notes 141–42 and accompanying text.
152. *See supra* notes 147–49 and accompanying text.
153. *See infra* notes 194–203 and accompanying text.

blame at other targets.[154] Included in the authors' shotgun blasts are racially restrictive covenants[155]—purely private agreements between property owners. In fact, the *Lochner*-era Supreme Court refused to invalidate these covenants, which fall well within the approval of many libertarian theories. I argue below, in subpart III(A), that these covenants show how laissez-faire constitutionalism can only accomplish so much as antidiscrimination law.

Second, the authors fail to consider the role that *Buchanan*'s substantive due process foundations might have played in the direct defiance of the decision. Higginbotham correctly notes that post-*Buchanan* residential segregation ordinances ultimately fell under *Buchanan*'s holding.[156] However, I argue that two features of *Lochner*-era substantive due process contributed to the resistance. The broad principles of "liberty" and "freedom of contract" it announces and uses in efforts to combat discrimination are the target of a rhetorically effective attack by critics, which afforded racist lawmakers a certain degree of cover to continue to enact the ordinances. Further, despite contentions that substantive due process afforded both economic and personal liberties, it in fact failed to protect the personal liberties of African-Americans. The doctrine produced a set of rights that can be described as jagged, if not fundamentally inconsistent. Thus, efforts to segregate that appeared to encroach upon *Buchanan*'s holding via restricting personal liberties occupied a legal gray area. I argue that these problems, caused by substantive due process, illustrate important weaknesses of using the doctrine as antidiscrimination law.

A. Restrictive Covenants and the Impotence of Laissez-Faire Constitutionalism

Racially restrictive covenants arose well before Baltimore implemented the first residential segregation ordinance in 1910.[157] The covenants weren't unique to southern and border states; they could be found in California[158] and New York[159] by the time the segregation ordinances began. Due to their contractual nature, with negotiable terms, a covenant

154. Bernstein, *supra* note 131, at 858–59; Higginbotham et al., *supra* note 55, at 856–62; Klarman, *supra* note 139, at 941–42.

155. Bernstein, *supra* note 131, at 864–66; Higginbotham et al., *supra* note 55, at 861; Klarman, *supra* note 139, at 942.

156. Higginbotham et al., *supra* note 55, at 856.

157. *See, e.g.*, Gandolfo v. Hartman, 49 F. 181, 181 (C.C.S.D. Cal. 1892) (describing a covenant in an 1886 deed that prohibited the grantee and his assignees from renting to persons of Chinese extraction).

158. *See id.* (describing a covenant attached to a deed in Ventura County, California).

159. *The Ghetto*, 4 CRISIS 222, 222 (1912) (reprinting the text of a racially restrictive covenant found in Harlem).

wasn't necessarily as invidious as the segregation ordinances. For example, a covenant found in Harlem in 1912 only applied until June of 1925, after which a property owner could again allow the property to be occupied by a black person.[160]

In the pre-*Buchanan* years, some racially restrictive covenants were not enforced, much like the earliest segregation ordinances, due to technicalities.[161] Some early attacks on racially restrictive covenants sounded in basic property law, and these covenants were held neither to be an unlawful restraint on alienation nor void against public policy.[162] Allegations that such covenants violated the Fourteenth Amendment were of little concern to courts in this period; the Louisiana Supreme Court dispelled a plaintiff's constitutional challenge to a covenant in all of three sentences and further noted, in fine Lochnerian form, that Louisiana law favored the "fullest liberty of contract."[163]

More serious constitutional challenges began after *Buchanan*, as the NAACP saw a kinship between the racially restrictive covenants and the segregation ordinances. Both involved a "fundamental question of property and citizenship rights," and by 1922, the NAACP desired to take the covenant question to the Supreme Court.[164] The Association's support crystalized behind a test case out of Washington D.C., where plaintiff Buckley sought to enforce a covenant to prevent defendant Corrigan, a white woman, from conveying property to defendant Curtis, a black

160. *Id.*; *see also* Koehler v. Rowland, 205 S.W. 217, 218 (Mo. 1918) (considering a covenant that ran for twenty-five years).

161. *See, e.g.*, People's Pleasure Park Co. v. Rohleder, 61 S.E. 794, 796 (Va. 1908) (refusing to enforce a covenant against sale to persons of African descent where the grantee was a corporation who allegedly planned to open a "pleasure park for the amusement of colored people").

162. *See, e.g.*, *Koehler*, 205 S.W. at 220 (concluding that a restraint on alienation, which "preserve[d] the property . . . as a district unoccupied by negroes," was permissible because it was neither an absolute restriction nor contrary to public policy).

163. *See* Queensborough Land Co. v. Cazeaux, 67 So. 641, 643 (La. 1915) (citing The Civil Rights Cases, 109 U.S. 3 (1883) and Ex Parte Plessy, 11 So. 948 (1892), *aff'd sub nom.* Plessy v. Ferguson, 163 U.S. 537 (1896)). *But see Gandolfo*, 49 F. at 182 (refusing judicial enforcement of a covenant restricting use of property by persons of Chinese extraction because it would violate the Fourteenth Amendment). This California case appears anomalous. *See* Parmalee v. Morris, 188 N.W. 330, 331 (Mich. 1922) (arguing that *Gandolfo* was decided on the grounds of a treaty between the U.S. and China and that the constitutional discussion was mere dicta).

164. *See* Letter from Robert Bagnall, Dir. of Branches, NAACP, to Alfred J. Murphy, Att'y (July 7, 1922), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 1, Slides 000491–000492 (explaining that after the Michigan Supreme Court upheld the racially restrictive covenant in *Parmalee v. Morris*, the NAACP desired to take similar action to that in *Buchanan*).

woman.[165] Moorefield Storey and Louis Marshall volunteered to serve as counsel when the case went to the Supreme Court.[166]

The District of Columbia Circuit saw the restrictive-covenant question as untroubling. It found it "unnecessary" to determine whether the covenant violated the Equal Protection Clause because it held there was no state action.[167] Without referencing *Buchanan*, the court held that the "constitutional right of a negro to acquire, own, and occupy property" was not infringed upon by racially restrictive covenants as blacks and whites alike could enter into such agreements.[168]

Storey and the other NAACP attorneys began their Supreme Court brief by pressing that *Buchanan* was controlling.[169] As *Buchanan* forbade the legislature from prohibiting the sale of property to a person on account of her race, so too should courts be forbidden to enforce a covenant that the legislature could not authorize.[170] In other words, it was not Buckley, but the sovereign, who was preventing Curtis from purchasing the home; the courts were effectuating racial segregation.[171]

The Supreme Court dismissed for want of jurisdiction.[172] Because the Fifth and Fourteenth Amendments required state action and could not prohibit "private individuals from entering into contracts respecting the control and disposition of their own property," the Court found a substantial constitutional question lacking.[173] The NAACP's theory about court enforcement of the covenant amounting to state action had not been properly brought before the Supreme Court, so the Court declined to consider it.[174] Thus, racially restrictive covenants effectively enjoyed the Court's blessing.[175]

The Court's refusal to consider the defendants' theory of court enforcement as "state action" illuminates the libertarian priorities of the

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165. NAACP, *Segregation*, 31 CRISIS 229, 229 (1926).

166. Letter from Walter F. White, Assistant Sec'y, NAACP, to Archibald H. Grimke, President, Wash. D.C. Branch of the NAACP (Oct. 28, 1924), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 1, Slides 000869–000870.

167. Corrigan v. Buckley, 299 F. 899, 901 (D.C. Cir. 1924) (citing, *inter alia*, The Civil Rights Cases, 109 U.S. at 31).

168. *Id.*

169. *See* Appellants' Points at 6, Corrigan v. Buckley, 271 U.S. 323 (1926) (No. 104) (describing their due process–property rights argument as "the legitimate and logical consequence of the unanimous decision" in *Buchanan*).

170. *Id.* at 14.

171. *Id.* at 14–15.

172. *Corrigan*, 271 U.S. at 329–32.

173. *Id.* at 330.

174. *Id.* at 331.

175. In two subsequent cases that would have afforded the Court the opportunity to answer the state-action question, the Court denied certiorari. Cornish v. O'Donoghue, 30 F.2d 983, 984 (D.C. Cir.), *cert. denied*, 279 U.S. 871 (1929); Russell v. Wallace, 30 F.2d 981, 981–82 (D.C. Cir.), *cert. denied*, 279 U.S. 871 (1929).

Lochner-era Court, as *Buchanan* could have also been dismissed on a similar technicality. In a dissent he ultimately opted not to publish, Justice Holmes argued the Supreme Court lacked jurisdiction because *Buchanan* was merely a test case where no actual case or controversy existed.[176] *Buchanan*'s status as a manufactured test case is rather clear: the black defendant, Warley, was represented by attorneys employed by Louisville fighting to uphold the discriminatory ordinance.[177] The other Justices, and eventually Holmes, acquiesced to this jurisdictional defect to announce a general property right rooted in substantive due process. However, when a robust reading of the Equal Protection Clause later offered African-Americans a *meaningful* right to acquire property, in the face of blatantly discriminatory covenants, the Court found it appropriate to place a jurisdictional hurdle in their path.

The NAACP's theory of state action would prevail twenty-two years after *Corrigan v. Buckley*[178] in *Shelley v. Kraemer*.[179] The *Shelley* Court acknowledged that nothing about the covenants per se violated the Constitution due to a want of state action.[180] However, because the state "made available . . . the full coercive power of government to deny [property rights] on the grounds of race or color" via the state's courts, the equal protection guarantee was not satisfied.[181]

Kraemer, the party suing to enforce the racially restrictive covenant in Missouri state court, submitted a brief to the Supreme Court that articulated a fundamentally libertarian vision of the judiciary. By libertarian theory of the judiciary, I borrow the words of Milton Friedman, who states that the courts must provide for the "enforcement of contracts voluntarily entered into," even in the case where those agreements are racially discriminatory.[182] Kraemer argued that because Missouri law—defined as statutory law and judge-created common law—merely *permitted* private discriminatory contracts, no state action, and thus no violation of the Fourteenth Amendment, occurred.[183] The right to contract was a "private

176. 9 BENNO C. SCHMIDT, JR., THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–21, pt. 2, at 805–06 (1984). For a detailed discussion of the standing problem, see Schmidt, *supra* note 113, at 511–17.

177. Brief for Defendant in Error at 1, 121, Buchanan v. Warley, 245 U.S. 60 (1917) (No. 614).

178. 271 U.S. 323 (1926).

179. 334 U.S. 1 (1948).

180. *Id.* at 13 (citing *Corrigan*, 271 U.S. at 330–31).

181. *Id.* at 19–20.

182. *See* MILTON FRIEDMAN WITH THE ASSISTANCE OF ROSE D. FRIEDMAN, CAPITALISM AND FREEDOM 27 (1962); *see also id.* at 110–11 (arguing that, while he has a personal distaste for racism, the proper recourse against racists are attempts at persuasion and the higher costs the market imposes on racists, rather than coercive action by the state).

183. Respondents' Brief at 26–27, *Shelley*, 334 U.S. 1 (No. 72).

right[] . . . not created by the [s]tate but . . . vested in the people" and the state had a "duty to enforce" such a private right through its courts.[184] To fail to enforce such a private right would approach "totalitarian[ism]."[185] Hence, a laissez-faire constitutional theory undergirded Kraemer's argument.

Bernstein himself, with the benefit of more than sixty years of hindsight, has articulated half-hearted support for the holding in *Shelley*—outside the fora where he has sung *Buchanan*'s praises. Writing for a publication of the libertarian-leaning Cato Institute, he agrees that the Court got it right in *Shelley* on the limited question of enforcement of restrictive covenants but believes that generally, courts should enforce discriminatory provisions in contracts.[186] Bernstein believes *Shelley* was correctly decided for two reasons: First, *Shelley* involved two contracts—the contract for the actual sale of the property between a willing buyer and a willing seller and the covenant that Shelley's and Kraemer's properties were subject to—allowing for additional "public policy" considerations to enter the Court's calculus.[187] Second, he agrees with an arguably ancillary point made by the *Shelley* Court: that state enforcement of the covenants wasn't truly "racially neutral"[188] as the parties were unable to direct the Court to a case where a court had enforced a covenant against white ownership or occupancy.[189] In further support of this point, because states already had official or unofficial policies supporting residential segregation, state action wasn't "*sui generis* contract enforcement" but truly part of a larger governmental policy favoring segregation.[190] Thus, Bernstein argues that so long as courts do it "even-handedly," they should enforce discriminatory contractual provisions.[191]

Why make such a fuss about restrictive covenants when considering *Buchanan*? We should be celebrating the triumph over *Plessy*-like ordinances and finding some merit—merit that Americans can all agree upon today—in *Lochner*'s otherwise controversial laissez-faire constitutionalism. Right?

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184. *Id.* at 27–29.

185. *Id.* at 29; *see also* FRIEDMAN, *supra* note 182, at 22, 27 (contrasting totalitarian and free societies before later insisting that voluntary agreements be enforced by the state in a free society).

186. David E. Bernstein, Shelley v. Kraemer*: A Correct, but Limited Opinion*, CATO UNBOUND (June 29, 2010), http://www.cato-unbound.org/2010/06/29/david-e-bernstein/shelley-v-kraemer-correct-limited-opinion/.

187. *Id.*

188. *Id.*

189. Shelley v. Kraemer, 334 U.S. 1, 22 (1948). I describe this point as ancillary because in the sentence immediately following the one quoted by Bernstein on this point, the Court stated that "there are more fundamental considerations." *Id.*

190. Bernstein, *supra* note 186.

191. *Id.*

If we want to look at *Buchanan* as a triumphalist account—illustrating a degree of black agency in an otherwise painful time—or as a way to highlight that *Lochner*-era progressives harbored racist sentiments, then perhaps we would be fine to not consider restrictive covenants. But if *Buchanan* stands for more than this, if it is presented as a doctrine that purports to combat discrimination, as Bernstein (and to a lesser extent Higginbotham) in fact claim,[192] then it deserves a more in-depth consideration. This doctrine must be normatively satisfying.[193] Thus, restrictive covenants put laissez-faire constitutionalism to an important test.

If one takes the position of Kraemer (and Milton Friedman), which I call "hard laissez-faire constitutionalism," the results are patently troubling. The evil that *Buchanan* defeated must be a quite narrow one: facially discriminatory state property laws. And the rationale that supports the defensible holding in *Buchanan*—government affording paramount respect to voluntary contractual agreements—turns to support the indefensible holding urged by Kraemer. A private, state-enforced agreement could accomplish what a legislative majority cannot. Thus, the only constitutional harm that hard laissez-faire constitutionalism prevents is narrow and abstract: the harm of the government classifying a person by his or her race.

As *Lochner* and *Buchanan*'s biggest modern apologist, Bernstein is wise enough to not follow the path of hard laissez-faire constitutionalists. However, a robust reading of *Shelley*, where courts are loath to enforce discriminatory contractual provisions, troubles him. He thus tries to bound the "court enforcement as state action" doctrine in the two ways mentioned above,[194] which each have serious consequences for his project of using laissez-faire constitutionalism as antidiscrimination law. Hence, I call his position "softer laissez-faire constitutionalism."

His first attempt to constrict *Shelley*'s state-action doctrine tries to paint restrictive covenants as a unique arrangement, unlike an ordinary discriminatory contract, thus meriting different legal treatment.[195] To put Bernstein's theory in more abstract terms, let's assume we have Contract *A* between *X* and *Y*, which contains a discriminatory provision (e.g., the covenant in *Shelley*); Contract *B* between *Y* and *Z* violates the

192. *See supra* notes 130–38, 147–48 and accompanying text.

193. While not all constitutional scholars believe that a doctrine must always produce normatively satisfying results (i.e., strict originalists), most scholars suggest that some normative consideration is important in justifying a theory of constitutional interpretation. *See, e.g.*, Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1373, 1379–81 (1990) (criticizing originalists, such as Robert Bork for their lack of concern about the consequences of their theory of constitutional interpretation). Bernstein, in his efforts to extol the virtues of laissez-faire constitutionalism as law that prevents discrimination, clearly falls into the group that cares about the normative impacts of competing constitutional theories.

194. *See supra* notes 187–91 and accompanying text.

195. *See* Bernstein, *supra* note 186.

discriminatory term of *A* (e.g., the deed in *Shelley*). Now, let's recast the agreements. Assume Contract *A* is between *X* Corporation and *Y* Construction Company. *X* is racist and will increase its payment by $10,000 if *Y* agrees not to use any Asian workers to build *X*'s new headquarters, and *Y* agrees. Contract *A*, in and of itself, harms third parties—Asian construction workers in the community. *Y* Construction Company risks liability for breach and will most likely decide not to go out and employ Asian workers.[196] Bernstein's argument essentially imposes a remorse requirement on *Y* Construction Company, who must be willing to enter into a second contract with the Asian workers and incur the costs of defending against *X*'s suit, to trigger Bernstein's state-action doctrine and protect the rights of the Asian workers. Or, one might have to venture into the realm of statutes prohibiting employment discrimination, which have faint, if any, promise under many libertarian perspectives.[197]

Bernstein's second effort to narrowly define *Shelley*'s state-action principle attempts to cut past the conceptual issues and look at the facts on the ground. He notes that the racially restrictive covenants really were a one-way street; they kept blacks out of white neighborhoods and not vice versa.[198] If this argument sounds familiar, it's because we've all seen it before. Justice Harlan made it in his famous *Plessy* dissent.[199] Harlan and Bernstein each looked at the facts in their context, the social reality of how the segregation statute and the restrictive covenants respectively operate, to find that the Equal Protection Clause had been violated. This inquiry into social facts was not unique for Harlan; he employed the same technique in his *Lochner* dissent, considering scientific data about the health risks to bakers before finding that the maximum hours law did not violate the liberty of contract based in due process.[200] Yet, Bernstein, if you will remember, labeled Harlan's effort in *Lochner* as a "model sociological opinion"—not as problematic as Justice Holmes's dissent but still far away from Bernstein's preferred approach: Justice Peckham's majority opinion

196. In a typical jurisdiction with at-will employment, there won't even be a contractual relationship between *Y* and *Z*, but for the sake of argument, I treat this second relationship as essentially contractual.

197. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 3 (1992) (urging the "outright rejection of the antidiscrimination principle in private employment"); *see also* DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 4–8 (2003) (noting that civil libertarians generally opposed prohibitions on private discrimination in the 1950s and arguing that antidiscrimination laws today have shifted from remedying a "quasi-caste system" to existing as an "austere moralism").

198. Bernstein, *supra* note 186.

199. Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) ("Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.").

200. Lochner v. New York, 198 U.S. 45, 70–71, 73 (1905) (Harlan, J., dissenting).

that dismissed the sociological urgings about the bakers' health.[201] Therefore, where Harlan's sociological approach remained consistent in the context of substantive due process as well as equal protection, Bernstein only finds a sociological approach appropriate in the latter context. Under the softer conception of laissez-faire constitutionalism, the employer in *Lochner* enjoys the presumption that the maximum hours law is unconstitutional, yet the black grantee in *Shelley* has the burden of showing that an invidious, society-wide pattern of discrimination exists.

Finally, and perhaps most fundamentally, Bernstein's efforts to constrain *Shelley*'s state-action principle create two categories: racially discriminatory contracts where there's a legally cognizable harm and racially discriminatory contracts where there's no legally cognizable harm—and contracts aren't assigned to a category based on the degree of real-world harm they inflict. When a racially discriminatory contract does not interfere with a second contract or when the plaintiff can't show that the contract is part of a larger pattern of discrimination, it falls into the latter category. In other words, however harmful a particular contract is to African-Americans, its uniqueness and its insularity vis-à-vis other contracts make it enforceable, per Bernstein, by an American court. This dichotomy, which ignores the actual harms inflicted and instead employs a rigid formalism, reflects an ideology similar to that of the Court in *Plessy*, which found that the Constitution only prohibited legislation that infringed upon "political" but not "social" equality.[202] Just as Justice Harlan found this distinction illusory in 1896 and argued that government race discrimination was unconstitutional in any form,[203] the distinction that Bernstein makes similarly proves illusory, as only some harmful racially discriminatory contracts won't be enforced under his conception of state action.

Having fleshed out how laissez-faire constitutionalism, of both the hard and softer varieties, would treat restrictive covenants and similar troubling agreements, we're left with a basic question: how much private racial discrimination are we willing to tolerate being facilitated by our courts? Under the hard formulation, one would have to accept a world in which *Shelley* came out the other way. Under the softer formulation, one would still have to accept a good deal more than we have today. The odd circumstances of a discriminatory contract purporting to interfere with a nondiscriminatory contract would seldom occur, and if these circumstances were to occur, minority plaintiffs challenging enforcement of discriminatory contracts would shoulder a much greater evidentiary burden than employers challenging labor laws.

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201. *See* BERNSTEIN, *supra* note 115, at 3, 45.

202. *Plessy*, 163 U.S. at 544.

203. *Id.* at 554 (Harlan, J., dissenting).

In sum, those who put forth *Buchanan* and laissez-faire constitutionalism as potentially potent antidiscrimination law offer it up as a choice, a way to read our nation's foundational document in its best light. I believe that those considering laissez-faire constitutionalism deserve an informed choice, beyond seeing the spotlight placed on *Buchanan*. Thus, restrictive covenants, a major reason why *Buchanan* had little effect, provide an important case study to show where laissez-faire constitutionalism runs into some of its biggest shortcomings as a viable source of antidiscrimination law.

B. Post-Buchanan *Residential Segregation Ordinances and the Troubles with Substantive Due Process*

Although *Buchanan* appeared to answer the question of the constitutionality of residential segregation ordinances, the case did not lead to their immediate demise.[204] In two terse per curiam opinions, the first in 1927 and the second in 1930, the Supreme Court struck down additional residential segregation ordinances.[205] One could argue that these two cases illustrate *Buchanan*'s efficacy in ending the segregation ordinances, and in turn, ending de jure residential segregation.[206] On the other hand, these cases might lead one to question *Buchanan*'s efficacy—thirteen years after the decision came down, plaintiffs found it worthwhile to put the question before the Supreme Court (for the third time) and the Court opted to grant certiorari.[207]

To be certain, resistance to a Supreme Court decision, be it direct or indirect, does not necessarily blunt the importance of the decision. For example, *Brown v. Board of Education* doesn't lose its place in the constitutional canon because of the massive opposition it encountered.[208] However, this resistance doesn't preclude a more focused criticism of the decision and its conceptual foundations.[209] Therefore, I argue that while *Buchanan*'s use of substantive due process ostensibly brought an end to residential segregation ordinances, substantive due process allowed the

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204. As late as 1949, Birmingham, Alabama had a residential segregation ordinance. *See* Monk v. City of Birmingham, 87 F. Supp. 538, 544 (N.D. Ala. 1949) (striking down Birmingham's ordinance), *aff'd* 185 F.2d 859 (5th Cir. 1950).

205. Harmon v. Tyler, 273 U.S. 668, 668 (1927) (per curiam); City of Richmond v. Deans, 281 U.S. 704, 704 (1930) (per curiam).

206. *See* Bernstein, *supra* note 131, at 858 & n.360 (making such an argument by citing *Harmon*, *Deans*, and legal challenges to segregation ordinances in lower courts).

207. *Deans*, 281 U.S. at 704.

208. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 4 (1958) (holding that despite their insistence to the contrary, the Governor and legislature of Arkansas were bound by *Brown*).

209. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34–35 (1959) (criticizing the Court in *Brown* for choosing African-Americans' freedom to associate with whites over whites' freedom not to associate with African-Americans without a basis in "neutral principles" of constitutional law).

ordinances last gasps at life for two reasons: first, judges found the most basic tenets of substantive due process easy to assail; second, *Buchanan*'s substantive due process holding was narrow in scope, giving lawmakers an ostensible avenue to skirt *Buchanan* by making an ordinance appear to primarily be racial regulation with secondary effects on property rights.

1. Louisiana: Harmon v. Tyler.—In 1924, Louisiana enacted a law requiring residential segregation in municipalities of more than 25,000.[210] This legislation principally affected New Orleans.[211] The NAACP expected to meet difficulty in its fight against the Louisiana law; the state had elected judges who would likely uphold the law to pander to their white constituencies.[212] The NAACP's national office urged the New Orleans branch to try the test case in federal court,[213] but surprisingly, a white plaintiff sued to enjoin a black defendant from violating the law in state court, and the state court refused to grant the injunction.[214]

The Louisiana Supreme Court reversed.[215] Part of the court's opinion is plainly wrong: it applied *Plessy* as the relevant precedent and tried to distinguish *Buchanan* on the grounds that the Louisiana statute dealt only with occupancy, not ownership.[216] Yet, in addition to the faulty application of precedent, the opinion also contained an attack on substantive due process that (when stripped of its racism) comes across as, at the very least, cogent:

> Liberty ends where the rights of others begin. It ends where the safety or the happiness or the welfare of others begins. . . . It is not a mere pretext of racial hostility. It is the oldest and most universal of laws, fundamental in all statutes and Constitutions, and paramount in

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210. Press Release, NAACP, Louisiana Legislature Enacts Segregation Law; N.A.A.C.P. to Investigate Legality (July 18, 1924), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000624.

211. *See* Letter from G.W. Lucas, President, New Orleans Branch of the NAACP, to Publicity Dep't, NAACP (July 15, 1924), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000627 (writing that the first efforts to combat the law will occur in New Orleans).

212. Letter from Robert W. Bagnall, Dir. of Branches, NAACP, to James Weldon Johnson, Sec'y, NAACP (Sept. 24, 1924), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slides 000629–000630.

213. *See* Letter from Robert W. Bagnall, Dir. of Branches, NAACP, to G.W. Lucas, President, New Orleans Branch of the NAACP (Oct. 14, 1924), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000636.

214. *See* Letter from G.W. Lucas, President, New Orleans Branch of the NAACP, to Robert W. Bagnall, Dir. of Branches, NAACP (Oct. 21, 1924), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slides 000639–000640 (describing the suit); *see also* Letter from G.W. Lucas, President, New Orleans Branch of the NAACP, to Robert W. Bagnall, Dir. of Branches, NAACP (Nov. 1, 1924), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000642 (informing Bagnall of the victory).

215. Tyler v. Harmon, 104 So. 200, 207 (La. 1925).

216. *Id.* at 203, 205; *see also* Buchanan v. Warley, 245 U.S. 60, 74 (1917) (defining property as not only ownership but also including "the right to acquire, use, and dispose").

> all lands, that the one must be effaced for the sake of the many. Where the many are to be benefited or saved, the via crucis, for the one, is not an act of generous sacrifice; it is an inescapable duty. Personal liberty and freedom of contract have an appealing, almost peremptory sound. They may carry us too far . . . .[217]

To be sure, the court employed this argument against substantive due process in pursuit of a most ignoble cause, but the court nonetheless suggested a central concern about substantive due process—a particular concern to an audience of laypersons trying to understand the Constitution. While the concepts of "liberty" and "freedom of contract" have a certain rhetorical appeal, sounding in the first principles of a so-called free society, these concepts are quickly cut down to size when one considers the implications of affording a person unlimited liberty or affording parties total contractual freedom. The police power of the states thus springs into action and constrains a citizen's liberties and contractual freedom once other citizens fear the repercussions of their exercise; this is basic to democratic government. Indeed, the Court in *Buchanan* recognized that the police power could, in some instances, be exercised legitimately.[218] Substantive due process, inherently, runs into a breaking point. This breaking point falls where courts and citizens balance abstract principles of "liberty" and "contractual freedom" with democratic desires, manifest in exertions of the police power.[219] Though the Court in *Buchanan* reached the morally "right" result, nothing about the substantive due process exercise itself made the position of those supporting the ordinances appear implausible. Though Bernstein and his cohort who press substantive due process as a panacea argue for a robust liberty principle—one with a capital *L*—that stands strong in the face of the will of the majority,[220] the liberty principle they urge wasn't one actually embraced by Louisiana's white citizens, lawmakers, or judges.[221] The Louisiana court thus provided the state's residential segregation ordinances with a respite from condemnation by taking advantage of the "play in the joints" of the substantive due process analysis.

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217. *Harmon*, 104 So. at 206.

218. *See Buchanan*, 245 U.S. at 74 ("True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare.").

219. *See* BERNSTEIN, *supra* note 115, at 3 (using *Lochner* as an example of the Supreme Court attempting to balance the competing desires of liberty and social progress in its application of substantive due process).

220. *See* Bernstein, *supra* note 131, at 805 ("The very purpose of the Constitution, according to traditional theory, was to prevent short-lived enthusiasms from encroaching on American liberty.").

221. *See Harmon*, 104 So. at 206 (refusing to apply the broad conception of liberty articulated by Justice Harlan in his *Plessy* dissent).

This criticism of substantive due process might come across as overly academic, considering that the doctrine won out when the U.S. Supreme Court summarily reversed the Louisiana Supreme Court.[222] Yet, a focus only on the ends the doctrine achieved ignores the real-world consequences of how it performed as a means. The conceptual and popular difficulties with substantive due process forced the NAACP to pay the costs for the protracted legal battle. The New Orleans branch estimated that it incurred $3,000 in legal fees to fight the Louisiana ordinance, approximately $40,000 in 2013 dollars.[223]

2. Richmond: City of Richmond v. Deans.—Undeterred by *Buchanan* and the New Orleans case, Richmond, Virginia enacted a residential segregation ordinance in 1929.[224] Richmond's ordinance responded directly to the language in *Buchanan*, which distinguished the Louisville segregation ordinance from more direct efforts to prohibit miscegenation, which the Court condoned.[225] It prohibited a person from moving to any street where that person couldn't marry a majority of the street's residents pursuant to Virginia's antimiscegenation law.[226] Although the courts failed to fall for Richmond's subterfuge,[227] their treatment of the case brings to light an important modern misconception about substantive due process in the *Lochner* Era.

In addition to the economic liberties protected by substantive due process, many *Lochner* defenders also contend that substantive due process

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222. Harmon v. Tyler, 273 U.S. 668, 668 (1927).

223. *See* Letter from G.W. Lucas, President, New Orleans Branch of the NAACP, to Walter F. White, Assistant Sec'y, NAACP (Mar. 16, 1925), *microformed on* Papers of the NAACP, *supra* note 71, Reel 2, Slide 000729 (estimating the expenses to be incurred by the New Orleans Branch of the NAACP in litigating the *Harmon* case); CPI Inflation Calculator, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (calculating, on November 23, 2013, $3,000 in 1925 to have the same buying power as $40,036 in 2013).

224. *See* Press Release, NAACP, Richmond Mayor Asked To Veto New Segregation Ordinance (Feb. 14, 1929), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000786 (reporting that the NAACP threatened Richmond's mayor with legal action if he did not veto the proposed residential segregation ordinance).

225. *See* Buchanan v. Warley, 245 U.S. 60, 81 (1917). In *Buchanan*, the Court stated:

> The case presented does not deal with an attempt to prohibit the amalgamation of the races. The 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.

Id.

226. Richmond, Va., Ordinance To Prohibit Any Person from Using as a Residence Any Building on Any Street, Between Intersecting Streets, Where the Majority of Residences on Such Street Are Occupied by Those with Whom Said Person Is Forbidden To Intermarry by Section 5 of an Act of the General Assembly of Virginia, Entitled "An Act To Preserve Racial Integrity," Approved March 20, 1924, and Providing that Existing Rights Shall Not Be Affected (Feb. 15, 1929), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000801.

227. *See* City of Richmond v. Deans, 37 F.2d 712, 713 (4th Cir. 1930) (per curiam), *aff'd per curiam*, 281 U.S. 704 (1930).

affords Americans significant personal liberties.[228] These defenders view *Meyer v. Nebraska*,[229] in which the Supreme Court struck down a Nebraska law that prohibited teaching German,[230] "as a great fount of constitutional rights [and as] the first modern civil rights case."[231] *Meyer* is perhaps best known for its so-called laundry list of liberties protected by substantive due process:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry*, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[232]

Despite this language in *Meyer*, decided seven years before the *Richmond* case, both the Fourth Circuit and the Supreme Court thought that *Buchanan* and the economic side of substantive due process alone answered the question about the segregation ordinance.[233] The freedom to marry was illusory for interracial couples; the courts saw no need even to address the matter.[234]

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228. *See, e.g.*, David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 49 (2003) (arguing that by using "*Lochner*ian due process," the Supreme Court "broadly expanded . . . protections for what we would today call civil liberties").

229. 262 U.S. 390 (1923).

230. *Id.* at 396–97, 403.

231. *See* Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENV. U. L. REV. 133, 133 & n.2 (2011) (citing commentators who hold this view).

232. *Meyer*, 262 U.S. at 399 (emphasis added); *see also* Bernstein, *supra* note 228 (quoting this portion of *Meyer* and contending that this language establishes it as one of several "*Lochner*ian cases involving fundamental liberties protected by the Due Process Clause, with no mention of equal protection").

233. *See* City of Richmond v. Deans, 281 U.S. 704, 704 (1930) (disposing of the case with citations to *Buchanan* and *Harmon*); City of Richmond v. Deans, 37 F.2d 712, 713 (4th Cir. 1930) (citing only *Buchanan*, *Harmon*, and the Supreme Court's zoning jurisprudence).

234. Whether the NAACP should have pressed for greater personal liberties for African-Americans under the era's dominant libertarian ideology manifest in substantive due process presents an interesting question, but it is one that I feel unqualified to answer being so far removed from the struggle. On one hand, the economic substantive due process doctrine would ultimately prevail against residential segregation ordinances in Buchanan and its progeny. Pushing to expand the reach of substantive due process beyond black property rights would have risked throwing limited dollars into litigation where the odds of prevailing might have been minimal. On the other hand, using litigation to define the scope of substantive due process could have proved valuable to the civil rights movement. Successful suits would have, of course, expanded African-Americans' legal rights. Unsuccessful cases might have better illuminated the racist contours of the *Lochner* era constitutional landscape and spurred civil rights activism based outside of litigation. *Cf.* Stephanie Mencimer, *Gay Rights Groups to Ted Olson: Thanks, but No Thanks*, MOTHER JONES (May 28, 2009, 9:21 AM), http://www.motherjones.com/politics/2009/05/gay-rights-groups-ted-olson-thanks-no-thanks (indicating major gay rights groups' concern about taking gay marriage to the Supreme Court because "[a] loss could be a major setback not just to

This stark dichotomy between substantive due process's broad protection of economic freedoms, regardless of a person's race, and its refusal to condemn attacks on race-related personal freedoms made Richmond's ordinance possible. At best, this distinction between economic and personal liberties confused the Richmond City Council into drafting the ordinance based on the wrong line of precedent. At worst, this glaring contrast afforded Richmond plausible deniability when crafting a law that was clearly unconstitutional per *Buchanan*.

The experience with Richmond's ordinance highlights an important weakness of substantive due process as antidiscrimination law. Given that the substantive due process inquiry inevitably involves balancing abstract liberty interests with the democratic will as expressed through the police power, the doctrine doesn't create a clearly defined, inviolable set of rights. Rather, it produces a fragmented collection of protections that affords those desiring to discriminate an avenue to enact laws with some plausibility.

The fragmented protections created by substantive due process are hardly unique to the *Lochner* Era. When substantive due process next reared its head, in the 1960s and 1970s, the Supreme Court began to recognize a privacy right founded in the Due Process Clause.[235] As the Court began to sketch the privacy right in terms of abortion, it acceded to the demands of the public to regulate the procedure.[236] Justice Blackmun created the now-famous three-part scheme, under which states couldn't regulate abortion during the first trimester, could regulate in regard to maternal health in the second trimester, and could regulate or even proscribe abortion to protect the potential human life during the final trimester.[237] Justice O'Connor famously derided this approach as "unworkable,"[238] and in the years after *Roe*, the Court mapped out the seemingly arbitrary contours of the abortion right.[239] Perhaps substantive due process is appropriate for the ethically and politically controversial

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the gay marriage movement but to other established gay rights governing adoption and foster care, employment discrimination, and other matters").

235. *See* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (finding a right to marital privacy in the Due Process Clause of the Fourteenth Amendment).

236. *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973) (extending substantive due process protection from its decisions regarding the right of access to contraception in *Griswold* to cover a fundamental, albeit limited, right of women to choose to terminate their pregnancies and identifying the right's locus as specifically within the realm of liberty-related privacy).

237. *Id.* at 164–65.

238. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 454 (1983) (O'Connor, J., dissenting).

239. *Compare, e.g.*, *id.* at 450 (majority opinion) (striking down a twenty-four-hour waiting period before an abortion could be performed), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992) (controlling opinion) (disagreeing with *Akron* and upholding a twenty-four-hour waiting period).

subject of abortion,[240] but for questions of race discrimination, the doctrine—with its willingness to ebb and flow with the will of a democratic majority, thus providing plausible grounds for the majority to discriminate on the basis of race—proves to be inadequate as antidiscrimination law.

IV. Did *Buchanan* Have a *Lochner*-Like Effect?: Class Issues in Post-*Buchanan* Black America

Buchanan's defenders and critics both tend to gauge its impact on African-Americans as an undifferentiated whole. At best, some consider its impact on a regional level, arguing that the end of racial segregation ordinances spurred the Great Migration of blacks from the South to the North, in an effort to tie the case into the dominant historical narrative of the era.[241] Even Michael Klarman, who shares my general skepticism about *Buchanan*'s impact, without reservation cites the post-*Buchanan* growth of the NAACP as some evidence of good that came of the decision.[242] Despite the path-breaking civil rights work done by the organization, we should be reluctant to automatically equate the NAACP with the interests of African-Americans universally.[243]

Finer-grained approaches, especially in the vein of social history, are absent—no doubt in part due to the difficulty of unearthing primary sources that illustrate common perceptions of *Buchanan*. A thorough social history of *Buchanan* would both exceed the space available for this Note and require a large amount of archival research. Thus, I attempt to lay the foundations of a trip down the social–historical path in this Part by examining *Buchanan* and relevant African-American sociolegal institutions.

My main intuition borrows from Cass Sunstein's work. He argues that the central feature of *Lochner* is a "constitutional requirement of neutrality" that refers to a "preservation of the existing distribution of wealth."[244] I argue that *Buchanan* was a factor in preserving existing class boundaries among *Lochner*-era African-Americans. The holding primarily benefitted

240. *But see* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 76 (2000) (arguing that *Roe* should have been decided on the grounds of women's equality).

241. *See, e.g.*, BERNSTEIN, *supra* note 115, at 83 (arguing that *Buchanan* implicitly protected migration).

242. *See supra* note 145 and accompanying text.

243. Derrick A. Bell, Jr. has made this point most forcefully in *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976). The main tack of Bell's criticisms is that the NAACP displayed, in the wake of *Brown*, deliberate indifference to black parents who cared far more about improved educational opportunities than achieving racial balance in schools. *Id.* at 487–88. My assessment in this Note levies no accusations of conduct undertaken with such knowledge. Rather, I point to a variety of institutional forces that led to the NAACP's failures to substantially address the needs of rural African-Americans during the *Lochner* Era.

244. Sunstein, *supra* note 34, at 875.

upper- and middle-class urban blacks, and several factors, discussed below, led the NAACP and black lawyers to devote their efforts to securing and protecting the rights of the same individuals while offering much more meager assistance to rural, working-class African-Americans. Thus, *Buchanan* ultimately had a *Lochner*-like effect; its insistence on government neutrality in regard to property rights helped to preserve the status quo between different classes of African-Americans.

As contemporary black lawyers dealt most directly with *Buchanan*, understanding their social status is key to understanding the social significance of the decision. Contrary to accounts that present black lawyers as either representing, or failing to represent, the "interests of a unified minority group," legal historian Kenneth Mack argues that black "lawyers were . . . caught between the needs and desires of the larger, white-dominated culture, and those of their own racial group."[245] Black lawyers often struggled; some had to take second, nonlegal jobs and others only had enough work to practice part time.[246]

Charles Hamilton Houston, who would later play a critical role in dismantling Jim Crow laws as special counsel to the NAACP,[247] served as an influential vice dean at Howard University's law school, where several prominent civil rights lawyers like Thurgood Marshall earned their degrees.[248] Though Howard's curriculum later included a famous course in civil rights law, during Houston's tenure in the 1920s and early 1930s, his passion for "black lawyers . . . work[ing] to advance the race" was channeled into developing the school's business law curriculum.[249] As blacks began to move northward and gained some wealth after World War I, workaday matters primarily sustained black lawyers' practices: criminal defense, wills, divorces, and small business matters, which provided some opportunities to go to court.[250]

What we today consider "civil rights work," prominent litigation challenging discrimination, occupied a different place. This work had "cash value," at times in direct compensation and always in terms of "prestige and social standing," allowing lawyers to gain more paying clients.[251] During the 1910s and 1920s, black lawyers who took on civil rights work were often accused by leaders of the national NAACP of simply trying to

245. KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 4 (2012).

246. *See id.* at 43.

247. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 198–201 (1983).

248. *Id.* at 70, 82.

249. MACK, *supra* note 245, at 44–45.

250. *Id.* at 39–40.

251. *Id.* at 38–39.

"gobble all the fees and the credit" on important cases—to the point where the organization sometimes preferred to use white attorneys.[252]

The NAACP's national office proved influential in defining what constituted a high-profile civil rights case. In 1913, the NAACP set up a legal bureau in its national office.[253] It emphasized that the legal bureau was only concerned with cases of "*race discrimination*" and that concerns not based on race should be taken to legal aid societies.[254] While the organization stated it would consider any case where there was doubt that race discrimination occurred, the examples of discrimination it provided involved obvious discrimination based on race: lynching, denial of equal public accommodations, and segregation.[255] Thus, cases of discrimination against working-class blacks typically fell outside of the bureau's paradigmatic case. The Urban League often took up the mantle for black industrial workers.[256]

The NAACP also devoted its legal resources to a second type of problem facing the urban middle and upper classes: the risk of violence resulting from fighting residential segregation. For example, in 1925, Ossian Sweet, a black doctor, moved into a white neighborhood in Detroit.[257] A mob gathered around the home and shots were exchanged.[258] A stray bullet struck and killed Sweet's neighbor, and Sweet and ten other men were tried for murder.[259] The NAACP brought in Clarence Darrow to lead the men's defense; the first trial ended in a mistrial, and the second ended with an acquittal.[260] On the first trial, the NAACP spent $21,898, and on the second, it spent $15,951, for a total of $37,849—approximately $505,113 in 2013 dollars.[261]

Complementing the organization's centralized general policy for case selection, the national office afforded the local branches significant discretion in choosing particular cases. For example, while the New Orleans branch fought the Louisiana law, lawyers from Lake Charles, a city approximately 200 miles away, contacted the branch about rendering

252. *Id.* at 68–69.

253. NAACP, *Our New Legal Bureau*, 7 CRISIS 139, 139 (1914).

254. *Id.*

255. *Id.*

256. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 176–77 (2007) (stating that the NAACP left economic equality to the Urban League and, therefore, had no obvious agenda to pursue on the behalf of industrial workers).

257. Marian M. Singleton, *A Review of the Sweet Case*, 42 CRISIS 270, 270 (1935).

258. *Id.*

259. *Id.* at 270–71.

260. *Id.* at 271, 285.

261. NAACP, *Extracts from Annual Reports of Residential Segregation: 1926 Report: The Sweet Case*, *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 1, Slides 000948, 000950; CPI Inflation Calculator, *supra* note 223 (calculating, on November 23, 2013, that $37,849 in 1925 was worth approximately $505,113 in 2013).

assistance in the case of a black man who had not received a fair trial.[262] G.W. Lucas, the president of the New Orleans branch, asked the national office for advice on whether to take the case.[263] Although the national office provided the advice upon request,[264] the ultimate decision on whether to take a case rested firmly with the local branch, and the New Orleans branch declined the Lake Charles case.[265] This decentralized method of case selection had important consequences. By not filtering all potential cases through the national office, cases within the gaze of the local branches—in other words, cases based in large urban cities—were more likely to be taken up. Similarly, by placing the power of case selection in the hands of local counsel, who stood to benefit either monetarily or through an increase in prestige, cases involving wealthy and influential plaintiffs were advantaged.

The residential segregation ordinances often fell into this latter category. In Louisville, "many members of [the] black better class were immediately able to move into formerly white neighborhoods [after *Buchanan*], although poorer African-Americans remained trapped in deteriorating neighborhoods near 'red-light districts.'"[266] The identity of the parties in residential segregation cases further illustrates this point. William Warley, the defendant in *Buchanan*, had substantial means and served as president of the Louisville NAACP.[267] Similarly, the first segregation ordinance in Baltimore was spurred by a Yale-educated black lawyer, in good standing at the bar, moving into a previously all-white neighborhood.[268] The fact that upper- and middle-class blacks had a substantial interest in gaining access to better housing wasn't lost on the national organization. As the NAACP fought *Corrigan*, the restrictive covenant case, it planned a rally in Washington D.C.[269] It selected the

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262. Letter from G.W. Lucas, President, New Orleans Branch of the NAACP, to Robert W. Bagnall, Dir. of Branches, NAACP (Feb. 28, 1925), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000700.

263. *Id.*

264. *See* Letter from G.W. Lucas, President, New Orleans Branch of the NAACP, to Walter F. White, Assistant Sec'y, NAACP (Mar. 16, 1925), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000729 (thanking White for the advice).

265. *See* Letter from Walter F. White, Assistant Sec'y, NAACP, to G.W. Lucas, President, New Orleans Branch of the NAACP (Mar. 19, 1925), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000733 (agreeing with the local branch's decision not to undertake the Lake Charles case).

266. Patricia Hagler Minter, *Race, Property, and Negotiated Space in the American South: A Reconsideration of* Buchanan v. Warley, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 345, 361 (Sally E. Hadden & Patricia Hagler Minter eds., 2013).

267. *See supra* notes 81–84 and accompanying text.

268. *See supra* note 47 and accompanying text.

269. Letter from Walter F. White, Assistant Sec'y, NAACP, to Archibald H. Grimke, President, Wash. D.C. Branch of the NAACP (Oct. 28, 1924), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 1, Slides 000869–000870.

Sunday after Thanksgiving because people from "all parts of the country" would be in town for the Howard–Lincoln game, i.e., college-educated upper- and middle-class African-Americans.[270] In 1925, the NAACP considered residential segregation the most important issue it faced.[271]

The experience the Indianapolis branch had while fighting a post-*Buchanan* segregation ordinance underscores the presence of wealth and ambition in the battles against residential segregation. Local NAACP members expressed concern to the national organization that politicians might file suit against the ordinance before it went into effect, likely causing ripeness issues for their legal challenge.[272] When the NAACP did file suit, it retained a prominent white firm.[273] The branch had worried about conflict because so many black attorneys wanted to provide their services on the case, but it seemingly avoided this conflict by only bringing on two black attorneys who had previously served as presidents of the Indianapolis branch.[274] However, this conflict later came to the surface when F.B. Ransom, an attorney for the Madam C.J. Walker Company, a wildly successful black-owned cosmetics company, was asked by the national branch to assist with the case.[275] Soon afterwards, a local black leader accused Ransom of trying to promote the Walker Company by working on the case.[276]

In addition to considerations of wealth and prestige that pushed legal battles against residential segregation to the forefront of the NAACP's efforts, the organization faced pressure to combat segregation due to the competing ideology of Booker T. Washington. Washington rose to prominence at the turn of the century by endorsing accommodationism—a "waiting game" where discrimination would end not through agitation but through hard work and quiet progress—which earned him an invitation to meet Theodore Roosevelt in the White House in 1901.[277] Many associated

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270. *Id.*

271. NAACP, *supra* note 165.

272. *See* Telegram from Walter F. White, Assistant Sec'y, NAACP, to Robert Lee Brokenburr, Att'y (Mar. 27, 1926), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000552 (responding to inquiries made by the Indianapolis branch and urging caution in its approach).

273. Telegram from Lionel Artis, Campaign Dir., NAACP, to James Weldon Johnson (Apr. 16, 1926), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000560.

274. Memorandum on Conference at the National Office of the N.A.A.C.P. from Sumner A. Furniss, Treasurer, Indianapolis Branch of the NAACP, to Assistant Sec'y, NAACP (May 12, 1926), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slide 000565.

275. Letter from F.B. Ransom, Attorney & Manager, Madam C.J. Walker Mfg. Co., to James Weldon Johnson (May 14, 1926), *microformed on* Papers of the NAACP, Part 5, *supra* note 71, Reel 2, Slides 000567–000571.

276. *Id.*

277. RAYMOND W. SMOCK, BOOKER T. WASHINGTON: BLACK LEADERSHIP IN THE AGE OF JIM CROW 7 (2009).

with the NAACP, including W.E.B. DuBois, viewed Washington as a threat to the ascendant black upper- and middle-classes, as he also promoted a focus on industrial, rather than professional, education.[278] When Louisville enacted its ordinance in 1914, Washington urged blacks to stop fighting segregation ordinances.[279] Though Washington later backtracked,[280] his remarks proved harmful. In the Louisville trial court, the city attorney quoted Washington in defense of the ordinance,[281] and ten years after Washington died, the Louisiana Supreme Court quoted his remarks in *Tyler v. Harmon*.[282] Washington's acquiescence to residential segregation ordinances spurred the NAACP to respond vigorously, as a slow and careful battle represented not just a risk of losing against the ordinance but also a risk that the growth of upper- and middle-class blacks might wane.

Against this backdrop of the concerns and interests of upper- and middle-class blacks came a mixed relationship with labor interests. Unlike the segregation ordinances, where the blacks found an ally in white real estate agents,[283] organized labor could be hostile to blacks. For example, Samuel Gompers, president of the American Federation of Labor, allegedly discouraged blacks from joining unions.[284] At times tensions erupted, as employers played black and white union workers against each other.[285] Yet, at other times, white and black workers were in solidarity with each other.[286]

The NAACP had two major concerns regarding rural black laborers in the *Lochner* Era: lynching and peonage.[287] Peonage laws subjected blacks

278. *See* W.E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 52 (3rd ed. 1903) (attacking Washington's advocacy of "common-school and industrial training" and his depreciation of "institutions of higher learning"); SMOCK, *supra* note 277, at 146 (explaining that Washington's "program of accommodation" alienated some members of the Afro-American Council who went on to become involved in the NAACP).

279. *Segregation*, 9 CRISIS 17, 17 (1914). Benno Schmidt attributes Washington's remarks to the different ways blacks were oppressed in the Deep South, which had few residential segregation ordinances, versus the border states and the North, which had many. Schmidt, *supra* note 113, at 500.

280. *See Segregation*, 9 CRISIS 70, 71 (1914) (quoting Washington's supporters, who argued that Washington merely said "[l]et us . . . spend less time in talking about the part of the city that we cannot live in, and more time in making the part of the city that we can live in beautiful and attractive").

281. *Courts*, 9 CRISIS 115, 115 (1915).

282. 104 So. 200, 204 (La. 1925) (quoting Washington condoning segregation in terms of the "purely social" as it upheld the residential segregation law).

283. *See supra* note 56 and accompanying text.

284. *Economic*, CRISIS, Dec. 1910, at 9, 9.

285. *See, e.g.*, *Economics*, 4 CRISIS 269, 269 (1912) (describing a factional fight between black and white members of the Galveston longshoremen's union occurring after only black workers were employed in cotton jamming).

286. *See, e.g.*, *Labor Alliances*, 3 CRISIS 63, 63 (1911) (explaining that white workers went on strike in sympathy with two discharged black workers).

287. GOLUBOFF, *supra* note 256, at 177.

to criminal penalties for breaking labor contracts.[288] In 1911, the Supreme Court found that Alabama's peonage law subjected defendants to an impermissible choice—work or go to prison—and thus violated the Thirteenth Amendment's prohibition on involuntary servitude.[289] The national organization devoted significant resources to legal battles against peonage and lynching. For example, the NAACP defended twelve peons in Arkansas who had been spared a lynch mob and instead convicted of murder in a sham trial, and the Supreme Court found that their trial violated the guarantee of procedural due process.[290] The national office also referred cases of alleged peonage to the Department of Justice for investigation.[291]

However, peonage and lynching weren't the only problems rural blacks encountered. Black tenant farmers and sharecroppers—fortunate enough to escape peonage laws and racial violence—typically faced crushing debt brought on by usurious rates of interest charged by landlords and merchants.[292] To escape the debt, these farmers would either move to a new farm or migrate to urban areas.[293] The usury problem was not lost on W.E.B. DuBois, who would serve as the NAACP's Director of Publicity and Research and edited *The Crisis*, the organization's monthly magazine.[294] In his seminal work, *The Souls of Black Folk*, he acknowledged that usury afflicted both poor whites and blacks in the South.[295] Yet, the NAACP never attempted to tackle the usury problem during the *Lochner* Era.

One might assume a fight against usurious interest would have been futile during this time; southern courts were considered hostile to blacks,[296]

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288. *See* Bailey v. Alabama, 219 U.S. 219, 242–43 (1911) (noting that a state statute, which sought to "compel" laborers to fulfill their labor contracts "by making it a crime to refuse," fell within the definition of a peonage law).

289. *Id.* at 244–45.

290. Moore v. Dempsey, 261 U.S. 86, 86–92 (1923).

291. *See, e.g.*, Letter from Walter F. White, Assistant Sec'y, NAACP, to Robert C. Herron, Assistant Att'y Gen., Dep't of Justice (Aug. 30, 1920), *microformed on* Black Studies Research Sources, Papers of the NAACP, Part 10: Peonage, Labor, and the New Deal, 1913–1939, Reel 15, Slide 000918 (Univ. Publ'ns of Am., 1990) (discussing a situation in which a landowner took a sharecropper's entire yield and demanded an additional $200).

292. Louis M. Kyriakoudes, *"Lookin' for Better All the Time": Rural Migration and Urbanization in the South, 1900–1950*, *in* AFRICAN AMERICAN LIFE IN THE RURAL SOUTH 1900–1950, at 10, 16–17 (R. Douglas Hurt ed., 2003).

293. *See id.* at 17 (describing how usury caused sharecroppers to cycle from farm to farm); *The Land*, 5 CRISIS 281, 281 (1913) (explaining that usury drove blacks to the cities).

294. *See* 3 CRISIS 3, 3, 43 (1911) (identifying DuBois as editor and as publicity and research director).

295. DU BOIS, *supra* note 278, at 169–70.

296. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 70 (2000) (discussing the ways in which blacks were discriminated against in southern criminal proceedings); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 276 n.54 (2005) (arguing that "the common law baseline of rights was not neutral with regard to race, but was subject to discriminatory decisionmaking").

and a cap on interest rates would violate basic Lochnerian principles of contractual freedom. Neither, in fact, was entirely fatal to usury claims brought by African-Americans; black usury victims had their rights vindicated under state law in Alabama,[297] Arkansas,[298] Georgia,[299] Mississippi,[300] North Carolina,[301] Oklahoma,[302] Tennessee,[303] and Texas.[304]

In the rural South, the NAACP no doubt brought valiant legal challenges to mob violence and statutes attempting to return blacks to slave-like conditions. The NAACP provided similar support when urban blacks fighting residential segregation dealt with mob violence, as Clarence Darrow's defense of Dr. Sweet shows.[305] But, when the opportunity came to help rural blacks gain economic independence—to perhaps realize some small part of the agrarian vision of Reconstruction—the NAACP didn't opt to bring suit under the southern states' usury laws. In contrast, the organization seized numerous opportunities to battle the residential segregation ordinances enacted to quell white fears of upwardly mobile African-Americans. *Buchanan* provided a powerful tool to the NAACP to defeat the facially discriminatory ordinances with the assistance of ambitious local counsel and to gain membership and financial support along the way. Employing facially neutral usury laws, on the other hand, would have mainly helped working-class African-Americans whose problems the upper- and middle-class leadership of the local branches only learned of second-hand. Thus, *Buchanan*, like many other cases molded in the vein of *Lochner*, helped to enforce existing class boundaries between African-Americans.

Conclusion

In 1917, the Supreme Court struck a blow to Louisville's ordinance in *Buchanan*, which the NAACP rightly celebrated as a triumph over the evil

297. *See* Irwin v. Coleman, 55 So. 492, 493–94 (Ala. 1911) (finding that a transaction attempted to "evade the law against usury" and affirming judgment for the black plaintiffs).

298. *See* Wimberly v. Scoggin, 193 S.W. 264, 266–68 (Ark. 1917) (finding that the black defendant's plea of usury should have been sustained by the trial court).

299. *See* Griggs v. Clemons, 162 S.E. 392, 392, 394 (Ga. Ct. App. 1931) (finding that black defendants had "a remedy to defeat the collection" of interest under the usury laws).

300. *See* Woodson v. Hopkins, 37 So. 1000, 1000–01 (Miss. 1905) (declaring usurious contracts, made to blacks, illegal and against public policy).

301. *See* Burnett v. Dunn Comm'n & Supply Co., 104 S.E. 137, 138 (N.C. 1920) (indicating that the jury found for the black plaintiff on his usury claim, which was not considered on appeal).

302. *See* Bean v. Rumrill, 172 P. 452, 454, 456 (Okla. 1918) (finding the black plaintiff's contract to be usurious as against him).

303. *See* State v. Fleming, 61 S.W. 72, 72–73 (Tenn. 1901) (affirming the defendant's criminal conviction for making a usurious loan to a black woman).

304. *See* Cotton v. Cooper, 209 S.W. 135, 136–37 (Tex. Comm'n App. 1919) (holding that the contract entered into by the black plaintiff was usurious).

305. *See supra* notes 257–61 and accompanying text.

of segregation. Yet, dismissing the case as merely one about "property rights" or "freedom of contract"—as many modern liberal scholars do[306]—does a disservice. These labels, used almost as epithets, not only too hastily reject the interesting and provocative work of libertarians like David Bernstein. They also fail to meet the libertarian scholars' argument and vindicate the skepticism of many progressives about using substantive due process, of both the modern- and *Lochner*-era varieties, as a constitutional prohibition on discrimination.

Expanding the scope of the inquiry, beyond simply looking at the holding in *Buchanan* and observing the death knells of the residential segregation ordinance, helps to rebut the libertarian claim that substantive due process makes for efficacious antidiscrimination law. The events following *Buchanan* illustrate the limited reach of substantive due process. The doctrine, in particular in its *Lochner*-era iteration, failed to provide any relief from attempts to discriminate via private agreement. Additionally, conceptual weaknesses and confusion over the substantive due process inquiry—balancing abstract liberty principles and the police power—afforded lawmakers a gray area in which they could enact discriminatory laws with a modicum of plausibility and left the protection of minority rights to judicial review. Finally, the libertarian thrust of the doctrine, in its interaction with various social institutions that have limited resources to provide legal assistance, has the potential to preserve the existing distribution of wealth within minority communities. Thus, while substantive due process has some potential to prevent discrimination, it also has significant limits that deserve to be acknowledged.

—Brent M. Rubin

306. *See supra* subpart II(A).